European Contract Law

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Materials for a Common Frame of Reference: Terminology, Guiding Principles, Model Rules

Produced by
Association Henri Capitant des Amis de la Culture Juridique Française
and
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Preface

In January 2003, the European Commission called for a "Common Frame of Reference" in its Action Plan on a "More Coherent European Contract Law". The "Joint Network on European Private Law", also called "CoPECL Network of Excellence", was established in May 2005 and funded by the European Commission under the Sixth Research Framework Programme, in view of preparing the Common Frame of Reference (CFR). The Association Henri Capitant des Amis de la Culture Juridique Française and the Société de Législation Comparée agreed to take part in this European project. To this effect, they formed a specific working group (AHC-SLC Group).

Within the network, the AHC-SLC Group belongs to the "Evaluative and supportive groups". Its task is to analyse the rules put forward for the Common Frame of Reference, having particular regard to its philosophical underpinnings. In order to do so the AHC-SLC first concentrated on the work relating to "Terminology" and on the values of European contract law, which can be expressed in the form of "Guiding principles". Later on, during a meeting in Paris, it was suggested that the AHC-SLC Group should also contribute to the task of drafting model rules. The AHC-SLC Group decided to work on the set of rules which is the product of work carried out, for many years, by the Commission on European Contract Law (Lando Commission): the *Principles of European Contract Law* (PECL). This codification already serves as a model, in Europe and all over the world, for those who wish to harmonize their contract law.

On December 31, 2007, several documents, drafted by various groups in the network, were sent to the Commission. During the months that followed, they have had their own lives.

The *Draft Common Frame of Reference* (DCFR), prepared by the Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group), partly based on a revised version of the Principles of European Contract Law, was published by Sellier. european law publishers, in a volume entitled: "*Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR), Interim Outline Edition*".

The "*Principles of European Insurance Contract Law*", drafted by a separate Group called the "*Project Group Restatement of European Insurance Contract Law*" (Insurance Group) constitute a separate set of rules applying to the field of insurance law.

The documents delivered by the AHC-SLC Group – Terminology, Guiding Principles, Revised version of the *Principles on European Contract Law* (PECL) – are published in French in a specific collection of the Société de Législation Comparée, dedicated to European and Comparative Law.

The contributions of the AHC-SLC Group to the Common Frame of Reference fulfill different purposes, in accordance with the three tasks set by the Action Plan of the European Commission: identifying guiding principles, reflecting upon definitions and terminology, drafting model rules.

For the elaboration of these materials for the CFR, specific teams were set up, led by academics specialized in the relevant field of study. Our own role in this process has been to act as academic directors of these three projects. We are most grateful to all the

members of the AHC-SLC Group who achieved a significant collective work, especially to the team leaders who dedicated a lot of time and energy to this project: Professor Guillaume Wicker who directed the group on "Guiding Principles of European Contract Law", Professor Jean-Baptiste Racine who directed the group in charge of the "Revision of PECL" and Dr Aline Tenenbaum who directed the group on "Common Terminology".

The entire work was published in French, in February 2008, in two separate volumes entitled: *Projet de cadre commun de référence – Terminologie contractuelle commune* and *Projet de cadre commun de référence – Principes contractuels communs* (volumes 6 and 7 of the collection "Droit privé comparé et européen" of the Société de Législation Comparée, B. Fauvarque-Cosson dir.).

The present English volume does not contain the full version of the two French books. Unfortunately, the extensive comparative comments which accompany the Revised Principles of European Contract Law have not been translated, due to lack of time and financial means. However, it should be emphasized that the texts proposed in the third part of this book are systematically based upon deep and innovative comparisons which assemble information on the "Acquis communautaire", international codifications, national laws and also national drafts. This work is available in *Principes contractuels communs* (pp. 215-743, to be ordered at www.legiscompare.com).

We hope that our work will contribute to the final Common Frame of Reference in a number of different ways.

First, the work on the **guiding principles** can contribute to the growing debate concerning the values which underlie the different types of legal proposals in any future CFR, whether these legal proposals are in the form of principles, rules or even definitions.

Secondly, the work on a **revised version of PECL**, insofar as it concentrates on the law of contract (general law of contract) draws attention to the fact that acceptance of the idea (and even function) of a CFR still leaves open the question of its form and content. In particular, the revised version of PECL proposed here follows PECL in preferring a simple structure with clear and relatively short rules, confined to the general law of contract, rather than extending to the law of obligations and beyond as in the case of the Draft Common Frame of Reference (DCFR).

Thirdly, the work on **legal terminology** is intended to be of practical use in the elaboration of the final versions of the CFR, that is to say, its translations into all the official EU languages. Indeed, were a CFR to be given formal recognition by the European Commission (in some form and for some purpose yet to be fixed), the question would immediately arise as to its translation into all of the 23 official languages. While, of course, the work on terminology presented here does not purport to deal with all the conceptual problems nor involve all the languages nor even language families in Europe, it is hoped that it can contribute significantly to the forging of the linguistic tools necessary for the many "toolboxes".

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Introduction to Terminology

Objectives and Method of the Terminology Group

The research group known as the "Terminology Group" was formed as part of the French academic Group constituted by the Société de Législation Comparée and the Association Henri Capitant des Amis de la Culture Juridique Française. The work carried out by this Group has specific objectives (**1**), which themselves determined the method which was adopted (**2**).

Only the black letter rules have been translated into English and are reproduced in this book. The commentaries and comparative analysis, which have not been translated for lack of means, can be found in the French book entitled Principes Contractuels Communs. This book has been published by the Société de législation comparée (see the references in the first pages of the present book).

1. The objectives

The present study comprises a comparative terminological analysis of a particular set of concepts. Far from attempting to establish an exhaustive legal glossary, the Terminology Group focused on the following notions or groups of notions: *contract, obligation and duty, juridical act/fact, public order and mandatory rules, good faith, fault and breach, damage, damages* and *ending of the contract*.

Throughout the work which was carried out, the Terminology Group was concerned that some legal words which seem to have a straightforward meaning in the context of one legal system, might carry a different sense in another legal system, even though the word itself appears to possess a clear equivalent in that other system. For example, the French term "contrat" can be translated into English by the word "contract", but these terms do not necessarily express an identical underlying concept in the two systems. These differences, whether minor or fundamental, stem from the variety of legal concepts used in the Member States' legal systems.

Therefore, the purpose of this study of terminology is not to create a new complete dogmatic contractual terminology to be applicable in a uniform manner (as is envisaged in the case of the drawing up of the Common Frame of Reference). Instead, the Terminology Group took as its starting point the terminology in current usage, and sought to explain and explore the difficulties affecting the use of certain terms adopted by the legal systems included in the study, and, where possible, to propose how their use should be made more apparent and more exact. This sometimes led the Terminology Group, either to suggest the jettisoning of certain terms as redundant (because synonymous with another concept) or, instead, to underline their irreducible particularity to an individual legal system.

In order to implement these objectives, the Terminology Group has adopted a specific method followed for each concept which has been analyzed.

2. The method

The method adopted by the Terminology Group is based on a two-stage analysis. Firstly, each concept was assessed from what has been called the "Acquis" viewpoint. Secondly, each concept was examined from a comparative perspective and in different legal systems.

As far as the first step is concerned, the "Acquis" which is contemplated covers a wide range of laws, regulations, rules, soft law elements and various codifications, to the extent to which they relate to contractual issues. Accordingly, the term "Acquis" should be understood to encompass the "Community acquis (Acquis Communautaire)"[1] in the classical sense and what has been described as "Acquis International". The former includes the Treaty, Directives and Regulations, Community Conventions such as the Rome Convention on the law applicable to contractual obligations, other European conventions such as the Convention on Human Rights and the *Principles of European Contact Law* drafted by the commissions under the chairmanship of Ole LANDO. The latter comprises international conventions, such as the Vienna Convention on the international sale of goods, the Hague Convention of 1955 on the law applicable to international sale of goods, international elements of soft law, such as the UNIDROIT Principles and the Uniform Customs and Practices for Documentary Credits.

When it comes to the comparative analysis found at the second stage of our analysis, attention was paid to reflect the diversity of legal systems and approaches. Therefore, most of the Member State laws, case law and academic works were examined – without attempting exhaustiveness given that such an attempt would be doomed to failure. In addition, other non-Community systems were considered, such as the American Uniform Commercial Code, the Louisiana codification, the laws of Quebec, in order to complement, and sometimes even to shed a different light on, European approaches.

For each concept examined, this two-stage analysis opens with general guidelines. These guidelines are not presented as a set of strict or rigid definitions, but rather as questions aimed to bring out the main differences and/or similarities resulting from the comparative analysis and also the possible translation difficulties. Moreover, in many cases the responses offered by Community lawyers or by the Community authorities themselves to the terminological questions addressed are closely connected with the substance of the notion considered and the regime of rules governing it. These various studies of the contractual concepts in current use should therefore lead lawyers in Member States to reflect on the terms which they themselves use and on their translation with a view to the future Common Frame of Reference.

Aline TENENBAUM
January 2008

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1 The expression "Community acquis" appears in article 5.B of the Treaty. Although it is accepted, its definition varies depending on the context in hand. Generally, the Community acquis "is the body of common rights and obligations which bind all the Member States together within the European Union. It is constantly evolving" (definition laid out by the Council and adopted in the Glossary dispatched on the gateway to the European Union, www.europa.eu.int)/ For a more limited definition, see e.g. Green Paper on the review of the consumer acquis 02/08/07, COM (2006) 744 final.

Introduction to the Guiding Principles and Revised Principles of European Contract Law

The Principles of European Contract Law delivered by the Commission headed by Professor Ole Lando, represent a fundamental step towards the construction of a common contract law. They have acted as a triggering element: it was only from the time of their publication that the very idea of a European contract law began to take real shape. They also demonstrated that such a work was possible: overcoming the divergence of national laws in the area of contract to show that a common law can be discovered and constructed. The Principles of European Contract Law thus constitute an academic work of considerable importance.

Since 2001, the European Commission has launched a general consideration of a European contract law. Today, there is even discussion of a facultative instrument in the area. Under the framework of common research for European contract law, the Association Henri Capitant and the Société de Législation Comparée have put in place a working group responsible for developing a 'common terminology' and' guiding principles of contract law'. This working group has also undertaken to revise the Principles of European Contract Law elaborated by the Lando Commision. These Revised Principles of European Contract Law are published in the present work, together with some Guiding Principles of European Contract law, (drawn up from the basis of the Revised Principles). These Guiding Principles could form part of a first Chapter of the Revised Principles of European Contract Law

I. Revision of the Principles of European Contract Law (PECL)

As PECL represents the fruit of the collective reflection of jurists of all horizons, conscientious to reconcile the diverse European legal cultures, they could not be revised without great care. As PECL represent a work of compromise, based on indepth analysis of comparative law, they must be subjected to a critical examination which excludes their appreciation according to one national law or in particular French law. Thus it was important that the revision of the Principles of European Contract law did not turn into a militant work in favour of such or such national legal system, but rather proved the coherence of the Principles and their operative value. This revision is undertaken to improve both the effectiveness of the Principles and their intelligibility. The goal has been to reflect on the 'best' law of contract possible, in particular, to reconcile freedom of contract and contractual justice and to satisfy practical needs, without sacrificing theoretical coherence.

The work consisted of analysing each article making up the Principles. This analysis was systematically divided into two parts. In the first stage, each article of the Principles gave rise to a discussion. This discussion was composed of two elements: first, a commentary of the article (to explain its meaning and scope and if applicable its deficiencies) and then a comparative analysis of the article (in order to establish the convergence of

the Principles with other texts: the UNIDROIT Principles of International Commercial Contracts, the Vienna Convention on Contracts for the International Sale of Goods, the European Contract Code Proposal (also called PAVIA Project), the French proposals for the Reform of the law of obligations and prescription, and on occasion the Draft Common Frame of Reference). In the second stage, the revised provisions were completed: these were the result of an effort to explain the reason and content of each provision and then to come up with a revised text.

In most cases, the original Principles of European Contract Law are restated *in extenso*. Sometimes they are reworded or reformulated to ensure greater clarity or to make them more concise. In other cases, the principles are completed or replaced by new provisions. For example, with regard to the avoidance and termination of contract: the principle of extra-judicial termination is retained but the procedure is modified. The revised articles are accompanied with a gloss intended to facilitate their reading. If the article is identical to that of the original Principles of European Contract Law, the gloss reads 'restatement'. If the number of the article has changed but the content has remained the same, the gloss reads 'renumbered'. If the article is a product of the reformulation of the Principles, either in whole or in part, the gloss reads 'modified', 'reworded', 'completed' or 'reformulated'. Finally if the article is entirely new, the note reads 'addition'.

Not all the chapters of the original Principles of European Contract law have been subject to analysis. Thus, there is no commentary of Chapter 1 'General Provisions', Chapter 10 'Plurality of Parties', Chapter 11 'Assignment of Claims', Chapter 13 'Set-Off', Chapter 14 'Prescription' or Chapter 17 'Capitalisation of Interest'. It seemed to the members of the working group that it was necessary to focus on shaping a 'solid core' of contract law; including the formation of a contract, its validity, its interpretation, its effect, and performance as well as the case of substitution of parties.

The structure of the Revised Principles of European Contract has changed. Although Chapters 2 ('Formation'), 3 ('Authority of Agents;) and 5 ('Interpretation') retain their titles, by contrast, Chapter 4 ('Validity') and Chapter 15 ('Illegality') are combined in the body of Chapter 4, which is newly titled ('Invalidity'). Chapter 6 ('Contents and Effects') is divided in two: a Chapter 6 'Content' and a Chapter 7 'Effects'. Chapter 7 is renumbered as Chapter 8 ('Performance') also including in its content the provisions of Chapter 16 ('Conditions'). The former Chapter 8 ('Non-performance and Remedies in General') has become Chapter 9 and the former Chapter 9 ('Particular Remedies for Non-Performance') has become Chapter 10. Finally a Chapter 11 has been created 'Substitution of Parties').

The work is concluded by a synthesis including the totality of the provisions; in total nearly 200 articles.

II. Guiding Principles for European Contract law

The Principles of European Contract law have opened up the possibility of a unified contract law. In this respect, the construction of a common basis for contract law implies the elaboration of Guiding Principles of European Contract Law, in a manner that could be more regulatory than prescriptive. The purpose of these Guiding Principles differs from that of the Principles of European Contract Law; it is perhaps less ambitious, but

certainly less constraining. The Principles of European Contract Law put forward a general collection of provisions regulating a contract from its formation to its end. However, this general regulation of contract could be preceded, either in time or materially, by principles of general value, intended to clarify the provisions of the Principles of European Contract law. Moreover, these Guiding Principles are not intended to propose a solution for each individual question of contract law but rather to clarify guiding concepts which could form a common legal culture, and allow the construction of a common European contract law.

Many ways are *a priori,* conceivable as being effective in establishing Guiding Principles of European Law. In particular, a body of principles could be defined with a regulatory aim but also a prescriptive part so that these principles could constitute a foundation for a European Contract Code. Bearing in mind the considerable work already realized by the Lando Commission, it has seemed preferable to lead the elaboration of these Guiding Principles by contemplating the Principles of European Contract law and also the revision work to which they were subject. The guiding principles are not intended to supplant the Revised Principles of European Contract law; on the contrary, the two works are intended to mutually complement each other. On one hand the Principles of European Contract Law constitute the main source used to identify the Guiding Principles. On the other hand, the Guiding Principles could represent, from now on, a guide for the interpretation and application of the Principles of European Contract Law. In effect, the meaning of the Revised Principles of European Contract Law can be clarified by the Guiding Principles; of which the Revised Principles of European Contract Law are merely a particular application. Of course, the Guiding Principles of European Contract Law were designed to have their own independent existence. But in conformity with their initial inspiration, they were equally designed to be associated with the Revised Principles of European Contract Law. In that capacity, the guiding principles could usefully take a position at the start of the Principles of European Contract law in the form of a preliminary chapter.

In accordance with the first stage of the method adopted by the working group, it is very clear from the text of the Principles of European Contract Law that guiding principles have already been identified. In particular, attention has been paid to the provisions of the first chapter 'General Provisions'. But, the results obtained could usefully be completed by cross-referencing the provisions of the other chapters. Thus, whereas the first chapter brought out the fundamental importance of freedom of contract[2] and contractual fairness,[3] the study of the body of other provisions has shown that the Principles of European Contract law are equally innervated by the principle of security of contract.

Hence, the elaboration of the Guiding Principles of European Contract law has been founded on the three pillars of freedom of contract, contractual certainty and contractual fairness. These three ideas had to be elaborated in the form of a text covering the whole of the contractual process. In order to do this, it was imperative to proceed with a comparative analysis as well as using lessons taken from the provisions of the Principles of European Contract Law. The principles of freedom of contract, contractual certainty and contractual fairness can be found in all the laws of the Member States of the Euro-

2 See Art 1.102.

3 See Art 1.201 and 1.202.

pean Union. However, their scope varies from one State to another and the search for Guiding Principles of European Contract law presupposes the identification a common basis of the different national laws. The study has necessarily turned towards German law, Dutch law, Swiss law,[4] French law, Italian law, Spanish law and English law. Whenever it has been possible to do so, guidelines relating to the legislation of other countries in the European Union have also been given.

This study of comparative law could not limit itself to the analysis of these legislations alone. In reality, the scope of the principles of freedom of contract, security of contract and contractual fairness must be clarified by two other supplementary sources: International law[5] and European Community law, and also codifications by legal scholars. The codifications referred to include: the Unidroit Principles, the European Code of Contract Preliminary Draft and the Proposals for Reform of the French Law of Obligations and the Law of Prescription. These different models have constituted a precious source as they propose the regulation of the whole of contract law, in the same way as the Principles of European Contract law. From these completed research projects, it has been possible to give the principles of freedom of contract, contractual certainty and contractual fairness a concrete content. Although the object of the proposed text was to come up with general principles, it has nonetheless appeared desirable to not proceed merely by way of generalities. The texts have thus been drawn up in an effort to maximize the accessibility and intelligibility of the rule posed.

As completed, the Guiding Principles of European Contract law are comprised of three sections, treating the freedom of contract (section I), contractual certainty (section II) and contractual fairness (section III) respectively.

We hope that the Revised Principles of European Contract Law as well as the Guiding Principles of European Contract Law here proposed contribute to today's debate concerning a European Contract Law. It seems to be necessary to go further in constituting a body of homogenous rules in contractual matters on a European scale, whether any future instrument be facultative, optional or even compulsory. We wish to thank all the members of the working group for having contributed to analysis in this area.

Guillaume WICKER and Jean-Baptiste RACINE
January 2008

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4 Swiss law has received attention and been integrated into the study of the European legal systems because it is made up of different influences, in particular those of French and German law and it cannot in this day and age hide from the influences of European Law. See in this regard V. P. ENGEL *Contrats de droit suisse (Traité des contrats de la partie spéciale du Code des obligations, de la vente au contrat de société simple, articles 184 à 551 CO, ainsi que quelques contrats innommés)* Stæmpfli éditions SA, Berne, 2000, n° 6, p. 9.

5 Treated only in respect of the United Nations Convention on Contracts for the International Sale of Goods of 11 April 1980.

Part I
Terminology

Chapter 1: Contract

Main concerns

A review of Acquis International as well as comparative law leads us to suggest two approaches to the notion of contract. The first approach merely identifies the common traits of the notion and results in proposing a narrow definition of contract founded on the existence, the consistency and the integrity of the intention of the party taking on the obligation **(I).** The second approach goes beyond the narrow framework of the intention to take on an obligation. Instead, its centre of gravity moves towards identifying the exchange which leads to reliance: the binding force is no longer conceived as protecting the will of the parties but as preserving the legitimate reliance of the parties concerned **(II)**.

Whatever the approach adopted, it is relevant to question the nature of the effects produced by a contract **(III).**

I. A Narrow Perception of Contract: A Contract Founded on the Respect of the Given Word

All of the legal systems observed as well as the legal texts analysed in Aquis Communautaire and Acquis International agree upon a narrow definition of contract. The contract is considered, according to this restrictive approach, as a meeting of wills intended to produce legal effects. The central element of this approach lies in the will of the party who takes on the obligation and the respect for the promise made.

In this narrow legal definition, the core element of the contract is the meeting of wills of two parties in view of creating legal effects. In this case the word "contract" can be used without ambiguity. It should even be preferred to other terms such as "agreement" or "*convention*" (in French). However, it is possible to identify certain expressions which seem inappropriate while using the word "contract": for example expressions such as the "contract is governed by…", or "the contract is concluded" are often found. With regard to this type of use, it would no doubt be more precise to talk of the "contractual relations" or of the "agreement" even if it must be acknowledged that these expressions are well established.

This strict definition centred on the meeting of wills raises several questions in relation to the scope of the Principles of European Contract Law (PECL):

A. Should an agreement made in a domestic (family) context be included in the notion of contract?

First possibility: The agreements entered into in a domestic context are contracts as defined above and are included in the Principles of European Contract Law (Agreements

in respect of which there is no intention of producing legal effects would therefore be excluded, as is the case under English Law).
Second possibility: The agreements entered into in a domestic context can be contracts, but should nevertheless be excluded as PECL were not intended to deal with family relationships.

B. Should a gratuitous contract be included in the notion of contract?

First possibility: To consider that gratuitous contracts fall within the scope of PECL.

A difficulty may arise out of the fact that in certain countries, such as England, a gratuitous promise is not a contract and is not, in principle, binding. It may however be binding if it has been made by deed.

Second possibility: To consider that gratuitous contracts do not fall within the scope of PECL, for they do not conform to the notion of reciprocity; this would be in keeping with the economic vision which underpins PECL. The contracts which fall within the scope of PECL must be founded on the idea of "bargain" identified by certain authors as the nucleus of contract (See point 2 mentioned above).

II. Towards a Widened Conception of Contract Founded on Reliance?

Could legitimate expectations[1] become the heart of contract? Several indications from different jurisdictions, including from French law, which is very attached to the protection of the will of the party taking on an obligation, could justify a positive response. "If the contract is an exchange which has as its purpose the division of labour and the best use of resources and if this exchange is planned and regulated by reciprocal promises which take root in the expectation that they have given rise to, the will to contract is no longer a psychological fact and the subject is committed because he has led others to trust him."[2] The objective would therefore be to respect the expectations of the parties as to the consequences of their acts.[3]

The national laws however, remain divided. These hesitations come to light in particular regarding the analysis of unilateral undertakings ("*engagements unilateraux*" in French).[4] PECL (article 2: 107), like the European Code of Contracts drafted by the

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1 Particular attention has been focussed on this issue in France over the last few years. Without purporting to be exhaustive, the following could be consulted: B. FAUVARQUE-COSSON (under the direction of), *La confiance légitime et l'estoppel*, SLC, 2007; P. LOKIEC, "Le droit des contrats et la protection des attentes", *D.* 2007, p. 321; E. POILLOT, *Droit européen de la consommation et uniformisation du droit des contrats*, Préf. P. de Vareilles-Sommières, LGDJ, 2006, n° 1081, 889 and especially the references cited under note 2.

2 R. SACCO, "Le contrat sans volonté, l'exemple italien", in: Le rôle de la volonté dans les actes juridiques, Etudes à la mémoire d'A. Rieg, Bruylant 2000, p. 721.

3 On the part played by appearance in reliance, see G. VINEY, note below Cass. 2ème civ., 11 Feb 1998, *JCP* 1998.I.185 and D. MAZEAUD, "D'une source, l'autre…", note below Cass. Ch. Mixte, 6 September 2002, *D.* 2002. p. 2963.

Academy of European Private Lawyers of Pavia ("Pavia Project") (articles 4 and 20), decided to treat unilateral undertakings as contracts, in general terms.

The issue is probably more theoretical than practical: it is about knowing if an offeror is bound even without the acceptance of the offer by its recipient and without such recipient having knowledge of the undertaking (like promises of a reward under German law). In practice, this analysis will seldom be useful because it will be possible to identify an implied acceptance by the recipient. Such is the position under English law. The question arises, however, as to the difference between a unilateral promise and a unilateral undertaking.

Several solutions are possible regarding the treatment of unilateral undertakings in European Contract Law.

First possibility: maintain the general terms of the Pavia Project and of PECL.

Second possibility: delete all references to unilateral undertakings as a separate category; it would therefore be necessary to define more precisely what constitutes acceptance.

Third possibility: a middle way would be to accept that unilateral undertakings can be governed by the contractual regime, but only as a subsidiary solution in exceptional cases, depending on the requirements of legal certainty.

The sources of the binding force would be different but the legal regime which would be applicable would be identical in part, with some elements borrowed from contract law.

III. The Nature of the Effects Produced by Contract

Under most laws, the meeting of the wills produces real effects as well as mandatory effects.

The mandatory effects can be of varying nature. Some of these effects are general in the sense that they can be found in nearly every contract, despite the specific nature of the contract. This category includes behavioural effects (intangibility, fairness, or irrevocability) which translate into obligations for the parties.[5] Other effects are specific to the characteristics of each contract. This is the case in respect of obligations intended by the parties and implied obligations such as those referred to in article 1135 of the French Civil Code.

As for the real effects, German law proposes a particular analysis. In German law the real effects of a contract are separate from the meeting of wills. (§ 433, § 929 BGB). This is what the Germans refer to under the term *"Abstraktionsprinzip"*: the contract creates the obligation, whereas the transfer of property occurs through another act, the two acts being independent of one another. This principle of "separability" is corrected by the mechanism of unjust enrichment (§ 812 BGB). In the French and Italian systems, if a contract is terminated, the goods should be restituted. The merits of German law on this point should be taken into consideration, whilst it should be recognized that the most widespread solution is to ignore the distinction between real and mandatory effects.[6]

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4 For a further analysis from a private international law point of view, see V. HEUZE, "La notion de contrat international", *Travaux du Comité français de droit international privé* 1997-98, p. 319.

5 See also the study on the terms "obligation/duty".

Acquis Communautaire and Acquis International

An examination of both Acquis Communautaire and Acquis International reveals a traditional terminological use of the term "contract" **(I).**

The study of the notion of contract in relation to Acquis Communautaire and Acquis International is more informative if it extends to the examination of notions close to the notion of contract, which are different in theory, but almost interchangeable in practice, one notion often having several meanings. Therefore, in addition to the notion of contract, the analysis will touch on the notions of undertaking *("engagement")* **(II)** and agreement *("accord")* **(III)**.

We will conclude with the examination of the recent regulation of 11 July 2007 on the law applicable to non-contractual obligations ("Rome II"),[7] which contains provisions which are specific to quasi-contracts (although not referred to as such) **(IV).**

I. The Use of the Term "Contract"

It is possible to identify from the study of Acquis Communautaire or Acquis International a certain number of elements which relate to the meaning itself of the word "contract" **(A).** However, beyond these traditional elements, there also emerges a conception of contract based on the idea of reciprocity **(B).**

A. The meaning of the word "contract"

The use of the term "contract" in Acquis Communautaire and Acquis International reveals that the traditional terminological distinctions are still relevant **(1)** even if the contract is not the subject of a separate definition **(2).**

1. The traditional terminological use of the word "contract"

The distinction between the "contract-agreement" and the "contract-legal relations" should be mentioned for the record. Such a distinction appears in Acquis Communautaire and Acquis International but its technical nature seems excessive in relation to the minor practical consequences which it entails.[8]

The notion of contract in the sense of "contract-agreement" refers to the meeting of the wills of the parties which gives rise to rights and obligations on the part of each party. It is this meaning for the notion which clearly predominates in Acquis Communautaire

6 On this question, see the excellent comparative study carried out by U. DROBNIG, "Transfer of Property", in: *Towards a European Civil Code, Third Fully Revised and Expanded Edition*, Kluwer Law International, 2004, p. 725; *adde*. J. DALHUISEN, *Dalhuisen on International Commercial, Financial and Trade Law*, Second Edition, Hart Publishing, 2004, p. 561.

7 *JO* L 199 of 31 July 2007.

8 See, for example, articles 1:107, 6:111 or even 9:305 of PECL.

and Acquis International. However, the use of the word "contract" understood as a contractual document (contract being understood here in the sense of *instrumentum*) is also common, as illustrated by the study of a few chosen examples:

Whether it be in Acquis Communautaire or Acquis International, the most frequent use of the word "contract" occurs with reference to a "contract-agreement", that is to say "contract-meeting of wills." This is the case every time there is a mention of "the conclusion of the contract", for example in PECL in articles 2: 104 (1) ("before or when the contract was concluded"), 2: 205 ("The contract is concluded when") or again in 4: 109 ("at the time of the conclusion of the contract"). It also appears in this sense in various directives or pieces of international legislation.

The notion of contract is also used to refer to the contractual document. To cite but one example of the use of the term contract clearly understood as *instrumentum*, article 10.1 b of Directive 200/31/CE of the European Parliament and the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ("directive on electronic commerce")[9] provides that "[…] whether or not the concluded contract will be filed by the service provider and whether it will be acccessible […]".

These two traditional meanings clearly emerge from the study of Acquis Communautaire and Acquis International, however the contract is almost never defined as such

2. The absence of a common definition of contract

To our knowledge, there is only one legal document, whether in Acquis Communautaire or Acquis International, which proposes a definition of the term "contract". Council Directive 90/314/CEE of 13 June 1990, on package travel, package holidays and package tours defines the contract as "the agreement linking the consumer to the organiser and/or the retailer".[10] This text proposes a restrictive approach to the notion of contract: it limits the notion to the agreement which legally binds the consumer and the professional.

Obviously the proposed definition cannot be generalized. Indeed, this type of text should be read in context, in a sectorial approach which only purports to govern a specific field.

There does not appear to be an abstract and general definition of contract anywhere else. This can be explained by the origin of the texts in questions. Community and international legislation have had as their principal objective to encourage commercial exchanges in specific sectors. The contract is not the central subject matter of these texts and is therefore not the subject of a uniform definition. As a simple legal tool for regulating the flow of wealth, the contract is never really defined by these supranational texts.

This absence of a definition contrasts however with the abundance of definitions relating to the subject-matter of the contract in these texts. The legislation seems to privilege an economic conception of contract founded on the principle of reciprocity.

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9 *JO* n° L 178 of 17 July 2000, p. 0001-0016.

10 *JO* n° L 158 of 23 June 1990, p. 0025-0064, article 25.

B. The primacy of a conception of contract founded on exchange

Whether it be in Community directives or international legislation, the subject-matter of the contract (…) is often presented in terms which acknowlegdes the preeminence of reciprocity **(1).** However, it should also be noted that current works relating to European contract law seem to grant a more important place to unilateralism in the contract **(2).**

1. The principle of reciprocity in the definitions relating to the subject matter of a contract

Although Community and international legislation is not particularly explicit when it comes to the meaning to be given to the term "contract", it is a lot clearer concerning the subject matter of the contract in question. These texts show a definite will to favour exchanges. This approach can explain the tendancy to approach contractual relations with reciprocity in mind – contractual relations in which it might be possible to identify an underlying doctrine very close to the English doctrine of consideration. For example, there is often a reference, in the definition of the subject matter of a contract, to what is provided in return, whether this be monetary or not. There follow a number of examples from Community law as well as from Acquis International.

Article 2 of Directive 94/47/CE of the European Parliament and the Council of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis[11] provides that "for the purposes of this Directive, a 'contract relating directly or indirectly to the purchase of the right to use one or more immovable properties on a timeshare basis', hereinafter referred to as 'contract' shall mean any contract or group of contracts concluded for at least three years under which, directly or indirectly, on payment of a certain global price, a real property right or any other right relating to the use of one or more immovable properties for a specified or specifiable period of the year, which may not be less than one week, is established or is the subject of a transfer or an undertaking to transfer".

Article 1 of Council Directive 85/577 of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises[12] states that "the present directive shall apply to *contracts under which a trader supplies goods or services to a consumer* […]".

Under the terms of article 2 of Directive 97/7/CE of the European Parliament and Council of 20 May 1997 on the protection of consumers in respect of distance contracts,[13] a "Distance Contract": means any contract concerning *goods or services* concluded between a supplier and a consumer under *an organized distance sales or service-provision scheme* run by the supplier, who, for the purpose of the contract, makes exclusive use of one or more means of distance communication up to and including the moment at which the contract is concluded".

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11 *JO* n° L 280 of 29 October 1994, p. 0083-0087.

12 *JO* n° L 372 of 31 December 1985, p. 0031-0033.

13 *JO* n° L 144 of 4 June 1997, p. 0019-0027.

In the Brussels international Convention on travel contracts (CCV) of 23 April 1970, the following provisions of article 1 are of interest: "For the purpose of this Convention: 1. "Travel Contract" means either an organized travel contract or an intermediary travel contract.

2. "Organized Travel Contract" means any contract whereby a person undertakes in his own name to provide for another, *for an inclusive price*, a combination of services comprising transportation, accommodation separate from the transportation or any other service relating thereto.

3. "Intermediary Travel Contract" means any contract whereby a person undertakes to provide for another, *for a price*, either an organized travel contract or one or more separate services rendering possible a journey or sojourn. "Interline" or other similar operations between carriers shall not be considered as intermediary travel contracts."

Similarly, the Vienna Convention of 11 April 1980 on contracts for the international sale of goods is not concerned with the definition of the notion of contract but provides details on the notion of "contract for the sale of goods" and therefore on the subject matter of the contract which is governed by the convention: the international sale of goods.

In the UNIDROIT Principles of international commercial contracts, the idea of reciprocity also appears. Indeed, articles 6.1.4 and 7.1.3 underline the fact that the obligations of the parties are interdependent.

Whilst they recognize the importance of reciprocity, recent projects carried out with a view to developping a European contract law have been keen to import into the notion of contract a more pronounced unilateral dimension.

2. A limited unilateralism in recent projects

Recent Community projects have made a place for unilateralism.[14] Such unilateralism can take two forms. Either the contract remains as a meeting of wills, an agreement entered into by at least two parties, but with one party only taking on obligations: the contract itself is then unilateral; or the projects recognize the validity of truly unilateral undertakings (*"engagements unilatéraux"* in French) which have binding force (…).

The Pavia Project is the only one to put forward an article which defines the contract and to place this article in first position within the proposed European Code. Article 1, Title 1, Book 1 provides as follows: "1. A contract is the agreement of two or more parties to establish, regulate, alter or extinguish a legal relationship between said parties. It can also produce obligations or other effects *on only one of the parties*. (…)". Thereafter, and throughout the Code, various references are made to promises (for example, article 23) or to unilateral acts (for example, articles 4 and 20).

Unlike the Pavia Project, PECL do not offer a definition of the notion of contract (although certain details are set out (…) on the conditions for its formation, as illustrated by article 2:101). However, article 2:107 of PECL provides for the possibility of a binding promise with no acceptance. The note[15] below this article mentions that in business,

14 D. MAZEAUD, "La Commission Lando, le point de vue d'un juriste français", in: *L'harmonisation du droit des contrats en Europe*, sous la dir. de Ch. Jamin et D. Mazeaud, Economica, 2001.

15 *Les principes du droit européen du contrat*, SLC, 2003, note below article 2:107, p. 118.

there are in existence a number of promises which are binding without acceptance, such as an irrevocable letter of credit opened by an issuing bank on the instructions of a buyer.[16] This provision appears to recognize, in a limited way, the unilateral undertaking.

In conclusion, both in Acquis Communautaire and Acquis International, the prevailing approach until now has been, overall, an understanding of contract based on reciprocity and interdependence. This is no doubt the direct result of the principles which guided the drafting of the legislation, principles which arose out of economic requirements, in respect of which the law needed to provide a unified or at least harmonised framework. From this economic viewpoint, the emphasis placed on exchange and reciprocity did not leave very much space for unilateralism.

Therefore, after examining the notion of contract, it appears most relevant to consider the notion of "*engagement*" (undertaking) in Acquis Communautaire and Acquis International, since this notion is likely to shed light on the notion of contract.

II. The Notion of "Engagement" (Undertaking)

A study of positive law shows that the term "*engagement*" (in French) does not have just one meaning and suffers from terminological inconsistencies (**A**). The notion of "obligation freely assumed", as is used by the ECJ in decisions relating to the interpretation of article 5.1 of Regulation 44/2001 shows a separate development: indeed, the notion of unilateral obligation is perceived as not being incompatible with the notion of contract (**B**).

A. The various meanings of the term "engagement"

The notion of "*engagement*" does not seem to be used in a consistent and univocal way, which makes it impossible to put forward a definition or even to identify the limits of the notion. An analysis of Acquis Communautaire is illustrative of this inconsistency (**1**) and Acquis International, although to a lesser extent, also shows that the term "*engagement*" is used with a number of different meanings (**2**). However, both in international banking law and in competition law, a univocal conception of "*engagement*" prevails, which will be considered separately (**3**).

1. A clear multiplicity of meanings in Acquis Communautaire

In French, only the term "*engagement*" is used. However, the English translation of this term varies.

Sometimes, the term "*engagement*", is reflected in the English text by the word "undertaking". This carries the connotation of a promise creating an obligation. For example:

16 See also, herafter, the comments concerning the notion of undertaking in banking law.

– article 6:101 of PECL: "[…] (3) Such information and other *undertakings* given by a person advertising or marketing services, goods or other property […] unless it did not know and had no reason to know of the information or *undertaking*".
– article 2 of Directive 94/47 of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis:[17] "a transfer or an ***undertaking*** to transfer …".
– article 1 e) of Directive 1999/44 of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees:[18] "guarantee: shall mean *any undertaking* by a seller or producer to the consumer".
– article 4. 6. e) of Regulation (EC) 2006/2004 on consumer protection cooperation:[19] "to obtain from the seller or supplier responsible for intra-Community infringements *an* ***undertaking*** *to cease the intra-Community infringement; and, where appropriate, to publish the resulting* ***undertaking***".

Sometimes, the term "commitment" is preferred in order to refer to the notion of *"engagement"*, as is the case in the following examples:
– Article 1a of Council Directive 90/88 of 22 February 1990 concerning consumer credit:[20] "The annual percentage rate of charge, which shall be that equivalent, on an annual basis, to the present value of all *commitments* (loans, repayments and charges), future or existing, agreed by the creditor and the borrower, shall be calculated in accordance with the mathematical formula set out in Annex II".
– Annex (n) of Directive 93/13 on unfair terms in consumer contracts, lists among the clauses which can be regarded as unfair, a clause limiting the seller's or supplier's obligation to respect *commitments* undertaken by his agents or making his *commitments* subject to compliance with a particular formality.
– Directive 2005/29 concerning unfair business-to-consumer commercial practices in the internal market: article 6 (c) mentions "the extent of the trader's ***commitments***". Article 6 (2)(b) mentions "… (b) non-compliance by the trader with *commitments* contained in codes of conduct by which the trader has undertaken to be bound, where: (i) the *commitment* is not aspirational but is firm and is capable of being verified …".

Sometimes, "liability" in English is used for the French *"engagement"*. The underlying connotation is in such case that of liability, even payment.

For example, abovementioned Directive 93/13,[21] sets out in its preamble: "in insurance contracts, the terms which clearly define or circumscribe the insured risk and the insurer's ***liability*** shall not be subject to such assessment since these restrictions are taken into account in calculating the premium paid by the consumer".

Sometimes, it is the term "obligation" which is used in English instead of the French *"engagement"*. The term seems to refer more to the subject matter of the *"engagement"*, to

17 *JO* L 280 of 29 October 1994, p. 83-87.
18 *JO* L 171 of 07 July 1999, p. 12-16.
19 *JO* L 364, of 9 December 2004, p. 1-11.
20 OJ L 061 of 10 March 1990, p. 14 to 18.
21 *JO* L 95 of 21 April 1993, p. 29-34.

its content. For example, article 9. 2 of Regulation (EEC) n° 2137/85 of 25 July 1985 on the European Economic Interest Grouping (EEIG)[22] provides that "If activities have been carried on behalf of a grouping before its registration in accordance with Article 6 and if the grouping does not, after its registration, assume ***the obligations*** arising out of such activities, the natural persons, companies, firms or other legal bodies which carried on those activities shall bear unlimited joint and several liability for them".

In other cases, instead of the term "*engagement*", it is the term "agreement" which is used. The connotation in such case is that of an agreement, a meeting of wills.

For example, under the terms of Directive 93/13, Annex C, among the clauses which can be regarded as unfair, there is listed a clause "making an **agreement binding** on the consumer whereas provision of services by the seller or supplier is subject to a condition whose realization depends on his own will alone". In the same way, Regulation (EC) n° 261/2004 of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights specifies that :[23] "The Commission recalls its intention to promote *voluntary agreements* or to make proposals to extend Community measures of passenger protection to other modes of transport than air, notably rail and maritime navigation …".

Finally, in some cases, the English term "engagement" is used. Directive 85/577 of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises,[24] which operates a distinction between the contract and the unilateral engagement, is in this respect an exception: "a contract or *a unilateral engagement* between a trader and a consumer"). The distinction does not appear to be fortuitous since a few lines below, the directive operates the same distinction: it mentions "such contracts and *engagements*"). Unfortunatly, the directive does not give any indications as to the significance of the distinction between these terms. A definition of the notion of unilateral engagement could no doubt be found in the light of the context of the directive, as can be identified in paragraphs 3 and 4 of article 1. However, even if grounds could be found for such an interpretation, it cannot be extended to apply to every use of the notion of "*engagement*" under Community law. This would in any event be not be desirable since the express notion of "unilateral engagement" only appears in this Directive.[25]

It emerges from these various translations – "undertaking", "commitment", "liability", "obligations", "engagement" – that there is no univocal and unanimously accepted meaning for the French term "*engagement*": it sometimes refers to the promise to do or not to do something, at other times it refers to the obligor's debts.

It can also refer to the manifestation of intention giving rise to a contract or to the obligations which arise out of a manifestation of intention.

The notion remains ambiguous and does not follow any overall terminological logic at a Community level. This multiplicity of meanings is however less present at an international level.

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22 *JO* L 199 of 31 July 1985, p. 1-9.

23 *JO* L 46 of 17 February 2004, p. 01-08.

24 *JO* L 372 of 31 December 1985, p. 31-33.

25 Subject, however, to case C-27/02 *Peter Engler*, analysed below.

2. A more limited polysemy in Acquis International

More traditionally, in Acquis International, the notion of "*engagement*" seems to refer to a manifestation of intention, through which a person takes on an obligation – either in the form of a promise, or by entering a contract. Several examples illustrating these two meanings are set out below.

Article 33.1.c of the Hague Convention relating to a uniform law on the international sale of goods of 1 July 1964 provides that "The seller shall not have fulfilled his obligation to deliver the goods where he has handed over: […] c) goods which lack the qualities of a sample or model which the seller has handed over or sent to the buyer, unless the seller has submitted it without any express or implied *undertaking* that the goods would conform therewith".

Articles 3.8 and 3.9 of the UNIDROIT Principles relating to fraud and threat[26] provide that: "A party may avoid the contract when it ***has been led to conclude the contract*** by the other party's fraudulent representation, including language or practices, or fraudulent non-disclosure of circumstances which, according to reasonable commercial standards of fair dealing, the latter party should have disclosed." Article 6.1.7 sets out that: "However, an obligee who accepts, either by virtue of paragraph (1) or voluntarily, a cheque, any other order to pay or *to pay*, is presumed to do so only on condition that it will be honoured".

3. No ambiguity: international banking law and competition law

If the polysemy of the term "*engagement*" is much less evident in the context of Acquis International than in Acquis Communautaire, the term is however univocal in the context of international banking law (**a**) and in that of competition law (**b**).

a) "Engagement" (undertaking) in international banking law

Although the meaning to be given to the term "*engagement*" is not generally established, it is however set out clearly in certain areas. This is the case in international banking law, which puts forward a single definition of "*engagement*".

In the UNCITRAL Convention on independent guarantees and stand-by letters of credit, article 2, entitled "Undertaking" provides that "1. For the purposes of this Convention, an *undertaking* is an *independent commitment*, known in international practice as an independent guarantee or as a stand-by letter of credit, given by a bank or other institution or person ("guarantor/issuer") to pay to the beneficiary a certain or determinable amount upon simple demand or upon demand accompanied by other documents, in conformity with the terms and any documentary conditions of the *undertaking*, indicat-

26 Only the article regarding fraud is reproduced here, but the article regarding threat uses the word "engagement" in a similar context.

ing, or from which it is to be inferred, that payment is due because of a default in the performance of an obligation, or because of another contingency, or for money borrowed or advanced, or on account of any mature indebtedness undertaken by the principal/applicant or another person".

In the same spirit, article 11:204 of PECL relating to "undertakings by assignor") provides that "By assigning or purporting to assign a claim the assignor *undertakes* to the assignee that […]".

b) "Engagement" (commitment) in competition law

The term "*engagement*", translated into English as "commitment" has a specific meaning in competition law. Regulation 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in articles 81 and 82 of the Treaty,[27] provides in its article 9 that "where the Commission intends to adopt a decision requiring that an infringement be brought to an end and the undertakings concerned offer *commitments* to meet the concerns expressed to them by the Commission in its preliminary assessment, the Commission may by decision make those *commitments* binding on the undertakings". Such a decision may be adopted for a specified period and shall conclude that there are no longer grounds for action by the Commission.

Here, the notion of "commitment" contains a certain amount of unilateralism. First, it would appear that the term was chosen purposefully, in preference to the terms "agreement" or "contract", although the nature of these "commitments" requires negotiation with the controlling authority, and it is, in the end, this authority which will give its agreement to the proposal made by the undertaking.[28] Technically, the commitment seems to exist before and independently from the decision of the authority; however, it will only be binding on the undertaking because such authority makes it binding. It would therefore appear that it is because the **initiative** of the "commitment" belongs to the undertakings that the "commitments" have been so named. It represents, in summary, the expression of the will to commit to adopting a behaviour which will not affect competition on a determined market; a will to which the relevant controlling authority may or may not accept to give binding force.

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27 *JO* n° L 1 of 4 January 2003, p. 1-25.

28 L. IDOT, "Adaptation du droit français au nouveau système communautaire de mise en œuvre des articles 81 et 82 CE", *RDC*, 2005, p. 305. For an illustration of how much this procedure is used see, in particular, L. IDOT, "Le régime des engagements en cours de formalisation", *RDC*, 2005, p. 697; "De nouveaux exemples de relations contractuelles aménagées par la technique des engagements", *RDC*, 2005, p. 1036; "Engagements et aménagement des contrats de distribution: un succès confirmé", *RDC*, 2006, p. 1111.

B. "Obligation freely assumed" ("Engagement librement assumé") and matters relating to a contract as per article 5.1 (Regulation n° 44/2001)

In a Community and international context, there is, as seen above, a strong tendancy towards reciprocity, on the basis that the interests in question are essentially economic interests.

However, the terminology used by the ECJ in its interpretation of article 5.1 of Regulation 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters[29] sheds a different light on the matter. In a series of cases, the ECJ defines the "matters relating to a contract" referred to in this article by the wording "obligation freely assumed".

In the Jakob Handte case[30] of 17 June 1992, the ECJ was required to interpret article 5.1 of the Convention.[31] Using succinct wording, it held that this notion "is not to be understood as covering a situation in which *there is no obligation freely assumed by one party towards another*". In this case, the preliminary ruling sought by the French Cour de Cassation was to determine whether the rule set out in article 5.1 could be applied in the context of an action brought by the sub-buyer of goods against the manufacturer, the initial seller, in a chain of contracts. After restating that article 5.1 must be interpreted independently, that is to say independently from any national consideration, the ECJ applied the article in a strict manner: it underlines that this article in an exception to the principle of article 2 set out by the same regulation and consequently deduces therefrom that "it must be observed that there is no contractual relationship between the sub-buyer and the manufacturer because the latter has not undertaken any contractual obligation towards the former". This case sets out, as a condition for belonging to the category of "matters relating to a contract", the existence of an obligation freely assumed by one party towards another, it does not provide any information as to the definition of the notion of obligation itself, or of "obligation freely assumed".

In the Réunion européenne S.A case[32] of 27 October 1998, the ECJ again took the view that "matters relating to a contract" should be interpreted strictly. Thus, if there is no proof of "any contractual relationship freely entered into between the consignee and the defendant", the litigious act could not be considered as being part of "matters relating to a contract" as par regulation 44/2001. It is clear, from the English version, that here, "*engagement librement assumé*" is synonymous with contractual relationship.

Such a reading seems to be confirmed by the Tacconi case dated 17 September 2002.[33] Indeed, point 22 of the case states as follows: "… although Article 5(1) of the Brussels Convention does not require the conclusion of a contract, the identification of an obligation is none the less essential for the application of that provision". Under the terms of this decision, in order for a matter to "relate to a contract", it is not necessary for a contract to be formed. It is essential for an obligation to have arisen. On the facts of the

29 *JO* n° L 12 of 16 January 2001, p. 1.

30 Case C-26/91, Rec. p. I-3697.

31 The convention was changed into a regulation on 22 December 2000.

32 Case C-51/97, Rec. p. I-6511.

33 Case C-334/00, Rec. p. I-7357.

case, it appears that during the pre-contractual negotiations entered into with a view to concluding a contract between the parties, no such obligation seems to have been taken on, which is why article 5.1 could not apply.

The Petra Engler case[34] was decided on 20 January 2005, and was concerned with a marketing prize draw. According to the ECJ, although the marketing prize draw is not a contract as per article 13 of the Brussels Convention, it falls within the scope of "matters relating to a contract" as per article 5.1.[35] Indeed, this is the case if the claimant can establish "a *legal obligation freely consented to* by one person towards another and on which the claimant's action is based." Such an obligation was held to exist on the facts (points 52-56). The ECJ therefore decided at point 56 of the same case: "*… the intentional act* of a professional vendor in circumstances such as those in the main proceedings *must be regarded as an act capable of constituting* ***an obligation which binds its author as in a matter relating to a contract***."

This case could be interpreted as recognizing in a limited way the existence of unilateral undertakings. However, this autonomous Community interpretation is not shared by all Member States. For example, the French Cour de Cassation, in a similar case, took the view that the facts gave rise to a quasi-contract.[36]

The semantic difficulties surrounding the term "*engagement*" and the links which exist with the notion of "contract" are naturally just as relevant in relation to the term "agreement".

III. The Term "Accord" (Agreement)

The term "agreement" is often used in a traditional way, to refer to a contract or to a way of expressing consent (**A**). However, it has a specific meaning in certain contexts (**B**).

A. The various meanings of the term "agreement" when used traditionally

In its most usual meanings, the term "agreement" refers sometimes to a category of contract or "*convention*" (**1**) sometimes to a form of expression of consent (**2**).

1. The use of the term "agreement" as a category of "contract" or "convention"

If the term "contract" is frequently encountered, as seen above, with the meaning of "agreement", it is not unusual for the term "agreement" to be used to mean "contract" (**a**).

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34 Case C-27/02, Rec. p. I-481.

35 Regarding a case with similar facts, see ECJ, 11 July 2002 (case C-96/00, Gabriel), *Rev. crit. DIP* 2003.484, note P. REMY-CORLAY. In this case, however, the ECJ took the view that the matter fell within the imperative and exclusive jurisdiction for contracts entered into with consumers on the basis that the sending of the prize was closely linked to the order for goods.

36 See, below, the section dealing with comparative law: Ch. Mixte. 6 septembre 2002, *Bull. Civ. Mixte*, n° 4, p. 9.

However, it would appear that, in certain cases, the use of the term "agreement" refers to a bilateral expression of consents, the subject matter of which is unclear and which could lead to conclude that the term "agreement" refers to a type of "*convention*" (contract) (**b**).

a) In a large number of texts, the word "agreement" is used to refer to a type of contract

Article 7 of Directive 1999/44/EC of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees[37] provides that "Any contractual terms or *agreements concluded* with the seller […] which directly or indirectly waive or restrict the rights resulting from this Directive […]". Recital 13 of Directive 94/47/EC of 26 October1994, on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis[38] states that "Whereas in the event of cancellation of or withdrawal from a contract for the purchase of the right to use one or more immovable properties on a timeshare basis the price of which is entirely or partly covered by credit granted to the purchaser by the vendor or by a third party on the basis of an *agreement* concluded between that third party and the vendor, it should be provided that the *credit agreement* should be cancelled without penalty; …" The fact that in English the same word is used (whilst in French, the words used are "*accord conclu*" and in the second instance, "*contrat*") may lead to conclude that the terms "contract" and "agreement" could be interchangeable in this recital.

b) Sometimes, the term "accord" in french is understood as a category of "convention"

For example, under the terms of article 1 of Council Directive 90/88/EEC of 22 February 1990 amending Directive 87/102/EEC for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit,[39] "membership subscriptions to associations or groups and arising from agreements (the French word used here is '*accord*') separate from the credit agreement ('*contrat*' in French …".

The terminology used in French shows that the term "*accord*" should be understood as a category of "*convention*" which is distinct from the contract in the narrow sense. However, the English translation, which in both cases uses the term "agreement", softens this distinction by treating both types of convention in the same way, terminologically at least.

In the UNCITRAL Model law on international commercial arbitration, the term *accord*/agreement is preferred, whether it be in French or in English, to that of "contract". The instances in which the word "agreement" is used in this sense are numerous in the Model law. They can be found in articles 11 (appointment of the arbitrators), 13.2 (challenge procedure), 15 (appointment of substitute arbitrator), and 22 (language) in particular. The use of the word "agreement" seems to coincide here with the specific subject matter upon which the parties agree, that is to say, for example, the appointment

37 JO n° L 171 of 07 July 1999, p. 0012-0016.

38 JO n° L 280 of 29 October 1994 p. 0083-0087.

39 OJ n° L 061 of 10 March 1990, p. 0014-0018.

of an arbitrator or the use of such or such rule of procedure. The agreement refers to a convention which does not give rise to any obligation on the part of one party or the other.

When is does not refer to a form of contract or "*convention*", the agreement frequently refers to the expression of consent.

2. The agreement as a form of expressing consent

More generally, the word "agreement" is often used to refer to the expression of consent. Council Directive 93/13/EEC of 5 April 1993, on unfair terms in consumer contracts,[40] among the clauses which can be regarded as unfair, lists a clause: "giving the seller or supplier the possibility of transferring his rights and obligations under the contract, where this may serve to reduce the guarantees for the consumer, without the latter's *agreement* …".

Article 6.3 of Directive 97/7/EC of the European Parliament and Council of 20 May 1997 on the protection of consumers in respect of distance contracts,[41] also states that: "Unless the parties have agreed otherwise, the consumer may not exercise the right of withdrawal provided for in paragraph 1 in respect of contracts: – for the provision of services if performance has begun, with the consumer's agreement, before the end of the seven working day period referred to in paragraph 1 …" Under the terms of recital 16 of the directive, it is provided: "Whereas the promotional technique involving the dispatch of a product or the provision of a service to the consumer in return for payment without a prior request from, or the explicit agreement of, the consumer cannot be permitted … "

B. Specific uses for the term "agreement"

From a terminological point of view, the notion of agreement, in addition to its classical meaning, has a specific application in certain contexts, in particular in the present context of European deregulation and of the encouragement towards soft law, in which the notion appears as a tool for deregulation (**1**), as well as in the specific area of competition law (**2**).

1. The agreement, a tool for deregulation

Directive 2000/31/EC of the European Parliament and the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ("directive on electronic commerce"),[42] in its recital 40, uses the following expression: "voluntary *agreements*"). This expression then reappears in recital 41 as "industry *agreements*".

40 OJ n° L 095 of 21 April 1993, p. 0029-0034, Annexe 1.

41 OJ L 144 of 4 June 1997, p. 0019-0027.

42 *JO* n° L 178 of 17 July 2000, p. 0001-0016.

The use of the term "agreement" with this meaning reappears in Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community framework for electronic signatures,[43] in which the following expression is used: "voluntary *agreements* under private law".

2. The agreement in competition law[44]

In the context of competition law, legislation refers to the term "agreement" exclusively to refer to anti-competitive agreements.[45] Moreover, practice, case law and Community legislation use for the most part the term "agreement" in the context of agreements which are traditionally separated into "vertical agreements" and "concerted practices", likely to affect trade between Member States.[46]

An "agreement" is defined, throughout the case law, as "the joint intention of the parties to conduct themselves on the market in a specific way".[47] In terms of competition law, the term "agreement" goes beyond, in a sense, the term "contract" since it does not necessarily have to produce binding legal effects. The judges make it clear, indeed, that it is not relevant to examine, in order to find the existence of an agreement, "whether the undertakings involved felt legally, *de facto* or morally bound to adopt the agreed conduct".[48] On that basis, gentlemen's agreements,[49] rules of professional ethics[50] or even recommendations[51] can be held to be agreements.

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43 *JO* n° L 013 of 19 January 2000, p. 0012-0020.

44 On the evolution of the notion of "agreement" in competition law, see the explanatory observations of L. IDOT, "Retour sur la distinction entre l'accord et le comportement unilatéral", RDC 2004, p. 289.

45 Under the terms of article 81 of the Treaty of Rome, "The following shall be prohibited as incompatible with the common market: all *agreements* between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market […] Any *agreements* or decisions prohibited pursuant to this article shall be automatically void".

46 Our aim is not here to discuss the law relating to restrictive practices (on these issues, see in particular, in French: M. MALAURIE-VIGNAL, *Droit de la concurrence interne et communautaire*, Armand Colin, 3rd edition, 2005; M.-A. FRISON-ROCHE, M.-S. PAYET, *Droit de la concurrence*, Dalloz, 1st edition, 2006; J. SCHAPIRA, G. LE TALLEC, J.-B. BLAISE, L. IDOT, *Droit européen des affaires*, 5th edition, PUF, 1999; in English: R. WHISH, *Competition Law*, 5th edition, LexisNexis, 2003; V. KORAH, *An Introductory Guide to EC Competition Law and Practice*, 7th edition, Hart Publishing, 2000). We shall limit our study to the issue of the particular meaning of the term "agreement" under Community competition law.

47 ECJ, 8 July1999, *Anic*, aff. C-49/92 P, Recueil p. I-4125.

48 M.-A. FRISON-ROCHE, M.-S. PAYET, *Droit de la concurrence*, Dalloz, 1st edition, 2006, n° 157;*Adde*. M. MALAURIE-VIGNAL, *Droit de la concurrence interne et communautaire*, Armand Colin, 3rd edition, 2005, n° 306.

49 ECJ, 15 July 1970, *Chemiefarma*, case 41/69, Rec. p. 661; *adde*. Decision, *FEG et TU*, 26 October 1999, JO n° L 39, 14 February 2000; Decision, *Treillis soudés*, 2 August 1989, JO, L 260, 6 September 1989.

However, the line separating an "agreement" from unilateral conduct is sometimes difficult to draw. A distinction used to be made[52] between measures which are ***genuinely*** unilateral and ***apparently*** unilateral – the latter being the only ones which could be held to be "agreements" as per article 81 of the Treaty.[53] Today, following the direction taken by the Court of First Instance,[54] backed up by the ECJ,[55] it appears necessary to refine the analysis and distinguish between two situations. First of all, it is relevant to consider whether the litigious case arises in the context of a distribution network. Indeed, should that not be the case, the notion of "agreement" is based on the idea of offer ("invitation") and acceptance, which must be proved by the competition authority. Conversely, in presence of a distribution network, two cases should be distinguished. The first concerns the measures which "arise out of the distribution contract, in respect of which the acquiescence of the distributor is assumed".[56] In the second case, "the implementation of the manufacturer's policy by the distributor is equivalent to tacit acquiescence to the restrictive measure, but in the absence of proof of such acquiescence, the latter cannot be implied from the signing of a lawful distribution contract".[57]

If the term "agreement" takes on a particular meaning in the context of competition law, the recent evolution of case law highlights that the concept is being brought closer to ordinary contract law, allowing the return of a form of pragmatism.[58]

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50 CFI, 28 March 2001, *Institut des mandataires agréés près l'Office européen des brevets (OEB)*, case T-144/9, *Contrats, conc., consom.* 2001, n° 109.

51 ECJ, 29 October 1980, *Heintz van Landewyck SARL and a. C / Commission*, joined cases 209 to 215 and 218/78, Rec. p. 3125.

52 See in particular ECJ, 12 July 1979, *BMW Belgium*, cases 32/78, 36/78, 82/78, Rec. p. 2435, ECJ; 25 October 1983, *AEG*, case 107/82, Rec. p. 3151; ECJ, 17 September 1985, *Ford*, cases 25/84 and 26/84, Rec. p. 2725; ECJ, 11 January 1990, *Sandoz*, case C-277/87, Rec. p. I-45.

53 "A distinction should therefore be drawn between cases in which an undertaking has adopted a genuinely unilateral measure, and thus without the express or implied participation of another undertaking, and those in which the unilateral character of the measure is merely apparent", TPICE, 26 octobre 2000, Bayer AG, aff. T-41-96, Rec. II-3383, point 71.

54 CFI, 26 October 2000, *Bayer AG*, case T-41-96, Rec. II-3383, *Europe*, décembre 2000, comm. n° 393; L. IDOT.; *adde*. CFI, 3 December 2003, *Volkswagen AG*, case T.-208-01, Rec. II-05141.

55 ECJ, 6 January 2004, *Bayer AG*, joined cases C-2/01 P and C-3/01 P, Rec. I-23, *Europe*, March 2004, comm. n° 84, L. IDOT; E. CLAUDEL, "Entente et concours de volonté. De la dénaturation à l'harmonie", *D.* 2004, p. 1970; *adde*. *JDI* 2004, p. 616, obs. C. PRIETO; ECJ 13 July 2006, *Commission c/Volkswagen AG*, aff. C-74-04 P, Rec. I-6585, *Europe*, October 2006, comm. n° 289, L. IDOT; *adde*. Conclusions of the advocate-general Tizzano, 17 November 2005, *Commission v/Volkswagen AG*, case C-74/04 P, Rec. I-6585.

56 L. IDOT, "Retour sur la distinction entre l'accord et le comportement unilatéral", *RDC* 2004/2, p. 296.

57 *Ibid*.

58 In favour of this case law, E. CLAUDEL, *op.cit.*; *contra* the European Commission which "clearly worried about the serious consequences of this new interpretation, pleaded that it would be very difficult to fight against parallel imports" (E. CLAUDEL, *op.cit.*). The tribunal, in this perspective, declared at point 174 of the *Bayer* case, that the aim of article 85 of the Treaty was not to "eliminate" totally measures that prevent intracommunity trade; it is more limited, because

IV. Observations Regarding Quasi-contracts under European Law

The draft Regulation of the European Parliament and of the Council on the law applicable to non-contractual obligations (Rome II)[59] sheds precious light on the notion of quasi-contract under European law.

There had already been mention of "quasi-delictual matter" in article 5.3 of Regulation n° 44/2001, it would appear however that draft Regulation Rome II grants a particular place to what it designates, in section 2 article 9, as "non-contractual obligations arising out of a act other than a tort/delict". Paragraph 3 of the article refers to enrichment without case and paragraph 4 deals with *negotiorum gestio*. The category seems to be understood narrowly, but the explanatory note offers a justification of this choice by the fact that these two cases are recognized by all Member States: it is by taking a pragmatic view that they have been included in the scope of this article. However, the lack of consistency regarding this area in the different Member States is such that it is probably preferable not to contain it by the use of technical vocabulary – like the word "quasi-contract" – which is foreign to many systems. In fact, the recent Rome II Regulation[60] has moved away from the initial draft. Indeed, under the expression "special rules where damage is caused by an act other than a tort/delict", are now grouped not only unjust enrichment and *negotiorum gestio*, but also *culpa in contrahendo*.[61] Finally, a twofold approach would appear to be emerging with regard to non-contractual obligations: those which result from a tort/delict and those which arise out of an act other than a tort/delict. Since unjust enrichment and *negotiorum gestio* are considered separately, it does not appear useful to group them under a category close to the category of quasi-contracts.

Comparative Law

The study of comparative law[62] – between Member States of the European Union but also outside the Union – shows that the use of the term "contract", understood as "agreement" is very frequent and that a number of differences, some slight and others more marked, become apparent between the various legal systems. Depending on the country, the contract is considered, sometimes as the meeting of wills with a view to producing legal effects **(I)**, sometimes more widely, as a declaration of intention likely to produce

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only the measures preventing competition installed by a joint will between at least two parties are prohibited by this provision".

59 COM 2003/0427 final.

60 Regulation n° 864/2007 of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), JO L 199 of 31 July 2007, p. 40-4.

61 See recital 29. However, the main text of the regulation avoids any categorization on the basis that the rules relating to unjust enrichment (article 10), negotiorum gestio (article 11) and to culpa in contrahendo (article 12) form part of a chapter III entitled "Unjust enrichment, negotiorum gestio and culpa in contrahendo".

62 It should be made clear that the narrow meaning of contract as contractual document *("instrumentum")* will be ignored in favour of a wider analysis of the notion.

effects (**II**). This difference does not necessarily reflect diverging approaches to the notion of contract itself.

The divergences are more obvious, however, when the question arises as to whether promises can result in binding effects without being accepted, that is to say without a meeting of wills (**III**) or when the specific issue of quasi-contracts is considered (**IV**).

I. The Contract as a Meeting of Wills Intended to Produce Legal Relations

A large number of States takes the view that a contract is formed only when an agreement, generally materialized by the meeting of an offer and an acceptance, has been made between two persons. However, this meeting of wills is not sufficient to hold that a contract exists, there is also a requirement that the "parties" should have intended to create binding effects, or to use the anglo-saxon terminology, intended to be legally bound (**A**).

Similarly to what has been observed with regard to Acquis Communautaire and Acquis International,[63] the very notion of "agreement" takes on a particular meaning in certain contexts, and in particular in the context of competition law (**B**).

A. The contract as a meeting of wills with the intention of creating legal relations: a variety of examples

A number of countries have adopted codified definitions of contract, which all place the emphasis on one main aspect, that of the meeting of wills of the parties with the intention of creating legal relations. The following examples can be examined:

French, Belgian and Luxemburg laws provide in article 1101 of their respective Civil Codes that: "the contract is an agreement by which one or several persons bind themselves, as regards one or several others, to transfer, to do or not to do something". The contract is understood as a juridical act which requires the agreement of two or more individual wills. The meeting of wills in the contract is intended to result in an obligation. *Stricto sensu*, the contract can be distinguished from a "*convention*" (in French) which has the aim of amending or extinguishing an obligation or creating, transferring or extinguishing a right other than a personal right.

Under Italian law,[64] article 1321 of the Civil Code provides that: "a contract is an agreement between two or several parties to create, regulate, or extinguish as amongst each other a legal patrimonial relationship".[65] Article 1174 of the Civil Code specifies: "it should be possible to carry out an economic assessment of the performance required by the obligation, which must correspond to an interest of the debtor, not necessarily patrimonial".[66]

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63 See *supra*.

64 R. SACCO, "Interaction Between the Pecl and Italian Law", in: *Principles of European Contract Law and Italian Law. A commentary*, L. ANTONIOLLI, A. VENEZIANO (eds.), Kluwer Law International, 2005, p. 11.

65 Art. 1321 *"Nozione. Il contratto è l'accordo di due o più parti per costituire, regolare o estinguere tra loro un rapporto giuridico patrimoniale"*.

Under Dutch law,[67] article 6.213 NBW provides that: "a contract is a multilateral juridical act, by which one or several parties bind themselves as regards one or several others".

In Denmark, a contract is defined as an agreement entered into between two or several persons which creates obligations (law of 8 May 1917).

Article 1378 of the Civil Code of Québec specifies that: "a contract is an agreement of wills by which one or several persons obligate themselves to one or several other persons to perform a prestation".

Article 1 of the Swiss Code of obligations provides that: "a contract is perfected when the parties have, reciprocally and in agreement, shown their will". This provision does not give an express definition of contract, but it implies that the contract is the result of the meeting of wills of the parties.

It results from these definitions that a contract is a juridical act which is created by corresponding and interdependent declarations of will of two or several independent parties. These declarations are made with the intention of producing legal effects for the benefit of one party and imposing obligations upon the other, or for the benefit of both parties reciprocally, with the burden also being imposed reciprocally.

These characteristics are found in other texts, such as the Pavia Project, in which the contract is defined as follows: "A contract is the agreement of two or more parties to establish, regulate, alter or extinguish a legal relationship between said parties. It can also produce obligations or other effects on only one of the parties".[68]

These definitions prevent certain types of agreement from being considered as being contracts, that is to say as meetings of will with the intention of producing binding legal effects. Certain meetings of will will therefore not be capable of creating binding legal relations: acts of politeness, voluntary assistance relationships (transport, work, etc.). And yet, the courts of certain countries, such as France, treats these as genuine contracts for pragmatic reasons relating to the compensation of the person carrying out the voluntary action in the event that such person suffers loss or damage by so doing. Although English case law also varies, decisions are recurrently based upon the existence of an *intention to be bound* in order to acknowledge the existence of a contract[69] (see for example *Balfour v. Balfour*[70]).

The courts seem moreover to be developping a system of presumptions in accordance with which certain agreements are presumed not to carry such an intention – that is the case for agreements entered into in a domestic context or debts of honor[71] – and certain others are presumed to include the intention of creating binding legal relations, such as

66 Art. 1174. *"Carattere patrimoniale della prestazione. La prestazione che forma oggetto dell'obbligazione deve essere suscettibile di valutazione economica e deve corrispondere a un interesse, anche non patrimoniale, del creditore."*

67 *The Principles of European Contract Law and Dutch Law. A Commentary*, D. BUSCH, E. HONDIUS, H. VAN KOOTEN, H. SCHELHAAS, W. SCHRAMA, Kluwer Law International, 2002.

68 On this text, see however the observations hereafter.

69 The intention to be bound is not however the only criterion. The parties must have reached an agreement, materialized by the meeting of offer and acceptance.

70 *Balfour v Balfour* [1919] 2 *KB* 571.

71 For letters of comfort, see also *Kleinwort Benson Ltd. v. Malaysia Mining Cpn. Bdh.* [1988] 1 *W.L.R.* 799; [1989] 1 *W.L.R.* 379.

in the commercial field, for example.[72] The distinction would then operate by reference to the identity of the parties rather than by reference to the terms of the agreement.

Although a generally accepted meaning of the notion of "contract" seems to emerge, where contract is understood as a meeting of wills resulting in binding legal effects, it remains that the notion of "agreement", *stricto sensu*, takes on a particular meaning, in particular in the context of competition law.

B. The specificity of competition law[73]

In the context of competition law, we have seen already that it is the term "agreement" which is clearly used, following the meeting of two wills, materialized by an "invitation" and an "acceptance", whether implied or express. Indeed, the fact that this "agreement" should produce legal effects is not of particular importance.

Bearing in mind the recent coming into force of Regulation 1/2003[74] which seeks to make competition procedures in various national laws more uniform, and the predominance and direct applicability of ECJ case law, the issues covered in the section above on "Acquis Communautaire and Acquis International" are also relevant here and should be referred to.

However, it would seem useful to mention here that the movement which has been observed resulting in contract law and competition law becoming closer, in particular through the notion of "agreement", was initiated in France, in the context of various cases.

Indeed, the commercial chamber of the Cour de Cassation, in two cases,[75] seems to have returned to a more traditional approach regarding the notion of "agreement", approach which was followed by the "Conseil de la concurrence" (the French competition authority). In order to distinguish between concerted practice and unilateral behaviour, the Conseil de la concurrence stated that "the case law has been unchanging on the point that by merely entering into a franchise agreement, an exclusive or selective distribution agreement or, more simply by purchasing in accordance with general conditions of sale, distributors are presumed to have agreed to the clauses – which may be anti-competitive- contained in such agreements or conditions. But the Conseil is careful not to assume from the contractual relations between a supplier and a distributor that the latter automatically agreed to anti-competitive practices outside the contract".[76]

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72 *Rose and Frank v. Crompton Bros*, [1925] AC 445.

73 See, generally, M.-A. FRISON-ROCHE, M.-S. PAYET, *Droit de la concurrence, op.cit.* n° 157; M.-A. FRISON-ROCHE, "Remarques sur la distinction entre la volonté et le consentement en droit des contrats", *RTD civ.* 1995, p. 573; *adde*. E. CLAUDEL, "Le consentement en droit de la concurrence, consécration ou sacrifice?", *RTD com.* 1999, p. 291; M. MALAURIE-VIGNAL, "Droit de la concurrence et droit des contrats", D. 1995, chron., p. 51.

74 Council Regulation (EC) n° 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, JO L 1, of 4 January 2003, p. 1.

75 Cass. com., 7 April 1998, n° 96-13735, *Bull. civ.* IV, n° 127, p. 102; Cass. com., 12 January 1999, n° 97-10808. inédit titré.

76 Report of the Conseil for the year 1999, p. 44, cited by L. IDOT, *op.cit.* p. 291.

The national law, as is the case with Community law, seems therefore to return to a more traditional approach of the notion of "agreement", requiring the proof of an "invitation" and of an "acceptance". This evolution shows evidence of the influence exercised by ordinary law upon competition law.[77]

Germany, however, is witnessing an opposite trend. Until 1999, § 1 of the GWB (law against restrictions on competition) rendered nul and void any "contract" *("Vertrag")* entered into by enterprises for a common aim etc. Because the courts had already brought their interpretation of this notion of "contract" closer to the notion of "agreement"[78] *("Vereinbarung")* as par article 81 TCE, the German legislator finally reacted by replacing the notion of contract with the latter, with the express intention of including, in accordance with prior case law, the agreements in respect of which the parties specifically did not wish to create any legal effects.[79]

In any event, in other countries, the contract is more centered upon the declaration of intention and on the behaviour induced by such declaration.

II. The Contract as a Declaration of Intention Capable of Producing Legal Effects

The fundamental element of the contract is stated differently and is, in appearance at least, different from that which has just been discussed. Although, the basis of the contract is still formed by the meeting of wills ("agreement"), in certain legal systems, its definition is wider: the contract resides in the *intention* of one of the parties to be bound and in the behaviour which results from such intention on the part of the other party.

The importance of intention appears, for example, in the following laws:

Under English law, the contract is a promise or a series of promises which will be enforced by the law. It is traditional to find, at the root of the formation of a contract, at common law, the meeting of offer and acceptance. However, since the XIXth century, the courts have added an additional criterion: the intention to create legal relations.[80]

Under German law, § 311 para. 1 of the BGB provides that: "For the creation of an obligation by a juridical act, and for any amendment of the substance of an obligation, a contract between the parties is necessary, unless otherwise provided by law". A contract is the agreement between two or several parties concerning a legal subject matter. There is no difference (as there is under French law) between contract and "*convention*". Although there is specific wording for agreements "for disposal" (or "real") in the BGB

77 On these questions see in particular: M. CHAGNY, *Droit de la concurrence et droit commun des obligations*, Dalloz, 2004; B. FAGES, J. MESTRE, "L'emprise du droit de la concurrence sur le contrat", *RTD com.* 1998, p. 71; *adde*. The articles in the section "Débats" de la *RDC*, 2004, p. 861, dealing with "Droit de la concurrence et droit des contrats".

78 BGH, 22 April 1980, NJW 1980, 2813.

79 See D. ZIMMER, in U. IMMENGA, E.-J. MESTMÄCKER, *Gesetz gegen Wettbewerbsbeschränkungen*, 3rd ed., Beck, 2001, § 1 N° 84.

80 *"Although a separate requirement of intention to create legal relations did not exist until the nineteenth century, it is now established that an agreement will not constitute a binding contract unless it is one which can reasonably be regarded as having been made in contemplation of legal consequences"*. J. BEATSON, *Anson's Law of Contract*, 28th edition, 2002, OUP, p. 69.

("*Abtretung*" for the sale of a debt, "*Einigung*" for the transfer of moveable property, and "*Auflassung*" for the transfer of immoveable property), the legal regime applicable to "contracts" *("Verträge")* applies regarding their conclusion and validity, and they are considered as contracts in accordance with this meaning. A contract may also have the aim of amending or extinguishing obligations.

There are contracts which do not relate to obligations, but to the dividing up of goods: the cause of the "real" contract relating to the property transfer is the "obligation contract" which forms the basis thereof (like, for example, the contract of sale). Acts of kindness can be "contracts" as under French law: German courts takes the view that the criterion should be found in an analysis of the will of the parties, which is often determined in accordance with presumptions of fact which follow objective factors such as the financial amounts in question and the importance of the case.

The Russian Civil Code distiguishes between contracts and unilateral acts. A unilateral act is defined as the act in respect of which the expression of the will of one of the parties only is necessary and sufficient (article 154). They are subject to the same rules as contracts on the basis that these rules are not contrary to the law, nor to the character or the nature of the juridical act (article 156).

Under American law, the 2nd *Restatement of Contrats* defines the contract as follows: "a contract is a promise or a set of promises for breach of which the law gives a remedy, or performance of which the law in some way recognises as a duty". In the *Uniform Commercial Code*, section 1-201, states that: "the total obligation in law which results from the parties' agreement …; agreement means the bargain in fact as found in the language of the parties or in course of dealing or usage of trade or course of performance or by implication from other circumstances".

In these legal systems, despite different wording, it would appear that the contract is characterized by a meeting of wills with the intention of creating binding legal effects, and that the emphasis is placed on the meeting of wills or on the intention of the parties. However, the approaches are more varied with regard to the value of promises which have not been accepted.

III. The Contract as a Binding Promise without Acceptance

It appears traditional to take the view that claims and debts can only arise out of the conclusion of a contract. *A contrario*, the view is taken that it is not possible voluntarily to make oneself the obligee or especially the obligor of a person. However, by exception, certain national or anational clauses provide that "promises" can result in obligations for the promisor even without having been accepted.

The Pavia Project, as well as PECL, seems to consider that promises can result in obligations for the person making the promise, even though such promise has not been accepted.[81]

PECL do not use, strictly speaking, the term "undertaking" ("*engagement*" in French) as source of the obligation. It is the term "promise" which is used, but more in the sense of a "unilateral intentional undertaking" and not in the sense of "unilateral contract".

81 See article 2.101 of the PECL commentary I; article 2.107, in: *Principes du droit européen du contrat*, SLC, 2003, pp. 97, 108.

Although the French lawyer will not be fooled by the two concepts, it would seem, however, that from a terminological and conceptual point of view, it is relevant to question the way in which the concepts of "undertaking", "promise" and *a fortiori* "unilateral contract" interrelate.

On the contrary, more reservations are expressed with regard to the Pavia Project. Indeed, the drafting of articles 20[82] and 23[83] seems to suggest that a "unilateral undertaking", although not expressly mentioned, is itself a source of obligation.[84]

The national laws are split when it comes to deciding whether these promises can be held to be "contracts". Certain systems take the view that they constitute unilateral undertakings, others see them as quasi-contracts whilst others see them as contracts. In fact, the terminology used evolves in the light of each country's ideas, which shows the delicate distinction to be made between the terms "contract" and "*engagement*" (**A**) independently from the fact that the term "*engagement*" takes on a specific meaning under competition law (**B**).

A. The delicate distinction between "engagement" and "contract" as a source of obligation

It is necessary to undertand distinctly the laws which recognize unilateral undertakings among the sources of obligation (2) and those which exclude them (1).

1. The delicate distinction made between "engagement", "contract" and "promise" under French and English law

Under French law,[85] we have already shown that from a terminological point of view, the term "*engagement*" refers to the source of obligation as well as to the obligations themselves. We shall therefore only consider the term "*engagement*" understood as source of obligations.[86]

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82 "Les déclarations et les actes unilatéraux réceptices produisent les effets qui peuvent en dériver en vertu de la loi, de la coutume et de la bonne foi, à partir du moment où ils parviennent à la connaissance de la personne à laquelle ils sont destinés et, même si leur émetteur les déclare irrévocables, ils peuvent être retirés jusqu'à ce moment".

83 "La promesse adressée au public, prévue à l'art. 13 alinéa 2, lie celui qui la fait dès qu'elle est rendue publique and following éteint à l'expiration du délai qui y est indiqué ou que l'on peut déduire de sa nature ou de son but, ou à compter d'un an après son émission si la situation qu'elle prévoit n'est pas survenue".

84 Supporting this view, see C. GRIMALDI, *Quasi-engagement et engagement en droit privé. Recherches sur les sources de l'obligation*, Préf. Y. Lequette, Defrénois, 2007, n° 932.

85 Ph. JESTAZ, "L'engagement par volonté unilatérale", in: *Les obligations en droit français et en droit belge. Convergences et divergences*, Actes des journées d'étude organisées les 11 et 12 décembre 1992 par la Faculté de droit Paris Saint-Maur et la Faculté de droit de l'Université Libre de Bruxelles, Bruylant – Dalloz, 1992, p. 17; A. SERIAUX, "L'engagement unilatéral en droit positif français", in: *L'unilatéralisme et le droit des obligations*, Ch. JAMIN and D. MAZEAUD (under the direction of), Economica, 1999, p. 7; J.-L. AUBERT, *Enc. Dalloz, Rep. civ.*, V°

A limited number of unilateral juridical acts is regulated by law (the will, the notice to quit given by the lessee or by the lessor…). The case law remains divided regarding the possibility that a person could, by exercising its will alone, become the obligor of another. The announcement of a prize has given rise to hesitations, such an announcement being treated sometimes as a unilateral undertaking,[87] sometimes as a contract.[88] The court decisions also produce varying results on how to treat an offer to contract and more particularly on what happens to an offer which contains a delay for acceptance in the event of the death or incapacity of the offeror: certain decisions take the view that the offer, as unilateral commitment of will, survives the events that affect the offeror,[89] whilst others consider that the offer should lapse.[90]

In the same way, a promise to perform a natural obligation is considered to be a civil obligation: no manifestation on the part of the beneficiary is necessary.[91] French law traditionally appears nervous about expressly recognizing a unilateral undertaking as an autonomous source of obligation.[92]

English law does not really recognize the notion of "*engagement*", with the meaning of unilateral undertaking. However, it is familiar with the theory of "unilateral promise". On principle, there cannot be a unilateral promise in the absence of consideration. However, the courts have softened this vision of consideration. In the case of *Carlill v Carbolic Smoke Ball Company*,[93] a promise *lato sensu* of a prize gave rise to a unilateral contract in the English sense when it was accepted by the performance of what what required (on the facts, using the smoke ball during a specified period). This solution does not apply if the "promisee" did not know of the promise: he could not act in contemplation of the promise, and there could therefore not be an acceptance. This approach is not

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"Engagement par volonté unilatérale"; J. GHESTIN, M. BILLIAU, G. LOISEAU, *Le régime des créances et des dettes*, Traité de droit civil, LGDJ, 2005, n° 103; *adde*. C. GRIMALDI, *Quasi-engagement et engagement en droit privé. Recherches sur les sources de l'obligation*, Defrénois, 2007, n° 600 and following.

86 On the relationship between "*engagement*" and "obligation", see the report on the terms "Obligation/duty".

87 It would appear in fact that academics have recently shown interest in the notion of "*engagement*". See in particular, C. GRIMALDI, *Quasi-engagement et engagement en droit privé. Recherches sur les sources de l'obligation*, Defrénois, 2007, n° 600 and following; J. GHESTIN, *Cause de l'engagement et validité du contrat*, LGDJ, 2006, n° 1; *adde*. from the same author, "Validité – Cause (Art. 1124 to 1126-1)", in: *Avant-projet de réforme du droit des obligations et de la prescription*, Pierre CATALA (under the direction of), La documentation française, 2006, p. 37.

88 Cass. civ. 1ère 28 March 1995, *Bull. civ.* I, n° 190; Cass. civ. 1ère 11 February 1998, *D.* 99, SC 109.

89 Cass. civ. 3ème 27 November 1990, *Bull. civ.* III, n° 255.

90 Cass. civ. 3ème, 10 May 1989, *Bull. civ.* III, n° 109, p. 60; Cass. Soc., 14 April 1961.

91 Civ. 1ère 10 October 1996, *D.* 1997.p. 158.

92 A recent study has however demonstrated the importance and usefulness of the general acknowledgment of the notion of "*engagement*" as source of obligation. See generally, C. GRIMALDI, *op.cit.*

93 [1893] 1 *QB* 256.

so far from the approach taken regarding the unilateral undertaking, in respect of which the acceptance by the obligee is not necessary for a right to arise, even though such acceptance is shown the implementation of the said undertaking.

Once the difficulties relating to the distinction between "contract" and "*engagement*" understood, the question arises as to the relationship between these two notions and that of a "promise", traditionally understood in civil law countries as a "unilateral contract".[94]

2. The acceptance of the theory of unilateral undertakings: the Belgian, German and Italian examples

Under Belgian Law,[95] the notion of unilateral undertaking has progressively been accepted until it was finally acknowledged generally by case law.[96] Indeed, in two cases of 9 May 1980,[97] the Belgian Cour de cassation held that: "the basis for the binding force of an offer is an intentional unilateral undertaking". The unilateral undertaking therefore appears, in Belgium, among the source of obligation. It should however be noted that this source of obligation is ancillary "in the sense that it should only be relied upon if the other sources of obligation cannot, without artificial device, provide a justification for the binding character of the alleged commitment".[98]

Under German law, article 311, para. 1 of the BGB specifies that a contract is the principle for creating a binding relationship, unless otherwise provided by law. However, in application of the theory of the unilateral undertaking, article 657 of the BGB provides that in the case where an individual lets it be known by public announcement that he will give a prize if a particular act is performed, then he is bound to do so even if the person performing the act had not acted in consideration of the promise.

Under Italian law, article 1324 of the Italian Civil Code[99] provides that the rules applicable to contracts are applicable to unilateral undertakings.

The undertaking as a source of obligation appears to be controversial, whilst the unilateral contract seems to be accepted without too many difficulties. The term "undertaking" should therefore *a priori*, not cause too many difficulties when it is understood as

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94 The notion of "unilateral contract" has in fact recently been considered as "unnecessary" by an author who sees it as a mere unilateral commitment of will, with the exception of real contracts. See C. GRIMALDI, *op.cit.* n° 835-1. The study should therefore be more concerned with the distinctions between the notion of "promise", "*engagement*" and "unilateral contract".

95 L. SIMONT, "L'engagement unilatéral", in: *Les obligations en droit français et en droit belge. Convergences et divergences*, Actes des journées d'étude organisées les 11 et 12 décembre 1992 par la Faculté de droit Paris Saint-Maur et la Faculté de droit de l'Université Libre de Bruxelles, Bruylant – Dalloz, 1992, p. 17; *adde*. C. GRIMALDI, *Quasi-engagement et engagement en droit privé. Recherches sur les sources de l'obligation*, Defrénois, 2007, n° 839.

96 L. SIMONT, *ibid*.

97 *RCJB* 1986, p. 135, n° 153; cited by C. GRIMALDI, *op.cit.* n° 842.

98 L. SIMONT, *op.cit.*, p. 45.

99 "Art. 1324 *(Norme applicabili agli atti unilaterali)*: *Salvo diverse disposizioni di legge le norme che regolano i contratti si osservano, in quanto compatibili, per gli atti unilaterali tra vivi aventi contenuto patrimoniale*".

source of obligation. However, as in PECL, the notion of "promise" should be preferred. It appears that it is the notion of promise which should be defined in order to avoid any difficulty in distinguishing unilateral undertaking and unilateral contract.

The term "*engagement*" (translated as "commitment"), finally, has a specific meaning in the context of competition law, which should be clarified.

B. The specificity of the term "commitment" under competition law

The notion of "commitment" in French competition law raises the same issues as the notion of "agreement".

However, it is interesting to note that the use of these procedures, which is new, is directly inspired by the American procedure of "consent decrees",[100] expression which seems to reflect the two sides of this type of measure: the manifestation of a will, the binding force of which arises out of a judicial act.

The English translation of this form of "commitment" ("*engagement*" in French) is different from the wording used in the United States.[101]

This terminological difference in English should not however, let us lose sight of the fact that the term "commitment" implies both the idea of unilateralism and personality. A person, when it commits morally or legally, manifests its will to be involved, its attachment, to a lesser or greater extent, to accomplish something.

IV. A Contract as a Specific Relationship between two Persons

Under French law, it would appear that the expressions "contract" *("contrat")* and "contractual relations" *("relation contractuelle")* are generally used indifferently. However, a deeper analysis brings to light a specific use of the term "relations", when the contract *stricto sensu* goes beyond the objective framework of the performance required, and refers to a series of undefined elements which shows a more subjective facet of contract: reliance, expectation, dependency… Contract loses its cold and automatic aspect, broadly materialized by the payment of the price in exchange for the performance of what was agreed, in order to encompass the situation or rather the social reality created by the contract.

It is, in fact, most interesting to note that this mutation from objectivity to subjectivity which appears under French law and under German law, which occurs when moving from contract to "contractual relations" (**A**), finds its equivalent in the American theory of relational contracts (**B**).

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100 R.A. EPSTEIN, *Antitrust Consent Decrees in Theory and Practice*, AEI Press, 2007; M. MALAURIE-VIGNAL, "Engagements, droit de la concurrence et droit des contrats", *Contrats, conc. consom.*, 2007, Repère 2.

101 In addition to the official translation into english, see R. WHISH, *op.cit.* p. 256. It would be relevant to examine the distinction, in English, made between notions such as "*commitment*", "*undertaking*" and "*promise*".

A. From contract to "contractual relationship"

Although the term "relations" is never used as a synonym of the word "contract", the two terms are sometimes joined together in order to describe a type of contractual relationship or a type of contract in particular. This is illustrated under French law by the use of the expression "established commercial ***relations***"[102] or "contractual work ***relations***".[103]

Originating in the Galland law of 1st July 1996,[104] the new article L 442-6-I-5° of the commercial code, as amended by the NRE law of 15 May 2001,[105] imposes a genuine duty to act fairly in the breaking off of *"established commercial relations"*[106] with an economic partner.[107]

From a terminological point of view, the expression is surprising. Despite the fact that the area is limited to "commercial" relations, and the possibly unnecessary addition of the adjective "established", it is the term "relations" which is intriguing. It appears that the "relations" tend to bring to light the personal aspect of the relationship between the parties to the contract, to go beyond the mere examination of the performance of the parties' reciprocal obligations.

Although the judgments applying article L 442-6-I-5° of the commercial code do not provide a real definition of the "established commercial relations", nor do they make it possible to determine the criteria to be used to identify such relations, they do however provide certain elements the presence of which points towards the existence of such relations. On this basis, Judith ROCHFELD has identified two relevant criteria: the length and intensity (collaboration and/or investment) of the relations.[108]

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102 Article L 442-6-I-5° of the commercial code.

103 Article L 122-3-4 and L 122-3-10 of the commercial code.

104 Loi n° 96-588 du 1er juillet 1996 sur la loyauté et l'équilibre des relations commerciales, JO 3 juillet 1996, p. 9983, *RTD civ.* 1996, p. 1009, obs. Ch. JAMIN.

105 Loi n° 2001-420 du 15 mai 2001 relatives aux nouvelles régulations économiques, JO 16 mai 2001, p. 7776, *RTD civ. 2001*, p. 671, obs. J. ROCHFELD.

106 The *"relation commerciale établie"* (established commercial relations) includes all types of commercial relations between two professionals, but excludes relations with consumers. This law applies to the purchase and sale of products as well as the provision of services. In other words, it could include any contract the performance of which is in successive or staggered parts which organises the exchange of goods or the provision of services between two commercial partners (distribution, supply or maintenance contract, *etc*). It could also include relations which are not organised, a "business trend" made up of a succession of contracts (Cass. com. 28 February 1995, *Bull. civ.* IV, n° 63)", M.-A. FRISON-ROCHE, M.-S. PAYET, *Droit de la concurrence*, *op.cit.*, n° 473.

107 On all of these questions, see in particular: M.-A. FRISON-ROCHE, M.-S. PAYET, *Droit de la concurrence*, Dalloz, 1st edition, 2006, n° 472; *adde*. J. BEAUCHARD, "Stabilisation des relations commerciales: la rupture des relations commerciales continues", *LPA*, 5 January 1998, n° 2, p. 14; Ch. LACHIEZE, "Quelques précisions sur la notion de rupture brutale d'une relation commerciale établie", *JCP E* 2004, p. 1477; *adde*. from the same author, "La rupture des relations commerciales à la croisée du droit commun et du droit de la concurrence", *JCP E* 2004, p. 1815; D. MAINGUY, "Les mystères de la rupture brutale de relations commerciales établies", *JCP E* 2003, p. 1792.

In addition, it should be noted that the expression "established commercial relations" is used, under French law, in the context of the breach of a contract. For example, if an agent suddenly breaks off established commercial relations (by ceasing to order or reducing orders or deliveries significantly), that is to say without respecting a notice period which takes into account the length of the commercial relations or the minimum period fixed by law, commercial usage or interprofessional agreements, such agent will be found liable in tort (delictual liability)[109] and must compensate his partner for any loss suffered. However, ordinary law, without expressly recognizing the notion of "relations", prevents contractual relations from being broken off brutally, abusively and even sometimes legitimately. The right to put an end to contractual "relations" remains the principle, but it should not be abused.

It is in this spirit that it would appear useful to turn the notion of "relations" *lato sensu* into a concept, in order to bring together its implications: "the admission of 'incompleteness' of this type of contract, and starting with the requirement that they be flexible (…); a shift in appreciation, from the economic exchange and its performance in terms of precise and defined obligations, towards an assessment of the behaviour of the parties and of their 'duties'".[110] Such an approach seems, moreover, to be compatible with German law.

Indeed, two close concepts should be mentioned here. Firstly, the general notion of "*Schuldverhältnis*" (obligation relationship), defined in § 241 of the BGB, which exists "around" any obligation (whether statutory or contractual), and which adds supplementary duties of information, diligence, respect for the property, rights and interests of the other party (§ 241, para. 2 of the BGB), so as to impose a liability which is wider than the general delictual liability. Secondly, and in parallel with the concept of the "established commercial relations", German case law has acknowledged from the beginning of the 20th century the concept of "*ständige Geschäftsbeziehung*" (permanent commercial relations) which also creates duties of information, respect and diligence as regards the other party, which are even more important that those which existed in the simple "obligation relationship".[111] Finally, under company law as in labour law, the specific bond between the directors or between employer and employee goes even further with regard to the intensity of the supplementary duties, so that the case law often talks of "*Treueverhältnis*" (loyalty relationship) or of "*Treuepflichten*" (loyalty obligations).

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108 J. ROCHFELD, "Au croisement du droit de la concurrence et du droit civil: l'avènement de la relation contractuelle?", *RDC* 2006, p. 1033. In her article, the author takes the example of a recent case (albeit unpublished) which illustrates this trend of taking into account these two criteria (Cass. com., 25 April 2006, n° 02-19577). *Adde*. A. de BROSSES, "La rupture fautive des relations commerciales continues", *Droit et patrimoine*, June 2003, p. 50; A. GRIZAUT, "Rupture brutale des relations commerciales, réflexions sur les premiers cas d'application de l'article L 442-6", *Droit et patrimoine*, juin 2003, p. 71; B. MAGERAND, *Les relations d'affaires en droit des obligations*, préf. E. Loquin, PUAM, 2003.

109 Cass. com. 6 February 2007, n° 04-13178.

110 J. ROCHFELD, "Au croisement du droit de la concurrence et du droit civil: l'avènement de la relation contractuelle?", *op.cit.*, esp. p. 1038 adde du même auteur, "Les modes temporels d'exécution du contrat", *RDC* 2004, p. 47, esp. n° 23 and following, p. 60 and following.

111 See, for example, BGH, 13 March 1996, NJW 1996, 1537.

This shift from contract to relations has, for over thirty years, been highlighted in the United States by Professor Ian MACNEIL essentially around the theory of the relational contract which he devised.

B. Relational contracts under American law

The paternity of the relational contract can be attributed to Ian R. MACNEIL.[112] In the mid-seventies, the professor at the Northwestern University School of Law made a distinction between two types of contract: discrete contracts and relational contracts.

The first category brings together all the contracts which carry out a punctual or isolated exchange. In this type of contract, the identity and position of the parties has no importance: the contracting parties do not necessarily know each other before they enter into the contract and, by entering into the contract, "they do not form any psychological bond".[113] In these discrete contract, the subject matter of the obligations and the details of their performance are provided in detail, so that the contract can be performed in accordance with what had been agreed (in its entirety) on the day it was entered into.[114]

The second category brings together all the contracts which last a certain length of time. Relational contracts are marked by the existence of a strong relationship between the contracting parties who "get to know each other, become involved, collaborate".[115] In addition, because these contracts are intended to last a certain length of time, their content is not fixed definitively upon the day they are entered into. On the contrary "it is intended to be clarified or amended during the performance of the contract, depending on surrounding events".[116]

French scholarship remained totally indifferent to this theory for a long time. It was only at the end of the nineties that certain authors started to present, to promote or discuss the distinction between discrete and relational contracts.[117]

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112 See, among the various works of the author: "The many futures of contracts", *Southern California Law Review*, 1974, vol. 47, p. 691; "Relational contract: What we do and do not know", *Wisconsin Law Review*, 1985, p. 483 and following; "Reflections on Relational Contract", *Journal of Institutional and Theoretical Economics*, 1985, p. 541 and following; *The New Social Contract: An inquiry into Modern Contractual Relations*, New Haven, Yale University Press, 1980.

113 Y.-M. LAITHIER, "A propos de la réception du contrat relationnel en droit français", *D.* 2006, Chron., p. 1003, esp. p. 1004, 2nd col. *in limine*.

114 *Ibid*.

115 *Ibid*.

116 *Ibid*.

117 See, inter alia, F. OST, "Temps et contrat, critique du pacte faustien", in: *La relativité du contrat*, TAHC, 2001, p. 137, esp. p. 162; H. MUIR WATT, "Du contrat" relationnel", Réponse à François Ost", in: *La relativité du contrat*, TAHC, 2001, p. 169 and following; J. ROCHFELD, "Les modes temporels d'exécution du contrat", *RDC* 2004, p. 47, esp. n° 23; R. LIBCHABER, "Réflexions sur les effets du contrat", in: *Propos sur les obligations et quelques autres thèmes fondamentaux du droit*, Mélanges offerts à J.-L. Aubert, 2005, esp. n° 22; M. FABRE-MAGAN, *Les obligations*, PUF, 2004, n° 74, pp. 179-180; Ph. MALAURIE, L. AYNES and Ph. STOFFEL-MUNCK, *Droit civil, Les obligations*, Defrénois, 2005, n° 428, p. 208; Ch. JAMIN, "Théorie générale du contrat et droit des secteurs régulés", *D.* 2005, Chron., p. 2342, esp. p. 2343;

In her doctoral thesis, Mme BOISMAIN attempted to clarify the limits of the notion and to propose a legal regime which would apply to relational contracts (*"régime encourageant la poursuite de la relation"*) (regime encouraging the continuation of the relations): increased intervention on the part of the judge,[118] requirement for a contractual balance,[119] restraints on the freedom to put an end to the contract,[120] adjustment of the damages due by the obligor,[121] and also, most importantly perhaps, adjustment of the contracts during their performance.[122]

The main fault affecting the relational contract is that it is difficult to ascertain. A number of criteria have been put forward by academics:[123] the length of the duration of the contract,[124] the amount of detail contained in the provisions,[125] the difficulty of finding an equivalent partner,[126] *etc*. The relative imprecision of these criteria makes it impossible to put together a precise list of relational contracts.[127]

C. BOISMAIN, *Les contrats relationnels*, Préf. M. Fabre-Magnan, PUAM, 2005, qui oppose les contrats *"relationnels"* aux contrats *"impersonnels"* (n° 17, pp. 27-28); Y.-M. LAITHIER, "A propos de la réception du contrat relationnel en droit français", art. cited above.

118 C. BOISMAIN, *Les contrats relationnels*, above cited thesis, n° 282 and following, p. 213 and following.

119 C. BOISMAIN, *Les contrats relationnels*, above cited thesis, n° 316 and following, p. 235 and following.

120 C. BOISMAIN, *Les contrats relationnels*, above cited thesis, n° 359 and following, p. 267 and following.

121 C. BOISMAIN, *Les contrats relationnels*, above cited thesis, n° 425 and following, p. 305 and following.

122 C. BOISMAIN, *Les contrats relationnels*, above cited thesis, n° 582 and following, p. 399 and following.

123 E. MCKENDRICK summarises the criteria identified by IAN MACNEIL in the following way: *"Macneil has identified a number of ingredients of a discrete transaction which, he argues, are not present in the case of a relational contract. These are: (1) a clearly defined beginning, duration and termination; (2) clear and precise definition of the subject matter of the transaction, its quantity and the price; (3) the substance of the exchange is planned at the moment of formation of the contract; (4) the benefits and burdens of the contract are clearly assigned at the moment of formation; (5) there is little emphasis upon, interdependence, future co-operation and solidarity between the parties; (6) the personal relationship created by the contract is extremely limited; and (7) the contract is created by a single exercise of bilateral power."* E. McKENDRICK, "The Regulation of Long-term Contracts in English Law", in: *Good Faith and Fault in Contract Law*, J. BEATSON, D. FRIEDMANN (eds.), Oxford University Press, 1995, reprinted 2002, p. 308.

124 See, among the American authors: R. E. SPEIDEL, "The Characteristics and Challenges of Relational Contracts", *Northwestern Law Review* 2000, vol. 94, p. 805, esp. p. 815; among the French authors: F. OST, "Temps et contrat, critique du pacte faustien", art. cited above, p. 162; J. ROCHFELD, "Les modes temporels d'exécution du contrat", art. cited above, n° 28.

125 See among the American authors: C. J. GOETZ et R. E. SCOTT, "Principles of Relational Contracts", *Virginia Law Review* 1981, p. 1089, esp. p. 1091; among the French authors: J. ROCHFELD, "Les modes temporels d'exécution du contrat", art. cited above, n° 28; R. LIBCHABER, "Réflexions sur les effets du contrat", art. cited above, n° 25.

126 C. BOISMAIN, *Les contrats relationnels*, above cited thesis, n° 209, p. 165.

Authors cite, in no particular order, the company, the non-profit making body *("association")*, the contracts for carrying out large works, turnkey contracts for the delivery of factories, technology transfer contracts, work contracts, distribution contracts, supply contracts or more recently contracts for civil union *("pacte civil de solidarité")*.

Certain authors even question whether all "contracts" might not be "relational", in the sense that they all imply a minimum amount of collaboration between the parties.[128] However, although it is clear that the concept of relational contract is not a working proposition, it will at least have brought to light the notion of "relations", in respect of which Y-M. LAITHIER proposes a dual interpretation: in the first case, "the relations are the bond that the parties must respect and preserve because there is some value attached to it. But the bond which binds the parties meets the definition of an obligation. It could therefore be argued that because the contract gives rise to obligations, it gives rise to relations. Any contract would then be *by definition* a relational contract; on the contrary, in the second case, which is much more elaborate, there should be a distinction made between the obligation and the relations, the relations" would refer to the behaviour, the relationship and the practices adopted by the parties, whilst the contractual obligation would remain classically defined as the legal bond which is there to ensure the obligee obtains satifaction; (…) In this way, the definition of contract provided by the Civil Code would be completed: it could be defined as an agreement *("convention")* giving rise to obligations and to relations. The contract would therefore be constituted of two elements: a content relating to obligations and a content relating to relations. The distribution of these two elements would vary depending on the intensity of the relations".[129]

V. Contract and Quasi-Contract

Most laws acknowledge a category which exists alongside the contract: the category of quasi-contracts, which brings together different concepts, which have in common the fact that they borrow certain aspects of their legal regime from contract. It appears interesting to compare the national approaches to this category, to assess whether it is sufficiently homogenous and determine whether the quasi-contract should be included in the scope of PECL.

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127 "*… it is impossible to locate, in the relational-contract literature, a definition that adequately distinguishes relational and nonrelational contracts in a legally operational way – that is, in a way that carves out a set of special well-specified contracts for treatment under special well-specified rules*" M. A. EISENBERG, "Relational Contracts", in: *Good Faith and Fault in Contract Law*, J. BEATSON, D. FRIEDMANN (eds.), Oxford University Press, 1995, reprinted 2002, p. 291.

128 G. ROUHETTE, "Compte-rendu de Ian R. MacNeil", *JDI* 1983, p. 960, and esp. p. 963; H. MUIR WATT, "Du contrat 'relationnel', Réponse à François Ost", art. cited above, p. 173.

129 Y.-M. LAITHIER, *op.cit.* However, the author notes further on that the distinction is not after all operational; "La raison tient tout simplement à l'existence d'un phénomène d'absorption des effets normatifs de la relation par l'obligation contractuelle. De sorte que tantôt la relation digne de considération crée une obligation nouvelle, tantôt la relation digne de considération modifie l'exécution d'une obligation existante".

Article 1371 of the French Civil Code provides that "quasi-contracts are purely voluntary acts of man, from which there results some undertaking towards a third party, and sometimes a reciprocal undertaking of both parties". The will of the parties is, in this case and unlike in relation to contract, a material act which produces effects which are organised by law, effects which are partly borrowed from the contractual regime (see for example the *negotiorum gestio* which borrows certain aspects from the regime of representation). The will of the parties does not play the same part as in the formation of the contract, because it is not directed towards the creation of obligations: the law recognizes the obligations because it considers it fair and useful.

However, certain effects are different from a defined contractual model, which suggests that the effects of quasi-contracts are specific. For example with regard to *negotiorum gestio*, it is accepted that the manager may carry out material acts, and not only legal acts as is the case for an agent, in respect of which he will be able to be reimbursed by the owner. In the same way, unjust enrichment can be the consequence, on the one hand, of non-contractual situations (for example the *de in rem verso* action brought by the person whose paternity is questioned against the real father for the alimony which was paid to the child in his place) and, on the other hand, of a number of varied contractual situations which appear to borrow elements from various contractual regimes. Similarly, the payments made under a mistaken belief cannot be merely treated as a contract for a loan just because it requires the delivery of goods or a sum of money, which is the usual consideration in a contract.

The courts have tended to show some flexibility when considering the conditions necessary for the existence of quasi-contracts. (See for example the body of case law according to which situations of voluntary assistance fall within the definition of *negotiorum gestio*).

They have also used the notion of quasi-contract to impose the obligation on the organiser of a prize draw to pay all of the promised prize money if he fails to show the existence of a random draw.[130]

In England and in the United States, the idea that unjust enrichment was based on an intentional element has been abandoned. Whilst for a long time, unjust enrichment was considered to be an implied contract, it is now based on concepts of equity and natural justice according to which an unjustified imbalance between the parties must be rectified.

American law proposed a general definition of unjust enrichment: article 1 du *Restatement of Restitution 1936* provides: "a person who receives a benefit by reason of an infringement of another person's interest or of loss suffered by the other, owes restitution to him in the manner and amount necessary to prevent unjust enrichment". English law does not adopt a global approach: it offers several specific rights of action for each type of unjust enrichment. Certain of these actions, however, go beyond the framework of quasi-contracts as it is defined in France. For example, the action "for money had and received" applies in a particular case: it enables the plaintiff to recover money to which he is entitled, and which in justice and equity the defendant ought to refund to the plaintiff, and which he cannot with a good conscience retain. *[The obligor may offer to pay his obligee*

130 Ch. mixte, 6 September 2002, *Bull. civ.* C.M., n° 4, p. 9, *D.* 2002. p. 2531, note LIENHARD et rapport GRIDEL – 2963, note D. MAZEAUD; *LPA* 24 October 2002.16, note D. HOUTCIEFF and Ph. LE TOURNEAU.

with monies held by his own obligor – if the latter fails to pay, then the plaintiff can bring an action "for money had and received" against the obligor who was supposed to pay him. This action supposes the express agreement of the initial obligor and of his own obligor.]

Neither English nor American law, however, recognize *negotiorum gestio*. There is no right of action, in principle, to recover expenses incurred by a person who voluntarily managed another's affairs.[131] Under English law, the action which is closest to the French "*gestion d'affaires*" is the "*quantum meruit*" action. In particular, this action authorises, subject to certain conditions, the compensation of a party who intervened in favour of another. It is therefore related to the protection of the manager of another's affairs, but is based on the principle of restitution.

Moreover, the courts have progressively accepted that an action based on unjust enrichment should be brought in two cases: the case where the intervention occurs following preexisting contractual relations ("agency of necessity"), and the case where the interference occurs without any preexisting contractual relations ("necessitous intervention").

Under German law, *negotiorum gestio* and unjust enrichment are referred to in the BGB under paragraphs 677 and following (for *negotiorum gestio*) and 812 and following (for unjust enrichment). Without ever naming them as quasi-contracts, German law considers both *negotiorum gestio* and unjust enrichment as autonomous sources of obligation, which exclude a meeting of wills on the part of the parties. Paragraphs 683 and 684 of the BGB distinguish two types of *negotiorum gestio*: justified or legitimate management on the one hand, and unjustified or illegal management on the other. The management is legitimate if it corresponds to the true intention, or in the absence of true intention, the presumed intention and to the objective interest of the owner.

In the absence of this element, the rights of the manager are limited. It is therefore the intention or the interest of the owner and not the behaviour of the manager which determines the amount of compensation.

Paragraph 812 of the BGB provides that "any person who acquires something without legal cause by reason of another person's performance or by other means to the detriment of such other person, is under an obligation to restitute such thing". The performance is the performance carried out by the aggrieved party on the basis of legal or contractual relations which binds him to the enriched party. The action can be brought to impose upon the buyer the restitution of the goods and of the ownership in the event that the contract of sale is annulled – indeed, under German law, the passing of title is separate from the agreement of the parties to the sale agreement. Regarding unjust enrichment arising out of other means, this most generally refers to the case of an act which affects another party's property, carried out by the enriched party, the aggrieved party or a third party.

Finally, in 2000, German law imposed a legal obligation on a professional who has sent a promise of a prize to a consumer, to pay such prize to the consumer (§ 661a of the BGB). A number of problems have arisen in trying to place such an obligation in a category. Whilst most authors almost unanimously reject its categorization as a contract, most call it "*rechtsgeschäftsähnlich*", which could be translated as "quasi-contractual" (the literal translation would be "treated as a juridical act"). Indeed, certain provisions of the

131 For England, *Falcke v. Scottish Imperial Insurance Co.* [1886] 34 *Ch.* 234 and for the United States, article 2 of the *Restatement of Restitution*.

general legal regime applicable to juridical acts apply to the promise, for example, the rules relating to legal capacity, representation and lack of consent.[132]

As for private international law, German courts, after initially insisting on treating the obligation as delictual,[133] finally followed the ECJ[134] which categorizes this obligation as contractual as per art. 5 n° 1, 13.1 n° 3 of the Brussels convention.[135] However, this private international law treatment of the obligation has no incidence on the internal private law position, in accordance with the principle of relativity of legal notions and of the autonomous interpretation of international law.

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132 See H. H. SEILER, in *Münchener Kommentar zum BGB*, 4th ed., Beck, 2005, § 661a n° 4.

133 BGH, 28 November 2002, NJW 2003, 426.

134 CJCE, 11 July 2002, C-96/00, *Rudolf Gabriel*, Rec. 2002, I-6367; 20 January 2005, C-27/02, *Petra Engler c/Janus Versand GmbH*, Rec. 2005, I-481. See above.

135 BGH, 1 December 2005, NJW 2006, 230.

Chapter 2:
Obligation and Duty

Main Concerns

I. The Ambiguous Use of the Term 'Obligation'

The term 'obligation' is widely used. Depending on the context, the use of the word leads to a univocal meaning or to ambiguous meanings.

For instance, the term 'obligation' in the singular or 'obligations' in the plural is univocal when it refers to what one party has agreed to perform under the terms of an agreement. In this sense, the positive counterpart of the obligation is the right (*'rights and obligations'*), that is to say what the creditor is entitled to receive from the debtor. This is a classical view of the term 'obligation' seen as 'a tie which exists between at least two individual persons which enables one person to request something from the other'.[1] The obligation should therefore be perceived as including a legal tie, a legal tie between at least two persons and a coercitive power enabling the enforcement of the obligation. It should be distinguished from the chose in action which is 'the anticipation of the objective economic result expected from the performance of the obligations'.[2] In this context, it would seem preferable to focus on the term 'obligation' exclusively.

Other uses of the term 'obligation' would however appear ambiguous. Firstly, an ambiguity occurs when the term 'obligation' is used to refer to the contractual relationship between the parties. It would be preferable to refer to the global contractual relationship by the term 'contract' or, in order to avoid any ambiguity, with wording such as 'the relationship between the parties'. Such a clarification would result in the parties having to fulfill obligations under the terms of the relationship which holds them together. It would therefore be superfluous to specify that the parties are under 'contractual obligations'. Secondly, the use of the term 'obligation' is ambiguous in French when it is understood as meaning one of the terms and conditions of performance for the obligations undertaken by the parties. Thus, the article 7:105 of the Principles of European contract law (PECL), entitled *'obligation alternative'* in French, deals with *'prestations alternatives'* in the body of the text, translated into English as *'alternative performance'*. In this context, the term 'obligation' could simply be replaced with the term 'performance' (*'exécution'* in French). Thirdly, it should be noted that the term 'obligation' is used in a haphazard way to refer to the delivery of property. Without going into a detailed analysis of delivery, the reference to the term 'obligation' may not be entirely appropriate in this context.

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1 J. GHESTIN, M. BILLIAU, G. LOISEAU, *Le régime des créances et des dettes*, Traité de droit civil, LGDJ, 2005, n° 4, p. 3. This definition appears as a common basis for the various academic proposals.

2 J. GHESTIN, M. BILLIAU, G. LOISEAU, *op.cit.* n° 6, p. 8.

Finally, an ambiguity occasionally arises, not from the use of the term 'obligation' but from that of '*engagement*' (in French). Indeed, although it is traditionally considered that consent finds its source in the freewill of the parties and that it is the origin of the obligations, it would appear that it is often used instead of such obligations. It would seem useful, in order to avoid ambiguities, to determine a standard use of vocabulary, particularly since the English translations of certain French texts are surprisingly inconsistent. Therefore, it would seem appropriate to assign an unambiguous use to the term '*engagement*' (in French): it should be used as meaning the source of the obligation. Should that be the case, and on the basis that this term is intrinsically an expression of unilateralism, it will be necessary to specify the nature of the '*engagement*' and therefore to add to the expression the adjectives 'contractual' or 'unilateral', even if the expression 'unilateral *engagement*' may seem pleonastic.

II. The Legitimate Use of the Term 'Duty'?

Can there be a justification for the use of the term 'duty' in a few specific cases or should the term'obligation' be given preference, for the sake of simplicity and clarity?

The analysis of Acquis International and Acquis Communautaire as well as comparative law reveals terminological hesitations.

PECL devote a specific article to the 'general duties' of the parties (Section 2) and also refer to the 'duty' of confidentiality (article 2:302).

Along the same lines, the term 'duty' could be narrowed to a specific use so that no confusion arises with the term 'obligation'. The double criterion which could be adopted in order to differentiate 'duty' from 'obligation' could reside in the source and in the person to whom this duty is owed.

With regard to the source, duty is a standard of behaviour inspired by principles of contractual justice. A contract generates two types of effects. On the one hand, it produces 'general behavioural standards of a moral and social nature',[3] duties under which the parties find themselves no matter what their status or the nature of the contract. These duties make up a behavioural charter; over and above the contract, a framework into which the contract fits. On the other hand, the contract generates an 'economic bloc relating to the promised performance of a material or intellectual obligation';[4] this economic bloc is made up of obligations and therefore necessarily linked to the particularities of the contract.

The area covered by duties is wider than that covered by obligations. A duty may be owed to a person other than the other party to the contract. This distinction is in fact applied in English law, in order to define the duty of confidentiality. If this double criterion is used in the context of PECL, some difficulties remain.

Should the use of the term 'duty' be limited to the duty of confidentiality, which, alone, could be invoked by a third party? Or could the use of the term be widened, as is already the case, to the 'duty' to behave in good faith and to the 'duty' to collaborate? The issues raised by these questions are also linked to the liability regime which could be

3 D. MAZEAUD, critical comment below decision Civ. 3ème 14 September 2005, *D.* 2006.761, and the quotations notes 16, 17 and 18.

4 *Ibid*, n° 8, p. 763.

called into play: certain legal systems have a tendency to punish the violation of duties under the rules of tort, although this tendency is not always followed coherently.

Acquis Communautaire and Acquis International

Both under Acquis Communautaire and Acquis International, the two most frequently used terms are 'obligation' (same word in French) and 'duty' ('*devoir*' in French). The term '*engagement*' in French is used more seldom.

The meaning given to the word 'obligation' is two-fold: either the term refers to the entire contractual relationship existing between the parties; or it describes more technically what is due by the obligor to the obligee under the terms of the contract. The word 'duty' is often used in the latter technical sense as a synonym of the term 'obligation' **(I).** However, whatever it refers to as being provided under the contract is different from what is understood by the use of the word 'obligation'. It is therefore legitimate to ask whether there exists an independent use of the term 'duty' **(II)**. As for the term '*engagement*' in French, its use is rare, but ambiguous **(III)**.

I. The Interchangeable Use of the Terms' Obligation' and 'Duty'

The terms 'obligation' and 'duty' are sometimes used as synonyms. They refer either to the entire contractual relationship between the parties **(A)** or, more narrowly, to what is due by the obligor to the obligee **(B)**.

A. A reference to the global contractual relationship: a rare use

The word 'obligation' and, much more seldom, the word 'duty' are used to describe the contractual relationship existing between the parties.

Examples of this use, which is sparse, can be found in texts of European origin.

Article 6:101 of PECL is entitled 'Statements giving rise to contractual obligations'. This provision defines the scope of the statements made before or when the contract is concluded. These statements give rise, in principle, to a (in the singular) contractual obligation. The use of the term 'obligations' in the plural refers to the global contractual relationship: it comprises all the various statements which come within the scope of the contract.

Articles 16:101 and 16:103 relating to the terms and conditions affecting an obligation use the word 'obligation' with an abstract and general meaning, referring to the contractual relationship affected by a condition. The use of the word 'obligation' is however ambiguous here: it is used, in the text of the article, to designate the entire relationship which is affected by the existence of a condition, but also to describe the specific obligation of a party subject to such a condition.

In any event, when PECL refer to the entire contractual relationship, the word 'contract' is used most frequently.

In secondary Community legislation, the word 'obligation' is very rarely used to refer to the global contractual relationship between the parties. Such a use can be found in Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community framework for electronic signatures:[5] article 1 of this directive refers to the conclusion and validity of contracts and other legal obligations. In this case, the term 'obligation' designates the global legal relationship. However, as will be shown hereunder, most directives use the word 'obligation' to refer precisely to what the obligor has to do (as opposed to the rights held by the obligee).

In the Rome Convention dated 19 June 1980 on the law applicable to contractual obligations,[6] the term 'obligation' refers to the global legal contractual situation between the parties. Thus article 1 sets out that the Convention rules apply to 'contractual obligations' in situation where a conflict of laws arises. However, in this instance also, it should be noted that the Rome Convention, in the provisions that follow, makes more use of the term 'contract' to refer to the global contractual relationship linking the parties (see for example, among a number of provisions, article 3 ('a contract shall be governed by the law chosen by the parties […]'), or article 4 ('To the extent that the law applicable to the contract has not been chosen in accordance with Article 3, the contract shall be governed by the law of the country with which it is most closely connected […]')).

Although the term 'obligation' used in article 1 does refer to the global contractual relationship between the parties, the report on the Convention[7] does not dwell on this use of the word: in the general presentation of the genesis of the Convention it highlights that the efforts to harmonize private international law focused on certain areas considered as being essential, and in particular the field of contract law (point 1 of the report introduction). The reference to contractual obligations in the very title of the Convention should be understood in this way (it is worth remembering that the Convention was initially intended to cover the law applicable to 'contractual and non-contractual obligations', but was finally limited to the former, the latter becoming the subject of a draft regulation dated 22 July 2003 on the law applicable to non-contractual obligations).

Much more frequently, the term 'obligation' is used to designate what the obligor must carry out in favour of the obligee. In this narrow sense, the texts usually use the term '*obligation*' in French, whilst the English versions would appear to vary, referring, indifferently to 'obligation' or 'duty'.

B. A frequent use to refer to what is due by the obligor to the oblige

The use of the term 'obligation' or 'duty' refers, in this case, in a narrow and technical sense, to what each party to the contract should do.

Many texts, both of European **(1)** as well as international origin **(2)**, show evidence of this use.

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5 *OJEC* L 13 of 19 January 2000, p. 12.

6 *OJEC* n° C/27 of 26 January 1998, p. 34.

7 *Report on the convention on the law applicable to contractual* by M. GIULIANO and P. LAGARDE, *OJEC* n° C 282 of 31 October 1980, p. 1.

1. Texts of European origin

Evidence of this use can be found in *soft law* such as PECL as well as in secondary legislation, the Rome Convention and the European Convention for the protection of Human rights (ECHR Convention).

In PECL, articles 1:201 and 1:202 set out the general duties of the parties: duty of good faith and duty to cooperate.[8] Article 2:301 refers to the duty of confidentiality.

These references aside, PECL make use of the terms 'contract' and 'obligation'. The latter, frequently recurrent, is used to define what each party owes to the other under the terms of the contract. Numerous examples of such use can be found: article 6:101 (statements giving rise to contractual *obligations*) – article 6:102 (Implied terms ('*obligations* implicites' in French) – article 6:111 (fulfillment of a party's *obligations* in the event of a change of circumstances – article 7:101 (place of performance of a contractual *obligation*) – article 7:105 (alternative performance of an *obligation*) – articles 8:101 et 8:103 on the non-performance of *obligations* – article 9:101 (monetary *obligations*) – article 9:102 (remedies available to the aggrieved party in the event of the defective performance of non-monetary *obligations*) – article 9:305 (effects of termination on the parties' *obligations*) – articles 10:101 to 10:205 (plurality of parties) – article 11:303 (effect of assignment on debtor's *obligation*) – article 16:101 (conditions).

In Community secondary legislation, a large number of directives dealing with consumer protection use the word 'obligation'. Reference is generally made to 'rights and obligations' together: rights of the consumer, at the heart of the legislation, and correlatively, obligations imposed on the professional generally. The common objective of these texts is to ensure a minimal level of harmonization between Member State laws in relation to consumer protection, in order to facilitate the organization and operation of the internal market.

For example, in Directive 2005/29/CE dated 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market,[9] article 2 defines a 'product' as including, *inter alia*, rights and obligations. This directive amends Article 9 of Directive 2002/65/CE so that it exempts the consumer from any *obligation* in the event of unsolicited supplies. Annex 1 lists commercial practices which are in all circumstances considered unfair.

Points 25 and 26 relate to visits to the consumer's home or persistent and unwanted solicitations except where national law allows the professional to carry out such practices to enforce a contractual *obligation*; point 31 relates to creating a false impression of a prize or gift which the claiming of such prize or gift is subject to the consumer paying money (in French, subject to an *obligation* to pay money).

Directive 97/7/CE of 20 May 1997 on the protection of consumers in respect of distance contracts[10] lists in its article 5 the supplier's information *obligations*. Article 6 provides that the consumer may withdraw in the event of a failure to fulfill these obligations.

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8 See also the comments at point B below.

9 *OJEU* n° L 149 of 11 June 2005, p. 22.

10 *OJEC* n° L 144 of 4 June 1997, p. 19.

In Directive 2002/65/CE of 23 September 2002 concerning the distance marketing of consumer financial services,[11] articles 3.4 and 5 impose pre-contractual information *obligations* on the supplier. Article 9 exempts the consumer from any *obligation* in the event of unsolicited supplies, the absence of a reply not constituting consent.

Article 5 of Directive 85/577/CEE of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises[12] provides that in the event of the consumer renouncing the effects of his undertaking, he shall be released from any *obligations* under the cancelled contract.

In Directive 94/47/CE of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis,[13] recital 9 states that it is necessary to stipulate minimum *obligations* with which vendors must comply. The body of the text defines the rights of the purchasers (and therefore correlatively the obligations of the seller).

Under the provisions of article 3.1 of Directive 93/13/CEE of 5 April 1993 on unfair terms in consumer contracts,[14] an unfair term is defined as a term which causes a significant imbalance in the parties' rights and *obligations*. The annex refers to rights and obligations of the parties a number of times.[15]

Directive 1994/44/CE of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees[16] emphasises the *rights* of the consumer. It specifies that the vendor must deliver goods which are in conformity with the contract of sale [and provide a guarantee].

Finally, Regulation n° 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters[17] provides in article 5.1 that a person domiciled in a Member State may be sued in another Member State 'in matters relating to a contract, in the courts for the place of performance of the *obligation* in question'. The term 'obligation' refers to *what is owed* by the defendant to the plaintiff.

Article 1 of the Rome Convention defines the material scope of the rules of the Convention. Paragraph b excludes in particular '*contractual obligations*' relating to wills and succession, rights in property arising out of a matrimonial relationship, rights and duties arising out of a family relationship, parentage, marriage or affinity, including maintenance obligations in respect of children who are not legitimate; are also excluded (article 1.c) 'obligations' arising under negotiable instruments to the extent that the negotiable character of these instruments is in question.

Article 10, relating to the scope of applicable law, provides that the law applicable to a contract shall govern in particular performance (article 10.b) and the various ways of extinguishing obligations (article 10.d).

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11 *OJEC* n° L 271 of 9 October 2002, p. 16.

12 *OJEC* n° L 372 of 31 December 1985, p. 31.

13 *OJEC* n° L 280 of 29 October 1994, p. 83.

14 *OJEC* n° L 95 of 21 April 1993, p. 29.

15 See in particular points b, e and o.

16 *OJEC* n° L 171 of 7 July 1999, p. 12.

17 *OJEU* n° L 12 of 16 January 2001, p. 1.

Articles 12 and 13, which deal respectively with the assignment of debts and subrogation, refer to the obligations between the assignor and assignee (article 12.1) and the obligation for a third party to satisfy the creditor (article 13.1).

In these various provisions, the term 'obligation' is clearly used to refer to what each party owes to the other under the terms of the contract between the parties (see in particular article 10.d. above).

Article 6.1 of the ECHR Convention provides that 'in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law (…)'. The English version refers to '*civil rights and obligations*', which is a notion more concerned with the distinction between private rights and public rights, distinction which is required for the application of the Convention. From this point of view, the word 'obligation' is not used in such a technical and narrow sense as described above: the expression 'rights and obligations' is used here with a meaning which is admittedly limited, but it is more the public or private nature of these rights and obligations, rather than their content, which gives rise to difficulties.

Article 1 of the Fourth Protocol provides that 'no one shall be deprived of his liberty merely on the ground of inability to fulfill a contractual obligation'. Once again, the word 'obligation' is used here to refer to what the obligor owes to the obligee under the terms of the contract.

2. Texts of international origin

The UNIDROIT Principles of international commercial contracts (2004 version) systematically use the term 'contract' to designate the global contractual relationship between the parties. The word 'obligation', however, is used in a narrow sense, to refer to what is owed by one party to the other.

Many examples of such a use can be given: article 1.11 defines the obligor as the party who is to perform an *obligation*, and the obligee, as the party who is entitled to the performance of that obligation; articles 5.1.1 and 5.1.2, under chapter 5 (content and third party rights), section 1 (content), refer to contractual *obligations* of the parties, which can be implied, in particular from the nature and purpose of the contract. Also relevant are articles 6.1.1 and 6.1.2, relating to the time of performance, by one party, of its *obligations*, article 6.1.6, relating to the place of performance of the *obligations*, article 7.1.1 which defines non-performance as the failure, by a party, to perform any of its obligations under the contract, articles 7.2.1 and 7.2.2, which define the rights of one party to require performance in the event of non-performance of an *obligation*, with a distinction based on the nature of the obligations in question, articles 8.1 to 8.5 on the set off of one party's *obligations* against the other party's obligations and article 9.2.1. on the transfer of *obligations*.

The term 'duty' used in the English version appears in the following provisions:

- Article 1.7 duty to act in accordance with good faith and dealing in international trade
- Article 2.1.16 duty of confidentiality
- Article 5.1.4 duty to achieve a specific result – duty of best efforts
- Article 5.1.5 determination of kind of duty involved.

The French version makes use, indifferently, in the same provisions, of the term 'devoir' (duty) or 'obligation':
- The good faith referred to in article 1.7 becomes an '*obligation*'.
- Article 1.1.16 refers to the '*devoir de confidentialité*'.
- The cooperation of article 5.1.3 becomes a '*devoir* de collaboration'
- Articles 5.1.4 and 5.1.5 related to '*obligation de moyen*' (best efforts) and '*obligation de résultat*' (specific result).

In the French version, it would appear that both the terms '*devoir*' and '*obligation*' are used interchangeably to describe what is owed by one party to the other. It is only for the '*devoir de confidentialité*' that the specific word, corresponding to the English term 'duty' is used.

There are a number of different international banking law operations in respect of which the International Chamber of Commerce has suggested a codification of professional practices. The UCP relating to documentary credits are among the most long standing, the latest version of which (UCP 500) came into force on 1 January 1994. The UCP 500 refer to credits which are 'separate transactions from the sales or other contracts on which they may be based' (article 3.a). Articles 13 and following, which are part of a section entitled 'Liabilities and responsibilities' ('*Obligations et responsabilités*' in the French version), set out the obligations imposed on the banks taking part in the documentary credit operation. The UCP 500 therefore clearly use the term '*obligation*' (in French) in order broadly to define what the bank owes to the principal.

The INCOTERMS, also elaborated by the International Chamber of Commerce, codify the rights and *obligations* of the purchaser and seller regarding the delivery of goods.[18] In such a context, the word 'obligation' is again used in a technical sense to refer to what the seller owes to the buyer in relation to the delivery.

A number of international conventions, not all of them in force, operating in the area of international commerce, make use of the term 'obligation' in French, often translated into English with the same word. The term is systematically used in its narrow sense to refer to what each party owes to the other under the terms of the contract.

In this way, in the Hague Convention of 15 June 1955 on the law applicable to the international sale of goods, article 1 which determines the scope of application of the convention refers to sales and by analogy to contracts for the delivery of goods to be manufactured or produced to the extent that the party under an obligation to deliver (the seller) must provide the necessary raw materials. Article 5.3 specifies the scope of applicable law which includes the obligations of the parties, and in particular, those relating to risk, excluding the transfer of title.

The Hague Convention of 14 March 1978 on the law applicable to agency refers to the agency relationship between the parties (article 10), and also to the *obligations* of the parties in respect of the scope of the applicable law (article 8).

The Hague Convention of 1st July 1985 on the law applicable to trusts and on their recognition refers, in its French version, to the trustee's '*obligation*' to manage, employ or dispose of the assets in accordance with the terms of the trust and the special duties imposed upon him by law (article 2); article 8 provides that the applicable law governs in particular the rights and '*obligations*' of the trustees among themselves. In both cases, the English version uses the term 'duty' instead of '*obligations*'.

18 INCOTERMS 200, ICC publication n° 560.

The Hague Convention of 22 December 1986 on the law applicable to international sale of goods refers in the scope of applicable law to the rights and *obligations* of the parties (article 12).

The Hague Convention of 5 July 2006 on the law applicable to certain rights in respect of securities held with an intermediary refers, in the French version, to the '*obligations*' of the intermediary (articles 2.1 and 2.3) whilst the English version uses the term '*duty*'.

The Vienna Convention of 11 April 1980 on the international sale of goods makes a clear distinction between a contract of sale and the *obligations* which arise between the buyer and the seller and which come under the scope of the Convention (article 4). A chapter deals with the seller's *obligations* (Part III, chapter 2), another with the buyer's obligations (Part III, chapter 3), finally, another with the provisions common to the obligations of the seller and of the buyer (Part III, chapter 5).

The United Nations Convention of 9 December 1988 on International Bills of Exchange and International Promissory Notes and the United Nations Convention of 11 December 1995 on Independent Guarantees and Stand-by Letters of Credit both refer to the rights and *obligations* of the parties to the banking operations (chapter IV of each of these texts).

The United Nations Convention of 12 December 2001 on the Assignment of Receivables in International Trade refers in article 11.1 to the mutual rights and *obligations* of the assignor and the assignee.

The UNIDROIT Conventions on International Factoring and International Financial Leasing (both dated 28 May 1988), refer in their French version to the rights and '*obligations*' of the parties (chapter 2 in each text) whilst the English version uses the terms '*right and duties*'.

In this last example, the term '*duty*' is used as a synonym of the term 'obligation': each party finds itself sometimes under '*obligations*' (in French) or duties owed to the other party and sometimes the holder of rights.

However, with regard to certain types of obligations, it is notable that preference is given to the term '*duty*'.

II. The Autonomous Use of the Term 'Duty'

Although, as was illustrated above, certain texts make use of the terms 'obligation' and 'duty' ('*obligation*' and '*devoir*') as if they were synonymous, certain 'obligations' are almost always referred to by the term 'duty' or '*devoir*'. As was mentioned above regarding PECL and the UNIDROIT Principles, some obligations are almost always referred to as 'duties' in English, with the French version sometimes following suit with the word '*devoirs*'. Thus, legislation refers to the duty to act in good faith, the duty of cooperation and the duty of confidentiality. The most pronounced specificity is found in PECL which classify the duty to act in accordance with good faith and fair dealing and the duty to cooperate under a common heading: the 'general duties' of the parties.

The question arises as to whether such a use is justified. Arguments in favour are based on one hand on the nature of the obligations in question (**A**) and on the other hand, on the sanctions arising out of a failure to comply with such obligations (**B**).

A. Specific nature of the obligations

The obligations to which these duties relate are standards of behaviour which imply a certain ethical code in the contract, a degree of solidarity between the parties.

PECL gives them the status of general duties which permeate the more specific obligations of the parties. The comment under article 1:201 of PECL thus specifies that the 'aim [of the concept of good faith] is to promote collective standards of good behaviour, of fairness and of reasonableness in economic transactions. It complements the provisions of the Principles and even takes precedence over them in cases where a narrow application of a provision would lead to a result which is obviously unfair'.

It has been argued that the term '*duty*' was different from the term 'obligation' in that the party to whom the duty is owed is not predetermined, whilst by definition the party entitled to the performance of the obligation is. Such a distinction is not entirely convincing: the party to whom are owed the various duties set out by PECL or by the UNIDROIT Principles is the contracting party: the duty to cooperate, for example, is expressly owed by each party to the other.

B. Sanctions specifically applicable to the breach of a duty

The question arises as to whether the sanctions applicable to a breach of these duties is identical to the sanctions which apply for the breach of 'classical' contractual obligations. PECL would appear to suggest a distinction. Article 1:301 sets out the definition of the term '*non-performance*'. It refers to a failure to perform an obligation under the contract, delayed performance, defective performance and failure to cooperate. On that basis, one can query whether a breach of the duty to act in good faith, which is not referred to expressly, will entail the same sanction as the non-performance of a classical obligation under the contract.

The answer to this question is not clear cut. It rests on the analysis of the notion of an 'obligation under a contract'.[19] On the one hand, this can be seen as a very narrow notion, focusing on the non-performance of an obligation which arises specifically under the contract. On the other hand, it can be understood as a wide notion, which must include a breach of rules of behaviour implied by the contractual relationship.

Finally, the last term which is recurrent both in texts of European origin and in those of international origin is that of '*engagement*'.

III. Specific Use of the Term 'Engagement' (in French)

The word '*engagement*' in French is ambiguous. Sometimes it designates the global contractual relationship between the parties, sometimes it refers to the mandatory character of the relationship between the parties. *[There is no single translation for the word in English, as specified in the footnotes and the English versions of legislation use 'undertaking', 'obligation' or 'commitment' depending on the context. In the interests of consistency, the French word 'engagement' has been adopted throughout the translation].*

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19 See also article 8.101 which allows the aggrieved party to resort to the remedies set out in chapter 9 when the other party does not perform an obligation under the contract.

The term '*engagement*' in French is much less frequently used than the terms 'duty' or 'obligation'.[20]

It is used in international banking operations in which the bank undertakes ('*prend l'engagement*') to pay in particular in documentary credit operations.[21]

In this context, it does not appear that the term '*engagement*' should have a different meaning from the term 'obligation'.

The use of this term in the context of the above mentioned Regulation n° 44/2001 would appear more specific. Its use arises from the interpretation made by the European Court of Justice (ECJ) of the notion of 'matters relating to a contract' referred to in article 5.1 of this text. The ECJ took the view that this notion was independent and should be understood as an 'obligation which is freely assumed by one party towards another' ('*engagement librement assumé*' in French). Such an interpretation is justified, according to the ECJ, by the objective of strengthening the legal protection of persons referred to in the Regulation.[22] The ECJ has applied this notion several times without seeking further to clarify the abstract phrase.[23]

The term '*engagement*' emphasises the voluntary character of the contractual relationship.[24] This notion appears to differ from the classical notion of obligation: there has to be a *contractual relationship* between the plaintiff and the defendant, out of which *obligations* arise. The ECJ itself however moved away from this conception in a case where it had to decide whether the promise by a mail order company to award a prize to a consumer could be considered as contractual in nature: The ECJ took the view that it could, on the basis that there existed an 'obligation freely assumed' by the company which had taken the initiative of sending a letter to the consumer, which obligation was the basis for the claimant's action.[25]

Comparative Law

No matter which country is in question, it is usual to identify different meanings attributed to the notion of 'obligation'.[26] It sometimes refers to the legal relationship existing between two or more persons, in accordance with which a person, the obligor must

20 See also the analysis of the distinction between the term "engagement" and the term "contract" in the document analysing the term "contract".

21 See, for example, article 3.a of the UCP relating to documentary credit which refers to the "*engagement*" on the part of the Bank to pay or article 9.a which defines the obligations of the bank with regard to an irrevocable documentary credit.

22 See in particular CJEC *Jakob Handte* C-26/91 of 17 June 1992.

23 It is probable that the type of appeal made to the Court on these questions of interpretation was not without incidence on the decision.

24 See also our comments on the document relating to the analysis of the term "contract".

25 CJEC *Petra Engler* C-27/02 of 20 January 2005, in particular recitals 50, 51 and 52.

26 For a historical approach of the notion, see in particular, Ph. STOFFEL-MUNCK, *L'abus dans le contrat. Essai d'une théorie*, Préf. R. Bout, LGDJ, 2000, n° 145 and following; J. GHESTIN, M. BILLIAU, G. LOISEAU, *Le régime des créances et des dettes*, LGDJ, 2005, n° 3 and following.

perform its obligations (‘*vinculum juris*’ – specific term in German law, ‘*Schuldverhältnis*’) as regards the obligee. But the ‘obligation’ also refers to what is due by the obligor to the obligee as a result of the contractual relationship, it is then often presented as being synonymous with the notion of ‘duty’.

The fact that the term ‘obligation’ should be interchangeable with the term ‘duties’ or even ‘liabilities’ reveals terminological inconsistencies (**I**). On this point, this observation matches those made in relation to the Acquis Communautaire and Acquis International. However, in certain particular contexts, the term ‘duty’ is given preference over the term ‘obligation’. (**II**). Nevertheless, a common base for the specific use of the terms ‘obligation’ and ‘duty’ would appear to be emerging (**III**). Finally, a clarification of the notion of ‘engagement’, often used improperly instead of ‘obligation’ would seem necessary (**IV**).

I. The Interchangeable Use of the Terms ‘Obligations’ and ‘Duty’

Under American law and English law, as under French law, an informal consensus would appear to have emerged, to the effect that the terms ‘duty’ and ‘obligation’ are synonymous.

In the American Uniform Commercial Code (hereafter UCC) it is apparent that the terms ‘obligations’, ‘liabilities’ and ‘duties’ are used interchangeably in order to refer to what one party is required to do in favour of another. The following expressions are used: ‘rights and liabilities’ (§ 3-206, § 3-405 (b), § 2-608 (3), § 8-110 (a)(2), § 8-110 (b)(2)), or also ‘rights and duties’ (§ 8-207), or finally ‘rights and obligations’ or ‘obligations under the contract’ (§ 1-301 (c)(1), § 1-301 (c)(2), § 1-301 (d), § 2-106). The Uniform Commercial Code refers to the term ‘obligation’ around 400 times, and to the term ‘duties’ around 100 times.

In English law, from a Statute law point of view, the inconsistencies in the terminology are also blatant. Section 27 of the Sale of Goods Act 1979, entitled ‘Duties of the seller and buyer’ is drafted as follows: ‘It is the duty of the seller to deliver the goods and of the buyer to accept and pay for them, in accordance with the terms of the contract of sale’ or even under Section 20.3 of the same Act: ‘Nothing in this section affects the duties or liabilities of either seller or buyer as a bailee or custodier of the goods of the other party’. On the contrary, Section 5 (1) of the Unfair Terms in Consumer Contracts Regulations 1999 states that: ‘A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer’, or even in Appendix 1 (b) of the same Act: “inappropriately excluding or limiting the legal rights to consumer vis-à-vis the seller or supplier or another party in the event of total or partial non performance or inadequate performance by the seller or supplier of any of the contractual obligations; including the option of offsetting a debt owed to the seller or supplier against any claim which the consumer may have against him’; in Appendix 1 (o): ‘obliging the consumer to fulfil all his obligations where the seller or supplier does not perform his’ or finally, under Appendix 1 (p): ‘giving the seller or supplier the possibility of transferring his rights and obligations under the contract, where this may serve to reduce the guarantees for the consumer, without the latter’s agreement’.

These inconsistencies in the use of terminology, in English law, are not limited to Statute law (as would appear to be the case in American law), but recur in case law and academic works. Reference is often made, in the context of 'fiduciary relationships' to the existence of a 'duty of care and skill', a 'duty not make a secret profit' or also of a 'duty of disclosure' owed by one party to the other, because of the particular nature of the contract between them, whether or not such duties were expressly set out. However, certain cases mention, in the same context, the existence of 'obligations'. For example, in relation to a 'fiduciary relationship', the court stated that: 'The distinguishing obligation of a fiduciary is the obligation of loyalty'[27] or 'The essence of a fiduciary obligation is that it creates obligations of a different character from those deriving from the contract itself'.[28]

Under French law, the interchangeability is also clear. One of its most obvious expressions is the multiplication of obligations during the XXth century, among which the obligation of information, the obligation to advise, the obligation to supervise or even the obligation to ensure safety, which in certain respects would appear to be a mere transposition into contract law of duties which are by nature outside the scope of contract. Certain types of behaviour have generated obligations or duties without the distinction between the two terms being clearly established.[29]

These inconsistencies in the use of terminology are particularly obvious in relation to the 'obligation' to ensure safety. Indeed the wording 'obligation' in relation to safety only appeared from 1911 in order to benefit the victims of transport accidents in proving a fault on the part of the transporter. In this way, safety passed from the field of tort to the field of contract, from a 'duty' to an 'obligation' but not without the academic body expressing significant doubts.[30]

In any event, a 'contractual obligation' of ensuring safety is now imposed on the manager of sports and leisure activities,[31] on the organiser of a holiday camp,[32] on a

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27 *Bristol & West B.S. v. Motthew [1998] 1 Ch. 1, at p. 17.*

28 *Re Goldcorp Exchange Ltd. [1995] 1 A.C. 74, at p. 98.*

29 Regarding the confusion between the contractual and tortious nature of good faith, see Ph. STOFFEL-MUNCK, *op.cit.* n° 145 and following. The author shows that the good faith as referred to in article 1134 para. 3 of the Civil Code is not an "obligation" but a "duty" in that it imposes a general behavioural standard. Article 1134 para. 3 would merely be a reminder of a wider requirement of public-spiritedness (or civility). Therefore, a breach of the duty of good faith could only be sanctioned under the rules of tort. In a similar vein, M. AYNES developed the idea of "contract ethics". In this case, "ethics appear as a set of rules of behaviour, close to the very heart of the contractual relationship, preceding the conclusion of the contract, governing its performance and sometimes its end; and this, in order for the contract to be individually and socially beneficial" (L. AYNES, "Vers une déontologie du contrat?", Cour de cassation symposium, 11 May 2006, n° 3, available on line at: http://www.courdecassation.fr/jurisprudence publications documentation 2/bulletin _information_cour_cassation_27/bulletins_information_2006_28/no_646_2151/). It is a "set of duties intended to enable human action to fulfill the principle of usefulness, that is to say to produce 'the most happiness for the benefit of those in whose interest the measures are taken'". (L. AYNES, *op.cit.*, n° 2).

30 Regarding the detrimental effects of the change from the "duty" to ensure safety to the "contractual obligation" to ensure safety, see G. VINEY, P. JOURDAIN, *op.cit.* n° 501-1, p. 472.

31 Civ. 1ère 17 March 1985, *Bull. civ.* I, n° 111, p. 102.

32 Civ. 1ère 11 March 1997, *Bull. civ.* I, n° 89, p. 58.

school,[33] on a medical practitioner[34] and on many others.[35] Contractual principles are therefore obscured by the presence of 'obligations' which were originally 'duties'. This situation raises a number of questions, both terminological and conceptual. Indeed, if a contractual 'obligation' to ensure safety is considered as just being the expression in a contract of a 'duty' in the wider sense, should it really be named 'obligation' or should the word 'duty' be maintained? Is this duty to ensure safety not in fact an expression of a general standard of behaviour, of a general duty not to cause harm to others (duty of care)? Should the remedies for the breach of such a requirement not be found exclusively under the principles of tort?[36] The question is just as relevant in the case where a breach of a contractual 'obligation' is also a breach of a general duty of care which causes loss or damage to a third party. The aggrieved third party is given the right to rely directly on the breach of contract provided such breach is the direct cause of the damage.[37] The central idea is as follows: if a person who is not party to the contract *(penitus extranei)*, suffers loss or damage arising out of the breach of contract by one of the parties to such contract, it is because the unfulfilled contractual 'obligation' also constituted a 'general duty not to harm others'.[38] Nevertheless, it would appear that the courts have preferred to refer to the term 'obligation' rather than 'duty'.[39]

This difficulty with terminology has been increased, these last few years, by the discovery of pre-contractual obligations of information, or to act in good faith. The breach of these 'obligations' is in principle actionable under the principles of tort: whether it be the breach of an obligation created by statute or by the courts, the obligations do not arise under the contract. Therefore it could be argued that the use of the term 'obligation' is not appropriate and that the term 'duty' should be chosen.[40] And yet, both in judgments and in various works on civil law, references are made indistinctly to

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33 Civ. 1ère 17 January 1995, *Bull. civ.* I, n° 43, p. 29.

34 Civ. 1ère 9 November 1999, *Bull. civ*. I, n° 300, p. 195.

35 For a particularly exhaustive and critical approach to the various ways in which the safety obligation has been invoked, see G. VINEY, P. JOURDAIN, *Les conditions de la responsabilité*, LGDJ, 2006, n° 499 and following; *adde*. The bibliography cited at note 437.

36 G. VINEY, P. JOURDAIN, *op.cit*. n° 501-1.

37 Putting an end to an opposition between the first civil chamber and the commercial chamber, see A.P., 6 October 2006, n° 05-13.255, to be published at Bull.; *JCP* G 2006, II, 10181, opinion A. GARIAZZO, note M. BILLIAU; *JCP* G 2007, I, 115, obs. Ph. STOFFEL-MUNCK; *D*. 2006, p. 2825, note G. VINEY; *RLDA* déc. 2006, p. 70, note Ph. JACQUES; *RLDC* janv. 2007, p. 5, note Ph. BRUN; *adde*. P. ANCEL, "Présentation des solutions de l'avant-projet", *RDC* 2007/1, p. 27 esp. n° 19.

38 Article 1342 of the Catala Project offers to solve this problem in two stages and provides to this effect that: "When the failure to perform a **contractual obligation** is the direct cause of damage suffered by a third party, such third party may claim compensation for such damage on the basis of articles 1362 to 1366. He then becomes subject to all the limitations and conditions which bind the creditor in seeking reparation for his own damage.
He may also obtain compensation on the basis of extra-contractual liability, but must then prove the cause of the damage in accordance with articles 1352 to 1362".
However, article 1352 sets out, as a source of tortious liability "the infringement of a rule of conduct imposed by law or a breach of a general ***duty*** of prudence or diligence".

39 The Commercial chamber seemed attached to a strict distinction between the two.

'obligation and/or duty to advise', 'obligation and/or duty to inform', 'obligation and/or duty of good faith' as well as the usual corollary 'duty and/or obligation to act fairly' … Case law has also made this confusion and, in relation to the 'obligation' of information, the *Cour de Cassation* (Highest appeal court in France) has stated that 'whatever the contractual relationship between a client and a bank, the bank has the duty to inform him of the risks taken …'.[41]

In German law, the legislative texts and academic writings hardly ever refer to the traditional Gernan word 'obligation', despite the fact that such term was in regular use among the drafters of the BGB who had a solid Roman law training. Instead, several terms are used including the term '*Schuldverhältnis*' which, as is the case with the term 'obligation', can take on two different meanings.

The '*Schuldverhältnis*' is used in a wider sense, explained in § 241 BGB (used for example in §§ 273 (1), 292 (1), 314 (1), 425 (1)), when it refers to the legal tie between the obligee and the obligor and is the source of 'ancillary' duties of information, of safety, and in a more general way, of respect for the rights and interests of the other party (§ 241 (2) BGB). The breach of these duties gives rise to a liability labelled as contractual.

The BGB also contains reference to a '*Schuldverhältnis*' in a narrow sense, used in §§ 362, 364 et 397 BGB, when it designates the obligation alone, without the ancillary duties. But the term is no longer used by academics in this narrow sense.

This '*Schuldverhältnis*' can arise out of a contract, a tort, an unjust enrichment, but also out of property law (for ex. the *actio rei vindicatio* (§ 985 BGB) or the *actio negatoria* (§ 1004 BGB) or out of family law (for ex. the right to food or to an allowance).

Both in European texts and in PECL, the term '*Schuldverhältnis*' is never employed, which is not surprising bearing in mind the concept of '*Schuldverhältnis*' in the wider sense is a feature specific to German law. The German versions of the above mentioned texts generally translate the term 'obligation' as '*Verpflichtung*', sometimes also as '*Pflicht*', '*Verbindlichkeit*' or even '*Schuld*', whilst 'duty' is generally translated as '*Pflicht*'. In German legal terminology, the two terms '*Verpflichtung*' and '*Pflicht*' are synonymous, and refer to the opposite of a '*Recht*' (right). Indeed, the BGB refers to the '*Verpflichtung zur Leistung*' (cf the title before § 241) and, without any difference, to '*Leistungspflicht*' (cf the title of § 275). However, the terms '*Verbindlichkeit*' and '*Schuld*' which are also synonymous, can only refer to obligations to perform something concrete, not to an abstract behaviour. These are therefore the negative counterparts of the '*Anspruch*' (claim) (and which, in fact, can also refer to debts).

The terms '*Verbindlichkeit*' and '*Schuld*' are therefore more specific terms than '*Pflicht*' ou '*Verpflichtung*', which means that every '*Verbindlichkeit*' (or '*Schuld*') is at the same time a '*Pflicht*' or '*Verpflichtung*'. For example, the contractual obligation to perform is referred to in the BGB '*Leistungspflicht*' or '*Verpflichtung zur Leistung*', but also '*Schuld*' or '*Verbindlichkeit*', whilst there is no '*Verbindlichkeiten*' or '*Schulden*' to ensure safety, but only '*Schutzpflichten*' or '*Informationspflichten*', which may, for linguistic reasons, also be '*Verpflichtungen zur Information*' without any change in content. Moreover, the use of the terms '*Pflicht*' and '*Verpflichtung*' is not limited to legal language, but can also be found in

40 Along the same lines, Ph. JACQUES, *Regards sur l'article 1135 du Code civil*, Preface. F. CHABAS, DALLOZ, 2005, n° 390 and following, esp. n° 390-1, p. 832.

41 Cass.com., 18 May 1993, *Bull. civ. IV*, n° 188.

a moral context (the two terms are not even listed as technical terms in Creisfelds' *Rechtwörterbuch*), whilst '*Verbindlichkeit*', '*Schuld*' and '*Schuldverhältnis*' are strictly legal terms.

These various observations lead to the impression that the two notions – obligation and duty – are not easily distinguishable and not in fact clearly distinguished. However, it would seem possible to identify a specific use of the term duty.

II. An Independent Use of the Notion of 'Duty'/'Devoir'

Under American law, a group of scholars argues for a differentiation of the terms obligation and duty. For instance, professor Wesley Newcomb HOHFELD, who devised the terminological system known as 'Hohfeldian terminology'[42] recommended a specific use of the terms. He proposed in particular that, in order to refer to a claim or rather to its opposite – that is to say to the debt owed by one party to the other – one should not talk of 'rights and obligations' or of 'rights and liabilities' but rather of 'rights and duties'. American case law sometimes echoes these proposals. For example, the term 'duties' or 'duty' is consistently made use of by the judges in the application of the 'implication' theory, which finds the existence of a 'duty of good faith'[43] or a 'duty of best efforts'.[44]

Under French law, the distinction made between obligation and duty is essentially academic, but is sometimes applied by the courts. This distinction is based on three main criteria. *The first criterion* relates to the nature of the liability incurred in the event of a breach: a breach of duties would entail a liability under the principles of tort, whilst a breach of obligations would be sanctioned under the rules of contract. *The second criterion* relates to the area covered by the performance to be made by the obligor. The distinction would then be based on the identification of the person for whose benefit the obligor is performing: the obligation would only bind the parties to the contract, whilst duties could also benefit third parties who could have a claim in the event of a breach. *The third criterion* is concerned with the effects of the contract. Effects can be classed into two categories:[45] General effects which occur independently from the nature of the contract and effects which are specific to each contract.

If the contract is intangible and irrevocable, it must come into existence, be entered into and implemented fairly: its effects go beyond the performance under the contract and impose general duties on the parties before, during and after the contract.

As noted by Prof. MAZEAUD, 'in addition to the specific obligations to which they have agreed, the parties are bound, as they would be by law, by standards of legal origin which constitute a general framework inside which such obligations will be implemented'.[46] In accordance with this principle, the so-called 'obligation' of good faith which is imposed on the parties under the terms of article 1134 al. 3 of the Civil Code would merely be a reminder of a wider requirement to behave fairly, a rule of good behaviour in

42 This system is described in W.N. HOHFELD, *Fundamental Legal Conceptions*, New Haven, Yale University Press, 1919.

43 *Anthony's Pier Four v. HBC Assocs.*, 583 N.E. 2d. 806 (Mass. 1991).

44 *Milau Assoc. V. North Ave. Dev. Corp.*, 368 N.E.2d 1247 (N.Y. 1977).

45 On this point, see. D. MAZEAUD, note under Civ. 3ème 14 September 2005, *D.* 2006.761.

46 *Ibid*, n° 8, p. 763.

society, which should be generally complied with, whether or not a contract is in existence.[47] Following the same ideas, the 'obligation' to ensure safety, the 'obligation' of information, of warning or advice, which have been added, *inter alia*, to the mandatory content of a contract, are part of this 'general framework' inside which every person must meet a 'basic standard of behaviour',[48] a 'general standard of civility';[49] in other words, every person has 'a general duty of good behaviour, which is the equivalent of the general duty of prudence and diligence described by H. and L. MAZEAUD,[50] and which finds an expression in the Civil Code',[51] in particular in articles 1382 and 1383. Indeed, it has been noted that these obligations are imposed primarily on professionals as a standard which is inherent to their profession, whether or not a contract is entered into (such a contract 'would only have the consequence of bringing into effect pre-existing professional rules'[52]).

It would appear, finally, that it is more the consequences of the requirements imposed on individuals, rather than the source of such requirements, which will condition whether the word 'obligation' or 'duty' is used and to a greater extent, the remedies for breach applicable to one or the other.[53]

Similarly, under English law, when parties are bound by a legal relationship, and that some hold a dominant position, Equity requires the imposition of certain 'duties' (as seen above, the term 'duties' should not here be understood as necessarily excluding the notion of 'obligation' but rather as the statement of a standard of behaviour not expressly

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47 The same questions seem to arise in Belgium. Indeed, if the third Civil Chamber of the *Cour de cassation*, in a judgment dated 19 September 1983 (*RCJB* 1986, 282, note. J.-L. FAGNART), clearly designates article 1134 para 3 of the Civil Code as the basis for the breach of a contractual right, the authors raise the question of the existence of "a more general principle of liability, with articles 1134 para.3 and 1135 of the Civil Code being the translation into the field of contract of such principle".

48 M. PUECH, *L'illicéité dans la responsabilité civile extra-contractuelle*, LGDJ, 1973, n° 31 and following cited by G. VINEY, P. JOURDAIN, *op.cit.* n° 473, p. 413.

49 J. DARBELLAY, *Théorie générale de l'illicéité*, Friboug, 1955, n° 69 and following cited by G. VINEY, P. JOURDAIN, *op.cit.* n° 473, p. 413.

50 H. et L. MAZEAUD and A. TUNC, *Traité théorique et pratique de la responsabilité civile délictuelle et contractuelle*, t. I, 6ème édition, Montchrestien, n° 103-109; H., L. et J. MAZEAUD and F. CHABAS, *Leçons de droit civil*, Montchrestien, 9ème édition, n° 21.

51 G. VINEY, P. JOURDAIN, *op.cit.* n° 473, p. 413.

52 G. VINEY, P. JOURDAIN, *op.cit.* n° 515, p. 498. The authors note that this distance from the contract is even, in fact, in certain cases, officially established by case law. The courts now accept, for example, that the obligation to advise imposed on notaries, because of its "professional" nature, can only be actionable under the principles of tort, they refuse to "treat this duty as an implied obligation under a contract" and they turn it into "in any circumstance, an implied legal duty" actionable under the rules of tort (see J. DE POULPIQUET, *La responsabilité civile et disciplinaire des notaires*, LGDJ, 1974, Preface P.-A. Sigalas, n° 160, p. 192 and n° 155)".

53 Ph. STOFFEL-MUNCK, *op.cit.* n° 153; G. VINEY, *Introduction à la responsabilité*, LGDJ, 2ème édition, 1995, n° 168. Regarding an analysis making a distinction between the source and the nature of a standard in order to determine whether it should be categorised as an obligation or a duty, see Ph. JACQUES, *op.cit.* n° 405 and following.

provided for in the contract but directly linked to the relationship created by the contract). These duties are imposed upon the parties based on the role they hold in the legal relationship and with the aim of preventing any form of abuse. The observation is valid in relation to agency relationships but also in relation to trust relationships, in which the trustee, because of the place he holds in the legal relationship, owes a number of duties to the beneficiary of the trust, even though there is no contract between them. These relationships are traditionally regarded as status-based fiduciary relationships. More recently, the existence of 'fact-based' fiduciary relationships was identified, in instances where the rules of Equity do not necessarily apply *ab initio* (unlike the case of status-based relationships), but where, having regard to the particular relationship between the parties, a fiduciary relationship is created.[54] One party therefore finds itself under certain obligations to which it did not expressly agree. Such obligations are imposed in cases where one party has, in relation to the other, a particularly advantageous position, in particular with respect to information. They are intended to prevent the abuses which could arise out of this de facto superiority, by forcing the contracting party to adopt certain types of behaviour. The finding of such duties remains strictly limited, undoubtedly because of the economic approach to contractual relationships.[55, 56]

Two cases alone always employ the same terminology. One of them is the duty created by case law in order to sanction a party at fault on the basis of the principles of tort, the other is the duty of restitution imposed in the context of unjust enrichment. Although the difference between the duties imposed by law and obligations derived from a contract is sometimes tenuous, the term which, almost systematically, is used, is that of duty, not obligation. Finally, it would appear that the use of the term duty does not depend so much on the existence of a contract (even if, as described, a contract may be a catalyst) but rather on a standard of behaviour.

Quebec law is one of the most rigorous regarding the distinction between obligation and duty ('*devoir*'). The mandatory or obligatory content of a contract comes under the name 'obligation' notwithstanding the fact that a so-called obligation is in fact the transposition into a contract of a standard which is intrinsically extra-contractual, in other words, a duty. Reference is even made to an obligation '*par accessoire*' (that is to say which derives its status as 'obligation' from its position as accessory to another obligation), which implies that it is a duty 'by nature'. Conversely, anything which is not contractual and finds its source in the law is named 'duty'. The distinction between tort and contract is therefore clearly made, even in cases where a duty which is extra-contractual in nature, is incorporated into a contract: such *duty* becomes thereafter an *obligation*.

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54 *Reading v. Attorney-General [1951] A.C. 507.*

55 *Nottingham University v. Fishel [2000] I.C.R. 1462.*

56 This approach is in fact very close to that developed by Mr AYNES (L. AYNES, "Vers une déontologie du contrat", *op.cit.*) when he writes about contract ethics. Indeed, the author considers that ethics, and *a fortiori* the behavioural standards which result from such ethics, should be treated as a "counterbalance in relation to the position of strength or influence held by one person over another" (*op.cit.* n° 6). The ethics act as a sort of counterbalance in relation to unilateralism, by imposing limits to prevent and sanction any form of abuse.

German law also operates a very strict distinction, but the distinction is not based on the source of the obligation (or duty) but on its subject matter. The distinction is only comprehensible by considering the position of the obligee: when the obligee's right is an '*Anspruch*', that is to say the right to the performance of an obligation (see Art 14:101 PECL, which is apparently an approximate copy of § 194 (1) BGB containing the legal definition of the '*Anspruch*'), then the obligor is subject to a '*Verbindlichkeit*' or a '*Schuld*'. When the obligee's right is not in itself enforceable but only takes effect in the event of its violation, then the obligor is only under a '*Pflicht*' or '*Verpflichtung*'.

III. Towards a Common Base in the Distinction between 'Obligation' and 'Duty'?

A survey of comparative law leads to an emphasis being placed on the contractualization of standards which were originally extra-contractual and thus on the transition from the notion of 'duty' to that of 'obligation'.

In theory, the parties to a contract can only be bound by those obligations to which they have agreed. However, the issue has arisen in various legal systems, in the name of some sort of contractual justice, as to whether obligations which were not expressly set out in the contract could be imposed upon the parties.

In this way, English law saw the development of the theory of implied terms or, in Quebec law, the idea of 'implied obligations', set out in article 1434 of the Quebec Civil Code: 'A contract validly formed binds the parties who have entered into it not only as to what they have expressed in it but also as to what is incident to it according to its nature and in conformity with usage, equity or law'. This article is the equivalent of article 1135 of the French Civil Code: 'Contracts are binding not only as to what is expressed therein, but also as to all the consequences which equity, usage or law attach to an obligation according to its nature'. The same terms can be found in the Belgian Civil Code, with, as a corrollary, the obligation to act in good faith which appears in article 1375: '*Good faith should govern the behaviour of the parties, whether it be at the time the obligation comes into existence, during its implementation or when it is extinguished*'.

English law does not recognize a general principle of good faith (although such a statement is gradually losing relevance in the face of Community directives which refer more and more frequently to the principle[57]) unlike number of national laws (France, Belgium, Switzerland, Quebec, United States) and projects of uniformisation of contract law (PECL for example). The English notion of contract, essentially economical, tends to limit its content so that the parties are only bound by those obligations to which they have expressly agreed. However, the theory of implied terms allows the judges, to a limited extent, to find the existence of implied terms in a contract.

There is however, a double limit to the judges' power: on the one hand, the judges cannot imply a term which contradicts an express provision of the contract, and on the other hand, they must act on the basis of a legal basis which is threefold: '*unexpressed intentions*', '*importation of general civil obligations*' and '*model contracts*'. In practice, it is a

57 See for example the Directive 93/13 of 5 April 1993, on unfair terms in consumer contracts OJEC L 095 of 21/04/1993, p. 29-34.

standard of behaviour, 'duties' which are extra-contractual by nature, which are incorporated into the contract. It would therefore appear that under English law, a duty of legal origin can become an implied term in a contract.

The obvious inconsistencies in terminology which occur in the use of the terms 'obligation' and 'duty' epitomize the difficulty caused by the theory of implied terms, which tends to impose on the parties various standards of behaviour (based on equity, usages or on the law) which are not expressly provided for in the contract. Extra-contractual matters are therefore brought into the contractual sphere and generate difficulties from a terminological point of view but also with regard to the question of how such standards should be treated legally (Should a breach of such standards be actionable in tort or in contract?). In order to deal with these difficulties, Quebec law adopts a position which is perfectly clear: For example, P.-A. CREPEAU,[58] is of the view that certain 'ancillary obligations'[59] acquire 'because they are fitted into the contractual mould, a contractual tint or qualification'. J.-L. BAUDOUIN and P.-J. JOBIN,[60] do not hesitate to state that the breach of an *obligation*[61] arising out of a contract, even if it is imposed by law, gives rise to the application of the rules governing contractual liability'.[62] Certain duties, the breach of which is generally sanctioned under the principles of tort, are therefore contractualized. Since 1994 and the new Quebec Civil Code – and in contrast with the large volume of civil liability litigation arising out of the provisions of the Civil Code of Lower Canada –, more and more obligations are implied, whether it be on the basis of the nature of the contract, of commercial practices, law or equity.

This evolution is reminiscent of article 1135 of the French and Belgian Civil codes and would appear to share similarities with the Anglo-American theory of *implied terms*.

Prima facie, the German distinction based on the subject matter of the obligation does not fit in with the theory outlined above. However, a more careful analysis shows that the difference with the proposed solution is not so significant. At the outset, the German system of civil liability is fundamentally different from the French and Common Law systems. There is in the BGB a strict distinction between the liability known as 'contractual', dealt with under §§ 241 (2), 280 (1) BGB and liability in tort, dealt with under §§ 823 and following BGB. This liability known as 'contractual' concerns not only the non performance or inadequate performance or an obligation, but also any breach of a duty of information or duty to ensure safety, including in respect of any injury or loss sustained by a party to the contract during the implementation thereof (for example, an injury caused by a banana skin on the floor of a shop on which a customer has skidded). Such duties are expressly dealt with in § 241 (2) BGB as arising out of '*Schuldverhältnis*' in the wider sense: '*Das Schuldverhältnis kann nach seinem Inhalt jeden Teil zur Rücksicht auf die*

58 P.-A. CREPEAU, "Le contenu obligationnel d'un contrat", *Rev. bar. Can.* 1965.1, esp. p. 28, cited by Ph. JACQUES, *op.cit.* n° 411, p. 872.

59 These are obligations which are ancillary to the contract and which find their source in article 1135 of the Civil Code. Ph. JACQUES, *op.cit.*

60 J.-L. BAUDOUIN, P.-G. JOBIN, *Les obligations*, 5ème édition, Yvon Blais, 1998, n° 813.

61 Our emphasis.

62 Ph. JACQUES, *op.cit.* n° 411, p. 872.

Rechte, Rechtsgüter und Interessen des anderen Teils verpflichten'. (The '*Schuldverhältnis*' may, depending on its content, oblige each party to respect the rights, the '*Rechtsgüter*' (for example, property, health or freedom) and the interests of the other party).

Moreover, according to § 311 (2) BGB, the mere fact that the parties have entered into negotiations with a view to concluding a contract constitutes this special tie named '*Schuldverhältnis*' which gives rise to the same duties of information, to ensure safety and to act in good faith as those arising out of a contract: '*Ein Schuldverhältnis mit Pflichten nach § 241 Abs. 2 entsteht auch durch 1. die Aufnahme von Vertragsverhandlungen, …* (A '*Schuldverhältnis*' giving rise to duties in accordance with § 241 (2) BGB will also be created when the parties enter into negotiations). The civil liability which arises out of a breach of such pre-contractual duties ('*culpa in contrahendo*') is therefore identical to contractual liability. However, liability in tort is also dependent on the breach of '*allgemeine Verkehrspflichten*' (general duties) which constitutes a fault and which gives rise to an obligation ('*Verbindlichkeit*'/'*Schuld*'): the obligation to pay damages. The theory – whether regarding terminology or content – is therefore identical: there are '*Pflichten*' (duties without a corresponding right) which only trigger consequences in the event of their breach. This 'consequence' is an obligation, which this time is paired with a right.

By noting that under French law as well as under the other laws under study, the result of a liability in tort is an obligation (imposed on the party found liable to pay damages to the victim) and that such a liability only arises in the event of a fault (therefore in the event of a breach of a general *duty* of good behaviour), a striking parallel appears between all these systems: the *obligations* ('*Verbindlichkeiten*') which correspond to a claim, that is to say their subject matter is an obligation the performance of which can be required by the obligee, and the *duties* ('*devoirs*', '*Pflichten*') the sole aim of which is to avoid loss or damage on the part of the other party, by establishing standard of behaviour. These 'duties' are treated (under French law, Quebec law, and to a certain extent, under English law) as being of a legal (rather than contractual[63]) nature.

Although there are clearly obstacles to a coherent use of the terms 'obligation' and 'duty' within the various legal systems (whether it be the source, the subject matter or the scope of the standard), it is necessary to reserve a specific use to each one, so that a uniformisation of their legal treatment should become possible. Although this is not a task which had been taken on by certain contemporary academics, it would appear that recent academic studies have attempted better to define the limits of these different notions.[64] Such works do not all reach the same conclusions, but it is positive that they should rekindle a debate which is gaining more weight at a time when the construction of European contract law is taking place.

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63 *Contra* Ph. JACQUES, *op.cit.* n° 408.

64 See *inter alia*, Ph. JACQUES, *Regards sur l'article 1135 du Code civil*, Dalloz, 2005; Y.-M. LAITHIER, *Les sanctions de la rupture pour inexécution en droit comparé*, LGDJ, 2004; Ph. STOFFELMUNCK, *L'abus dans le contrat, Essai d'une théorie*, LGDJ, 2000.

IV. Terminological Inconsistencies in the Use of the Term 'Engagement'[65] (in French)

The term '*engagement*' (in French) is used in a surprising variety of ways.[66]

If the Principles of European Contract law,[67] the UNIDROIT Principles[68] or even the Pavia Project,[69] do not refer to the term very much, it is frequently used under various laws. For example, the French Civil Code contains 48 articles which refer to it, the French Commercial Code has 108, the French Consumer Code 31, the Labour Code 127… Other Francophone laws are also familiar with the concept: For example, the Swiss Code of obligations refers to it 11 times whilst the Swiss Civil Code refers to it 7 times. Belgian law is also familiar with the term 'engagement', referred to in its various codes, as is the case for Quebec law.

The term '*engagement*' is, very often, used out of convenience, without being conceptualized.[70] However, it would appear that a common base can be determined regarding

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65 Aside from the variations on the use of the term by the legislator or the courts, it would appear that the term "*engagement*" *has aroused the interest of modern academics. Indeed, Mr. GHESTIN, in his work on the cause (consideration) (J. GHESTIN, Cause de l'engagement et validité du contrat*, LGDJ, 2006, n° 1) uses the term "*engagement*" with a new meaning. "The expression cause of the '*engagement*' aims first to emphasise, from a negative point of view, the appropriateness of avoiding inappropriate distinctions (…) made between the cause of the obligation and the cause of the contract. From a positive point of view, it means that consideration should be assessed in relation to all the '*engagements*' of the parties arising out (…) of a contract (…)". This is the meaning which was adopted by the Proposals for Reform of the Law of Obligations and the Law of Prescription (the French Reform Proposals) which take the view that "the '*engagement*' seems more appropriate to name the act which gives rise to the contract understood as a legal or even economical, global operation, and not only, in an analytical way, to one or more obligations placed side by side" (J. GHESTIN, Introduction, Article 1124).

66 Legal "engagements" must be distinguished from moral "*engagements*", the first being sanctioned by law and the second not. It is traditionally taught that moral "*engagements*" fall within the field of lawlessness, or conscience and are not sanctioned by the law (see in particular, on this question, Ph. MALAURIE, L. AYNES, Ph. STOFFEL-MUNCK, *Les obligations*, Defrénois, 2005, n° 439). However, a recent judgment seems to cast doubt on the assertion: Cass. com. 23 January 2007, n° 05-13189, to be published at *D.* 2007, p. 442, obs. X. DELPECH; *CCE*, n° 4, April 2007, comm. 54 Ch. CARON; *Contrats, conc. consom.*, n° 4, April 2007, comm. 104, M. MALAURIE-VIGNAL: "By committing *(s'engageant)* itself, even morally, 'not to copy' the products which were commercialised by a competitor, a company had expressed its unambiguous and deliberate intention to be bound with regard to its competitor".

67 The main examples of use occur in articles 2:105 and 6:101.

68 The main examples of use occur in articles 3.8, 3.9 and 6.1.7. In the first two articles the term "*engagement*" appears to have been used in lieu of "consent".

69 The Gandolfi project uses the term "*engagement*" a little more frequently than the various other projects. It can be found in articles 48, 121, 144, 146. It is sometimes used to mean the source of the obligations, sometimes in lieu of the obligation itself.

70 See, however, C. GRIMALDI, *Quasi-engagement et engagement en droit privé. Recherches sur les sources de l'obligation*, Préf. Y. Lequette, Defrénois, 2007.

what is perceived by the notion of '*engagement*', as perfectly illustrated by German law. Indeed, the terms '*engagement*' and obligation are translated by the use of the same term '*Verpflichtung*'.

Finally, it would appear that the source of the obligation, the '*engagement*' and its result, the obligation, are *de facto* treated as one and the same.

This observation is confirmed by the examination of certain provisions of French law and other Francophone laws, such as Belgian and Quebec law. The fact of treating the two the same, or even confusion between the two, is understandable. After all, if traditionally, it is the obligations which suffer from non-performance, in fact the '*engagement*' is necessarily also not performed (**A**).

If a confusion is both obvious and understandable, it is accepted that the term '*engagement*' is however generally used as the source of the obligation. A difficulty then arises in working out how the terms '*engagement*' and 'contract' interrelate (**B**).

A. Evidence of a confusion between 'engagement' and obligation

There are provisions which bring confusion to the logical distinction between '*engagement*' and obligation, the first being the source of the second.

Indeed under Swiss law, article 175 of the Code of obligations provides in its paragraph (2) that "the debtor cannot enforce performance of the '*engagement*' of the purchaser of a debt so long as such debtor has not fulfilled his obligations towards such purchaser under the contract for the purchase of the debt". This is an expression of the fine distinction between the source of the obligation and the obligation itself. Indeed, if through the performance of the obligations which I have undertaken, I fulfill the terms of my contractual (or unilateral) '*engagement*', then should the term 'obligation' not have been used in this article, with its traditional meaning of 'a tie which links at least two persons which enables one of them to require that the other perform something'.

Under Quebec law, article 1458 of the Civil Code is particularly revealing. It provides that every person has the duty to honour the '*engagement*' which that person incurred'. The second paragraph reveals what the Quebec legislator intended by '*engagement*', in this instance, an 'obligation'.

The second paragraph provides that: 'such person is, when it breaches such duty, liable for any personal injury, damage to property or mental distress caused to the other party to the contract, and must make good such injury or damage; neither party can prevent the application of the rules regarding contractual liability by opting for the application of rules which are more favourable to them'. It is clear that in this instance the term '*engagement*' is used in lieu of the term 'obligation'.[71] Article 1486 of the same code appears to confirm this observation when it states that the managed party (in a business management contract) "must also fulfill the necessary or useful '*engagements*' which were incurred in its name or for its benefit, by the manager as regards third parties'. In this instance, the term is ambiguous, it seems to refer just as much to 'obligations' insofar as the said '*engagements*' arise out of the conclusion of a contract and of the

[71] It should, however, be noted that the English translation of the text (available at the following Internet address: http://www.canlii.org/qc/laws/sta/ccq/20070117/whole.html) uses the term "*undertaking*" rather than "*obligation*".

contracts which could have been entered into by the managed party[72]". Article 2001 of the same code provides, moreover, in its paragraph 2, in respect of chartering, that "the contract, when it is in writing, is evidenced by a charter party which sets out, in addition to the names of the parties, their '*engagements*' …". In this provision again, the term 'obligation' would have been more appropriate as the consequence of the conclusion of the contract.[73]

Under Belgian law, article 1143 of the Civil Code, provides that "the obligee has the right to request that whatever was done in breach of the '*engagement*', be destroyed; and he may be authorised such destruction at the expense of the obligor, without prejudice to any damages, if relevant". In this instance, it would appear that the article refers to the 'obligation' rather than its source. Article 1184 of the same code provides that there is an implied condition that a bilateral contract may be avoided in the event that one party does not fulfill its '*engagements*'. In paragraph 2, the article provides that "the contract is not void as of right. The party in relation to which the '*engagement*' was not fulfilled (…)". Here again, the term 'obligation' could have been used instead of '*engagement*', even if, in fact, the failure to perform any contractual obligations necessarily implies the failure to fulfill the 'engagement' of that party. The question therefore arises as to what it is that the party failed to perform: is it the obligation or rather the '*engagement*', source of such obligation?

Under French law, the position is very similar to that described un relation to Belgian, Swiss and Quebec law, essentially for historical reasons.[74] Therefore the comments relating to articles 1143[75] and 1184[76] of the Belgian Civil Code also apply. Moreover, article 1836 paragraph 2,[77] of the Civil Code states that "the '*engagements*' of a member cannot, in any event, be increased without his consent". In this case, it would seem that the term '*engagement*' is used in lieu of the term 'obligations'. Article 1371 is also interesting in that it concerns quasi-contracts. These are defined as "purely voluntary acts of one party resulting in some sort of '*engagement*' as regards another party and in some instances a reciprocal '*engagement*' on the part of both parties". Here the term '*engagement*' is used as meaning the consequence of a voluntary act. It is not the source, but the consequence. It would therefore be, prima facie, more appropriate to use the term 'obligation'. Article 1103[78] of the Civil Code[79] provides that "it [the contract] is unilateral when one or more persons are under obligations in relation to one or more others, without there being any '*engagement*' on the part of such others". In this case, the contracting party shows its intention to become obligee but without any commitment, it does not show evidence of consent from which an '*engagement*' would result. It is therefore not under any obligation. Thus, the drafting of this article is evidence, to a certain extent, of the different nature of the terms '*engagement*' and 'obligation'.

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72 It should be noted again in this instance that the English translation refers to the term "obligation".

73 Here, it is the term" undertaking" which was chosen as the English translation of the term.

74 The Civil Code having been used as a basis for the foreign codifications.

75 In the English translation of the Civil Code (www.legifrance.gouv.fr), the term "*engagement*" is translated as "undertaking".

76 Here, the term "*engagement*" is translated as "undertaking".

77 Here, the term "*engagement*" is translated as "commitment".

78 Here, the term "*engagement*" is translated as "obligation".

79 Article 1103 of the Belgian Civil Code is identical to the French Civil Code article.

The French Reform Proposals also seem to use the term '*engagement*' and 'obligation' in turn, as evidenced by the drafting of article 1158 which provides: "In all contracts, the party for whose benefit the performance of an '*engagement*' ('obligation' in the English translation) was not carried out, or was poorly carried out, may either seek performance of the obligation or cause the dissolution of the contract or ask for the payment of damages that may be added, depending on the circumstances, to the performance or the dissolution". Just as in the examples outlined above, it is likely that the authors of the report had in mind the obligations arising out of the '*engagement*'.[80] However, if from a terminological and conceptual point of view, the difference between '*engagement*' and obligation exists, it remains that from the point of view of terminology and meaning, the confusion is understandable. When the obligations are not performed, the '*engagement*' which is at the source of such obligations is also not performed. The same observations can be made, for example for articles 1158 paragraph 2 or even article 1159.

If the '*engagement*' is the result of the exercise of freewill, it is the source of the obligation. However, as has been observed, the proposed distinction is not so clear in its terminological expression. In any event and despite a certain amount of uncertainty in the use of the words, it would seem that the term '*engagement*' is regularly used to refer to the source of the obligations. The question does however remain as to how it should be distinguished from the notion of 'contract'.

B. Evidence of a specific use of the term 'engagement' as the source of the obligation

Although in the relationship existing between an obligation and an '*engagement*', the two are often confused, it remains that in a large number of instances, it is used specifically to mean the source of the obligation, often indistinguishable from the contract.

A clarification should be made in this respect. The term '*engagement*' is frequently used in lieu of the term 'contract'. This substitution is not intrinsically wrong in that the contract "is the result of two unilateral acts since it is the result of two '*engagements*', that of the offeror and that of the offeree, two unilateral '*engagements*' which will become a contract when they meet".[81] So that when the term '*engagement*' is used instead of the term 'contracts', it is an involuntary but nevertheless inappropriate ellipsis.

Indeed, the 'engagement' is necessarily unilateral 'because it emanates from one sole individual'[82] – and the addition of the adjective 'unilateral' to the term '*engagement*' would appear pleonastic. That is why it is important that when legislators, judges and academics replace the word 'contract' with the word '*engagement*', they should qualify it with the adjective 'contractual'.[83] Without this qualification, there remains a doubt as to the nature of the '*engagement*': unilateral or contractual.

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80 This view would appear to be confirmed by the English translation of the article: "*in all contracts, the party for whose benefit the* **performance of an obligation** *was not carried out, may either seek* **performance of the obligation** *(…)*".

81 C. GRIMALDI, *Quasi-engagement et engagement en droit privé. Recherches sur les sources de l'obligation*, Pref. Y. Lequette, Defrénois, 2007, n° 600.

82 *Ibid*.

83 We refer the reader to the work relating to the notion of contract and the relationship between this notion and that of "*engagement*" and in particular that of unilateral "*engagement*". It should

The following paragraphs will examine the use of the term '*engagement*' used instead of the term 'contract' but also in a more ambiguous sense in which the term can also be understood to have a unilateral meaning.

Under French law, the new article 435 paragraph 2 of the law n° 2007-3080 dated 27 March 2007, provides that 'the acts which [the person placed under the protection of the courts] has carried out and the '*engagements*' which such person has contracted during such placement can be rescinded on the basis of loss or reduced if they are excessive, even though they cannot be cancelled under the terms of article 414-1'. In the same way, article L 210-6 of the Commercial Code provides in paragraph 2 that "persons who acted in the name of a company before its incorporation are held jointly and indefinitely liable for the acts so performed, unless the company, once it is duly incorporated and registered, takes over such '*engagement*'. These '*engagements*' re then deemed to have been contracted by the company *ab initio*.' In the same spirit, article L 210-9 of the Commercial Code provides, in its first paragraph, that "neither the company, nor any third parties may refuse to honour such '*engagements*' (…)".[84]

The French Reform Proposals also occasionally use the expression '*engagement*' in lieu of the term 'contract', as evidenced for example by the drafting of article 1172-2[85] which provides that "however, certain clauses which appear in one of the contracts apply to the parties to the other contracts, provided such parties were aware of such clauses at the time of their '*engagement*' and did not express any reservations". The term '*engagement*' is also used in ways which are ambiguous in that they could be referring to the term 'contract' as well as to the unilateral '*engagement*'. In any event, these different examples reveal that the term '*engagement*' is used to mean the source of the obligation, or even of the claim. Thus, article 1116 provides that "in order to be valid, an '*engagement*' requires the contracting party to be capable of enjoying or holding a right".[86] Article 1182 paragraph 2 provides that: "in the event of the fulfillment of the condition, the obligation is deemed to have existed from the date the '*engagement*' was contracted".[87] In this instance, if it can be considered that the article could apply to a unilateral '*engagement*', the use of the verb 'to contract' is likely to introduce some uncertainty as to the scope of the article.

Under Belgian law, article 1125 of the Civil Code provides that "a minor and a person under judicial disability may not claim incapacity in order to avoid their '*engagements*' except in the cases provided for by law". Similarly, article 1185 of the same code provides that "the term differs from the condition, in that it does not suspend the '*engagement*' but merely delays its fulfillment".

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however be made clear that a unilateral "*engagement*" is sometimes considered to be the direct source of the credits and debts without the intermediate step involving the creation of an obligation (see generally on this question, J. GHESTIN, M. BILLIAU, G. LOISEAU, *Le régime des créances et des dettes*, Traité de droit civil, LGDJ, 2005, n° 103 and following; C. GRIMALDI, *Quasi-engagement et engagement en droit privé. Recherches sur les sources de l'obligation*, Preface. Y. Lequette, Defrénois, n° 937, p. 430.

84 The English translations of the term "*engagement*" in these instances use the term "obligation".

85 The English translation of the text uses the expression "global undertaking".

86 Here, it is the term "convention" which was chosen to translate the term "*engagement*".

87 Here, it is the term "commitment" which was chosen to translate the term "*engagement*".

Under Swiss law, the Civil Code provides in its article 779 l (2) that: 'It [the building lease] may be extended at any time, in the form which is prescribed for its constitution, for a new maximum term of one hundred years, but any '*engagement*' made in advance in this respect is void'. It would not appear that the code refers here to the obligation in its various meanings but rather to the '*engagement*' which is its origin. Due to the lack of precision of the term, the reference could just as well be a reference to a unilateral '*engagement*' as to a contractual 'engagement'.

Along the same lines, article 7(1) of the Code of obligations, entitled 'Offer *without engagement* and public offer' provides that: 'The offeror is not bound if he made express reservations or if his intention not to be bound arises either out of the circumstances or out of the nature of the offer'. In this hypothesis, it would appear that an expression of freewill and consent, understood as the intention to be bound, should be distinguished. If the offeror does not agree to fulfill the obligation towards the offeree, that is to say he does not subscribe to any 'engagement', it could be considered that this offer without '*engagement*' is a mere invitation to treat, without any mandatory force because there is no intention to be bound. In any event, it would appear that this article of the Swiss Code of obligations only refers to the source of the obligation and not to the obligation directly. Article 40 b follows the same logic, when it states that when the 'engagement' was contracted in certain circumstances, whether it is an offer or an acceptance, such 'engagement' can be revoked. Article 497 (3) of the Code of obligations provides that: "if the creditor knew or could have known that the guarantor had agreed to the guarantee on the assumption that the same debt would be guaranteed by other guarantors, the guarantor is not bound by his agreement if this assumption proves wrong or if, at a later stage, one of the guarantors is released by the creditor or if his '*engagement*' is declared void". In this case, the term '*engagement*' is used instead of the term 'contract'.

Under Quebec law, article 1574 of the Civil Code provides in paragraph 2 that: 'They [the offers] may also by made by the production of an irrevocable, unconditional '*engagement*' with an indefinite term, subscribed by a financial institution exercising its activities in Quebec, to pay to the creditor the sum which is the object of the offers if such creditor accepts them or if they are declared valid by a tribunal'.[88]

If conceptually, '*engagement*' and 'obligation' can clearly be distinguished, the latter being the source of the other, it remains that the way they are used shows a certain confusion between the two. If it is evident that such confusion is regrettable with regard to clarity and precision, it would appear that it is comprehensible and does obscure the meaning of the provisions in question. A reservation should however be expressed.

It is really in its relationship with the term 'contract' that the term '*engagement*' causes the most difficulty. Indeed, if it is interpreted as being at the very origin of the obligation or the claim, the elliptical use of the term introduces some doubt as to the scope of the rule: is the particular provision applicable to contractual '*engagements*' (to contracts) or can it also be applied to unilateral '*engagements*'?

Finally, the need to clarify the meaning given to the term '*engagement*' is particularly important in view of the fact that English translations of this term are varied and cannot be ordered in any way.

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88 Here, the English translation uses the term "undertaking" to translate the term "*engagement*".

Chapter 3:
Juridical Acts – Juridical Facts

Main Concerns

I. Observation

What emerges from a study of Acquis Communautaire and Acquis International, and from an analysis of comparative law, is that the distinction between juridical acts and juridical facts is not a concept that is shared by the various national laws of obligations.

In Acquis Communautaire and Acquis International, the distinction is not really used as such, probably because positive law on the subject does not have the objective of establishing a law of obligations.

Such a distinction is essentially made in France and in countries which have used the French Civil Code as a model. In France in particular, it was recently reaffirmed in the Proposals for Reform of the Law of Obligations and the Law of Prescription (the French Reform Proposals):[1] it is considered as the centrepiece of the law of obligations.

II. Relevance of the Distinction

The distinction between juridical acts and juridical facts should make it possible to classify obligations depending on their source: the legal regime applying to an obligation would differ depending on whether such obligation resulted from a juridical act or a juridical fact. Bearing in mind the elaboration of European principles of contract law, it would therefore appear relevant to examine this theoretical distinction from a terminological angle: the question arises as to whether a contract forms part of a single category, governed by specific rules, both in the various national laws and in Acquis Communautaire and Acquis International.

Under French law, the distinction between "*acte juridique*" (juridical act) and "*fait juridique*" (juridical fact, sometimes translated as juridically significant fact) is and remains essential: its purpose is in principle to organise different legal regimes, based on the part played by the will of the parties, as evidenced by the wording recently adopted in the French Reform Proposals. Juridical acts are defined in article 1101-1 as "exercises of will which are intended to produce legal effects", whilst article 1101-2 defines juridical facts as "conduct or events to which the law attaches legal consequences". However, the French Reform Proposals make it clear that "the contract remains the central figure among juridical acts". This reflects the positive law on the issue, which gives contracts a more prominent place than is accorded to the more general notion of juridical act.

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1 Documentation française, 2006.

Other legal systems make similar distinctions from a terminological point of view, although such distinctions are not intended to organise in such a systematic way the legal regimes applying to the various categories identified. For example, Italian law refers to the *"fatto giuridico"* (juridical fact) which includes, in the wider sense, *"l'atto giuridico"* (juridical act). The latter category includes in particular the *"negozio giuridico"*, a term which is close to the *"acte juridique"*, in a narrow sense, under French law. German law identifies juridical acts *("Rechtsgeschäft")* as one of the main categories, set apart from real acts *("Realakte")* and juridical quasi-acts *("geschäftsähnliche Handlungen")*. German law remains reluctant to establish classifications, on the basis that these are tools used more for description that for the labelling of categories which will attract a different legal treatment. It is apparent from these examples that the modern classifications of a number of legal systems have moved away from the French categories and in particular from the distinction between juridical act and juridical fact.

In Acquis Communautaire and Acquis International, the expression "juridical fact" is absent: traditionally, the category of contract is opposed to the category of tort.

Consequently, the question arises as to the relevance of maintaining the distinction between juridical act and juridical fact, particularly in view of the fact that a further autonomous category, that of quasi-contract, appears to be emerging under French law, which could provide the justification for a different classification.

III. Questions

Has the labelling of a source of obligation – contract, quasi-contract, or tort – established itself in an abstract and obvious way, or is it sometimes based on mere convenience?

Should a bipartite distinction between "contractual obligations" and "non-contractual obligations" be adopted, as suggested by the Regulation n° 864/2007 of 11 July 2007 on the law applicable to non-contractual obligations ("Rome II Regulation"),[2] with a further distinction within the latter category between non-contractual obligations which arise out of a tort and those which arise out of a fact other than a tort (quasi-contract)?

Such a distinction would largely match the distinction between juridical act and juridical fact.

Or could a tripartite classification be adopted, as under English law, which distinguishes between contract, quasi-contract and tort?

Comparative Law

In legal systems which are based on Roman law, the sources are based on concepts which have become classical.

The common core, originating under Roman law and largely present in modern systems, is based on notions of contract, quasi-contract, delict and quasi-delict. These

2 *JO* L 199 of 31 July 2007.

distinctions have often been criticized, sometimes severely. They still provide matter for debates regarding a systematization of the law of obligations. In France, they have disappeared in favour of a fundamental distinction between the notions of juridical act *("acte juridique")* and juridical fact *("fait juridique")*. In accordance with this idea, a juridical act is defined as "a voluntary act, specifically carried out, in accordance with the conditions set out by law, with the intention of producing legal effects of a desired nature and extent";[3] on the contrary, "a juridical fact is an event which, whether or not intended, produces legal effects which are independent from the intention of the parties concerned".[4] European codifications which occured after the Civil Code, in particular in Germany, Italy, Switzerland or the Netherlands, have in some instances opted for different classifications, or given up on any attempt at a codified classification.

However, the question of classification is not specifically French, or even exclusive to countries with a civil law tradition. Indeed, although English law experienced what was mainly a case-by-case approach until the XIXth century, the contemporaneous approach gives a prominent place to a systematic organisation of the law of obligations.

The distinction between juridical act and juridical fact, whether it be in comparative law or in relation to Acquis Communautaire and Acquis International, raises the issue of the organisation of the sources of the law of obligations. In certain civilian countries, the principle of a strict systematization of the sources of obligation would appear to dominate (**I**), to the extent that it is possible to refer to a taxonomic approach,[5] whilst the question is treated differently in common law countries, and England in particular, where the prevailing approach to the law of obligations could be qualified as "organisational" (**II**).

I. A Systematization of the Sources of Obligations Based on the Distinction between Juridical Act and Juridical Fact: A Phenomenon Anchored in Countries with a Civil Law Tradition

A classification of the sources of obligation existed under Roman law (**A**). Under French law, the classification is based essentially upon the distinction between juridical act and juridical fact (**B**). It remains strongly anchored in the French system, which is alone in this respect: although the classification can be found in certain other civilian systems, inspired by French tradition (**C**), it would appear outmoded since the XIXth century. First of all, Austrian law expressly refused the use of the concepts of quasi-contract, quasi-delict and juridical fact.[6] Then, the German and Italian systems in particular separated the theory of the juridical act from the issue of the sources of obligation by treating the juridical act as the general instrument used to implement human intention. The contract, as source of the obligation, is just a type of juridical act among others (**D**). Finally,

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3 J. FLOUR, J.-L. AUBERT and E. SAVAUX, *Les obligations*, t. I, *L'acte juridique*, 11e ed., Armand Colin 2004, n° 60.

4 Ibid.

5 The term "taxinomic" does not only refer to the idea of classification, but also to that of systematization.

6 See § 859 of the Austrian Civil Code ("ABGB").

without using codification to systematize the source, certain systems such as Scottish law are particularly interesting in that they have come under the double influence of Roman law and common law (**E**).

A. The Roman origins of the classification of the sources of obligations[7]

Under Roman law, a binary distinction between juridical act and juridical fact did not prevail. Tripartite (**1**) or even four-part distinctions (**2**) have been suggested, in which such expressions do not even appear.

1. The tripartite distinction suggested by GAIUS

One of the first ways of arranging the law of obligations by reference to the sources of obligation goes back to the 2nd century BC. It was GAIUS who operated a distinction, in the *Institutes* (3, 88), between the obligations arising out of a contract *(ex contractu)* and those which arose out of a tort (delict) *(ex delicto)*.[8] This dichotomy is considered to be the first *summa divisio obligationum*. However, there is some doubt as to the true nature of his theory, in particular since the discovery of another work, entitled *Res Cottidianae* – later referred to as *Aurei*. In this work, GAIUS sets out a tripartite division: obligations can arise out of a contract *(ex contractu)* out of a delict *(ex maleficio)*, or out of a third category named *variae causarum figurae* ("the various figures of causes").[9] It would appear that, under this last category, GAIUS may have been referring to quasi-contracts *(quasi ex contractu teneri videntur)* and quasi-delicts *(quasi maleficio)* without naming them.

Such a hypothesis would appear to be corroborated by the mention in the *Institutes* (3, 91) of the action for repayment of money handed over in the mistaken belief it was due: "the sum of money paid when it was not due may be claimed by *condictio* from the recipient, in the same way as if he had received a loan". The question has therefore arisen for historians as much as for jurists: Did GAIUS have a twofold or threefold division in mind? The majority of academics take the view that it is difficult to attribute the paternity of the tripartite division to GAIUS on the basis that the text of the *Aurei* was substancially modified by postclassical authors.[10]

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7 H. and L. MAZEAUD, J. MAZEAUD, F. CHABAS, Leçons de droit civil, T. II, Premier volume, Obligations, Théorie générale, Montchrestien, 9th edition 1998, esp. p. 44-48; R. ZIMMERMANN, The law of obligations, Roman Foundations of the Civilian Tradition, OUP 1996, esp. pp. 10-21; R.-M. RAMPELBERG, Repères romains pour le droit européen des contrats, LGDJ, Systèmes, Droit, 2005, p. 33-42; J.-P. LEVY, A. CASTALDO, Histoire du droit civil, Dalloz, 1st edition 2002, esp. p. 648-654.

8 "Omnis obligatio vel ex contractu nascitur, vel ex delicto".

9 "Obligationes aut ex contractu nascuntur aut ex maleficio, aut proprio quodam jure ex variis causarum figuris".

10 H. and L MAZEAUD, J. MAZEAUD, F. CHABAS, *op.cit.* n° 46, p. 45. However, Mr. LEVY and Mr CASTALDO, after noting the existence of this majority held opinion put forward a dissenting view, arguing that, according to them, the paternity of the tripartite division could legitimately be attributed to Gaius. *op.cit.* p. 650.

2. The four-part distinction put forward by JUSTINIAN

JUSTINIAN suggested a four-part division of obligations, consisting of contracts, quasi-contracts, delicts and quasi-delicts.

The category of quasi-contracts included indebitum solutum, negotium gestum, tutela, communio and legatum per damnationem.

The category of quasi-delicts included *iudex qui litem suam fecit* (damage caused by the judge to another person), *deiectum vel effusum*, *positum vel suspensum* (when objects placed or suspended on a ledge or a roof fell and endangered traffic below) and finally *furtum vel damnum in navi aut caupone aut stabulo*.

As for the meaning of the terms "contract" and "delict", they were summarised as follows by R. ZIMMERMAN: "It has remained fundamental ever since and is the reflection of the fact that different rules are needed to govern the voluntary transfer of resources between two members of the legal community on the one hand, and possible collisions between their private spheres on the other: the one body of rules being concerned with the fulfilment of expectation engendered by a binding promise, the other by the protection of the status quo against wrongful harm".[11]

With the same viewpoint, Ch. FRIED[12] writes: "The law of property defines the boundaries of our rightful possessions, while the law of torts seeks to make us whole against violations of those boundaries, as well as against violations of the natural boundaries of our physical person. Contract law ratifies and enforces our joint ventures beyond those boundaries".

This division was adopted but also heavily criticized by academics, in particular during the XIXth century when it was used as a basis for the French codification.

B. The progressive consecration of the distinction between juridical acts and juridical facts in the french theory of classification of obligations by reference to their sources

Although the classification of obligations by reference to their sources based on the distinction between juridical act and juridical fact is that which is accepted by academics today (**2**), it was not however the first classification to be suggested, as evidenced by the arrangement of the Civil Code which was severely criticized by academics (**1**).

1. The arrangement of the Civil Code: a heavily criticized choice

POTHIER, during the XVIIIth century, revisited to the four-part arrangement of obligations as had been envisaged by JUSTINIAN. But in addition to contracts, quasi-contracts, delicts and quasi-delicts, he put forward a fifth source, the law. Generally speaking, this last source was used as a residual category for whatever was not covered by the four others. POTHIER's influence was crucial with regard to the arrangement which appears in the French Civil Code.

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11 R. ZIMMERMAN, *op.cit.*, p. 11.

12 Ch. FRIED, *Contract as Promise*, Harvard University Press 1981, p. 2.

The doyen CARBONNIER highlights the existence of a symmetry occuring on the one hand between contracts and quasi-contracts, which have legality in common and on the other hand, delicts and quasi-delicts, which are illegal. In parallel, "contracts and delicts have intention in common: whether it be the intention to cause damage, the intention to create obligations; whilst quasi-contracts and quasi-delicts are not intentional, implying a weaker part played by will compared with contracts or delicts. Excluded from these considerations, the law appears as a receptacle for all the obligations which cannot find a place elsewhere. […] The law, along with the three other sources, forms in article 1370, paragraph 1, the wider category of obligations which form without a contract, as opposed to the contractual obligations".[13]

Such an arrangement, partly inherited from Roman law, drew a certain amount of criticism.

Alternative suggestions were thus put forward. The heat of the criticism was not directed so much at the Justinian arrangement as it was at the Civil Code itself. From its original version in 1804, it distinguished in Part III, entitled "Different ways of acquiring ownership", a number of titles, among which Title III "Contracts and contractual obligations generally" and Title IV "Obligations which arise without a contract". The doyen CARBONNIER writes: "It is there, in fact, that can be found the great classification of the Civil Code (it is the heading of the two titles which divides the law of obligations), and although the second label may seem purely negative, the modern distinction between juridical act and juridical fact is not so far removed".[14]

The criticism directed at the distinction suggested by JUSTINIAN and partly used by the authors of the 1804 code coincided with a period during which the influence of Roman law was waning. The fiercest criticism had already been voiced by jusnaturalists such as PUDENDORF and GROTIUS. Their approach was based on a functionalist theory, which aimed to classify obligations by reference to their content and effect rather than by reference to their sources.[15]

Some authors[16] came back to the subdivision based on GAIUS' *Institutes*, opposing contracts to delicts. Others, such as PLANIOL, took the view that a quasi-contract was an empty notion and that there were only two true sources of obligations, the contract and the law: "In reality, there are only two sources of obligations: a meeting of wills between the obligor and obligee, and the almighty will of the law, which imposes an obligation upon a person, no matter what that person's intention and in the interest of another. This classification ends up being no more that the well known distinction based on contractual or non contractual obligations, but instead of using a negative description of the

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13 J. CARBONNIER, *Droit civil, Les biens, Les obligations*, Quadrige, Manuel, PUF 2004, Text of the 22nd revised edition, janvier 2000, pp. 1928-1929.

14 J. CARBONNIER, *op.cit.*, pp. 1929 and 1930.

15 In a very similar vein as PUDENDORF and GROTIUS, "the system of the Prussian General Land Law […] does not have a title on obligations or even on contract, but deals with the individual obligations in the context and from the point of view of their function for acquisition, loss and transfer of ownership". R. ZIMMERMAN, *op.cit.*, p. 18, note 100.

16 H.H. SEILER, Die Systematik der einzelnen Schuldverhältnisse in der neueren Privatrechtgeschichte, (Münster thesis), 1957, p. 94 cited by R. ZIMMERMAN, *op.cit.*, p. 19.

latter, by referring to them as "obligations which form without a contract", as set out in the Civil Code, it is more positive in attributing a special and unique source to such obligations: the law".[17]

Beyond the differences in opinion, some sort of consensus seems to be emerging as to the necessity of finding a broader category than "contract" to cover the intentional action of man, whether or not it generates obligations. This effort of generalisation resulted in the creation of the category of "*actes juridiques*" (juridical acts). This category was opposed to the category of "*faits juridiques*" (juridical facts), the internal subdivisions of which have nevertheless been the subject of controversy similar to that which surrounded the title IV of Part III of the Civil Code.

2. The classification based on a distinction between juridical acts and juridical facts is Alive and Well

Despite the criticism, the sources of the law of obligations are arranged, in French legal theory at least, in accordance with the dichotomy between juridical acts and juridical facts.

This distinction was impliedly adopted by DEMOGUE,[18] then expressly by BONNECASSE, in tome 2 of the Supplement to the BAUDRY LACANTINERIE treatise in which he sets out two opposing methods to define a juridical act and a juridical fact: "it is exceedingly difficult to classify in a clear cut way the works of contemporary authors with regard to the theory on juridical act and juridical fact, all the more so because most are content with very general sections on the topic. We shall however point out […] that while some authors, CAPITANT, COLIN, PLANIOL, make use of abstract concepts and generalisation to end up with very simple definitions falling within the province of pure juridical technique, the others, such as DEMOGUE, constantly mixing science and technique, refuse the use of abstraction and generalisation which they argue would not reflect the complexity of life in society and then end up, finally, with definitions which are much more complicated than the first".[19]

However, as noted by J. HAUSER, "no matter from which angle academics considered the question, it remains certain that the *summa divisio* juridical act-juridical fact gradually found its place in all classical works on civil law".[20]

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17 M. PLANIOL, "Classification des sources des obligations", *Rev. Cri. De Leg. et de Jurisp.*, 1904, p. 224; *contra* J. FLOUR, *Cours poly.*, 2nd year, 1964-1965, Paris, Les Cours du droit who considered that "*s'agissant de 'source première', c'est bien entendu la loi qui en constitue le noyau mais que dans le domaine des 'sources immédiates' des subdivisions demeurent justifiées*".

18 R. DEMOGUE, *Traité des obligations en général*, t. I, Paris, 1923, n° 11.

19 J. BONNECASSE, Supplement to the treaties Baudry Lacantinerie, 1925, t. 2, n° 311.

20 J. HAUSER, *Objectivisme and following objectivisme dans l'acte juridique*, LGDJ 1971, p. 29, n° 23. Certain works such as those of BEUDANT LEREBOURS-PIGEONNIERE (*Cours de droit civil français*, 2nd ed., Paris, 1936, t. 8, n° 14) only leave a residual place for the distinction whilst others such as those of MARTY and RAYNAUD (*Traité de droit civil, t. 2 "les obligations", vol. 1.* 1962 and vol. 2 1965), or much more recently that of FLOUR, AUBERT and SAVAUX (*Droit civil, Les obligations, T.1., L'acte juridique*, 11e édition, Armand Colin 2004; *T.2., Le fait juridique*, 11e édition, Armand Colin, 2005; *T.3.* (adde. Y. FLOUR), *Le rapport d'obligation*, 4e

As for the quasi-contract, its place in the traditional classification is that of a particular type of juridical fact, so that it can clearly be distinguished from the juridical act. As explained by D. MAZEAUD, traditionally, "what distinguishes the quasi-contract from the juridical act in general, and from the contract in particular, is the role played by intention in each of these sources of obligation. Whilst in the juridical act, the intention is to produce legal effects, in the quasi-contract, the intention is reduced to the carrying out of an action which benefits a third party, without any intention to bind or to be bound".[21] The quasi-contract could therefore be defined, traditionally, as a spontaneous juridical fact which essentially benefits a third party.

This classification of the sources of obligations has found a new lease of life thanks to the French Reform Proposals. Under a new Title III, entitled "Obligations", a preliminary chapter deals with the "sources of obligation". This chapter contains articles 1101 to 1101-2 which highlight the divide between juridical act and juridical fact, and grant a residual role to the law, in particular with regard to *"obligations of neighbourhood and servitudes of public law"*.[22]

The *"acte juridique"* (juridical act) is defined in article 1101-1: "Juridical acts are exercises of will which are intended to produce legal effects". Are expressly included contracts, as well as unilateral juridical acts and collective juridical acts, which are subject to the same legal regime as contracts *"insofar as is reasonably possible"*.[23]

"Faits juridiques" (juridical facts), are defined in article 1101-2: "Juridical facts consist of conduct or events to which the law attaches legal consequences". Within this category, two sub-categories can be distinguished: the quasi-contrat, on the one hand, briefly defined at paragraph 2 as "an action which confers on another a benefit to which he has no right" and "an action which, without legal justification, causes harm to another", on the other hand, which is dealt with under a separate sub-title, entitled "Civil liability". The Roman law distinction between delict and quasi-delict is very discretely preserved: it is only mentioned in article 1117-3 of the French Reform Proposals.

Moreover, beyond the apparently bipartite distinction between juridical act and juridical fact, it is really a classification setting out three types of sources of obligation – juridical act, quasi-contract and "action which, without legal justification, causes harm to another".[24] "These three main sources of obligation"[25] are the subject of the prelimin-

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édition, Armand Colin 2006), on the contrary, structure their reasoning around this distinction.

21 D. MAZEAUD, note below Ch. Mixte, 6 Sept. 2002, *D.* 2002.2963.

22 The quote is from the drafting of paragraph 2 of the new article 1101 of the French Reform Proposals which provides "Certaines obligations naissent également de l'autorité seule de la loi, comme les obligations de voisinage et les charges publiques dont il est traité dans les matières qui les concernent" ("Certain obligations also arise out of the sole authority of the law, such as neighbourhood obligations and servitudes of public law").

23 Article 1101-1 *in fine* of the French Reform Proposals: "L'acte unilatéral et l'acte collectif obéissent, en tant que de raison, pour leur validité et leurs effets, aux règles qui gouvernent les conventions". ("The unilateral act and the collective act are governed, as far as reasonably possible, as regards their validity or their effects, by the rules which are applicable to conventions.").

24 It should be noted here that the section on "responsabilité civile" (civil liability) of the French Reform Proposals are not limited to delictual civil liability (tort) alone, but also includes

ary chapter. They also determine the tripartite organisation of the titles contained in the new Part III, which deals with contracts, quasi-contracts and civil responsibility under three separate sub-headings. More generally, there is now strong competition regarding qualification as a juridical act or a juridical fact, to the point that the time has perhaps come, as suggested by C. CAILLE, to put an end to the marginalisation of the quasi-contract as a source of obligation. Rather, this "legendary monster"[26] should be given a stand-alone place, alongside juridical acts and tort. Indeed, although it comes under the category of juridical facts, it can give rise to obligations which are contractual in nature:

"The fact that cases of competition arise permanently[27] leads us to observe that the traditional classification of the sources is insufficient to govern all situations in a satisfactory manner. In certain cases, the dualist classification alone leads either to a situation where no solution is found, or to a situation in which a solution is only found by deforming the concepts. This dilemma can only be resolved by a novel approach to the sources, by admitting that contractual obligations can find their sources in non-contractual situations. It is not inconceivable today that such a 'mixed' category should be recognized. It would have its place in the process, which has seen intention play a diminishing role in the creation of contractual obligations".[28]

Better still, it would seem that the frontier between the two sources of obligation is less clear cut that might be imagined and that the passage from one to the other is in fact the result of a progression, a "trajectory":[29] "Between the ideal juridical act, pure product of intention and the ideal juridical fact, there are situations which are more complex, less 'pure', which can find an attraction in both categories".[30] There would be a danger in artificially creating a new contractual *source* in order to justify the judicial creation of a

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contractual liability. This constitues a major difference with English law which does not include this mecanism in the category of Tort. On the reasons for this choice, see G. VINEY, *Avant-projet français, Sous-Titre III – De la responsabilité civile (articles 1340 à 1386), Exposé des motifs*, p. 141.

25 G. CORNU, Avant-projet français, p. 14.

26 Ibid.

27 The examples used by the author are those of acts of accommodation, invitations to treat and advertising lotteries, with in particular, in the last case, the effect of the judgment handed down by the Chambre Mixte, on 6 September 2002, *D.*2002.963, note D. MAZEAUD; *Defrénois* 2002.608, obs. E. SAVAUX; *JCP* 2002. II. 10173, note S. REIFERGESTE; *Contrats, conc. consom.* 2002, comm. 151, obs. G. RAYMOND.

28 C. CAILLE, "Quelques aspects modernes de la concurrence entre l'acte juridique et le fait juridique", in: *Propos sur les obligations et quelques autres thèmes fondamentaux du droit, Mélanges offerts à Jean-Luc Aubert*, Dalloz 2005, pp. 61-62.

29 M.-L. IZORCHE, L'avènement de l'acte juridique unilatéral en droit privé contemporain, PUAM 1995, n° 119 quoted by C. CAILLE, *op.cit.* n° 15, p. 63.

30 Ibid. C. CAILLE adds that these concepts of juridical act and juridical fact should be used as abstract models of reference." […] un agissement de l'homme ayant un effet juridique ne se définit plus par son appartenance ou sa non appartenance à telle catégorie mais par sa proximité par rapport à ce modèle". (… an action of a person which has a legal effect is no longer defined by reference to its belonging or not to a given category but more by reference to how close it is to this model.).

contractual obligation, because this would make the category of juridical acts meaningless. It is necessary simply to "accept to disassociate the effects from the source by recognising that contractual obligations may find their source in non-contractual situations".[31] This is made possible by the quasi-contract, as provided in article 1371 of the Civil Code.

Despite the apparent generality of the definitions, behind which, in both the Civil Code and in the French Reform Proposals, there is the idea of redressing the balance between two estates, instances of quasi-contracts are provided in a closed list. There are therefore, *prima facie*, no particular links between the existing quasi-contracts and the new approach to the quasi-contract, which is advocated by a number of academics, by the Cour de cassation, or even by the European Court of Justice. (ECJ).[32] This new approach would involve opening the list of quasi-contracts and treating them as "a technique to assist the judge by enabling him to attach contractual obligations to situations which are non-contractual, without having to ascribe artificially to these situations the name of juridical act. The question arises, however, in the event that such a theory be implemented, as to the means of recognising this new meaning of the notion of 'quasi-contract'".[33]

The question became very relevant in France in the context of the litigation relating to advertising lotteries. The cases illustrate the line – sometimes very fine – which separates juridical act and juridical fact. As pointed out by D. MAZEAUD, "the way in which the source of an obligation is qualified sometimes depends on mere convenience, and can even vary from one extreme to another, that is to say from act to fact, on the basis of purely formal considerations relating to the actual wording of the document which expresses the intention of the obligee".[34]

In cases decided before 2002, the situations considered have sometimes been qualified as juridical facts.[35] From a practical point of view, the major inconvenience resulting from this solution was as follows: "because the judges were bound by the rule of compensation for the loss suffered, they inevitably granted damages in an amount which was less than the value of the illusive prize, by reason of the small amount of loss suffered". On other occasions, however, the Cour de cassation chose to qualify the situation as a juridical act. For instance, it held that a contract had been formed on the basis of a meeting of wills emanating from both the company and the consumer,[36] or even that there had been an intentional unilateral undertaking on the part of the advertiser using

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31 Ibid.

32 The reference to the ECJ echoes the *Engler* decision which is examined below (in the Community and international acquis).

33 C. CAILLE, *op.cit.*, p. 66. This results in accepting the possibility of unnamed quasi-contracts. Along the same lines, J. HONORAT, "Rôle effectif et rôle concevable des quasi-contrats en droit actuel", *RTDciv.*1969. 53; Ph. LE TOURNEAU, *Rep. Civ.*, Vis Quasi-contrat, n° 12.

34 D. MAZEAUD, above mentioned note below Ch. Mixte, 6 Sept. 2002.

35 Cass. civ. 1ère, 3 March 1988, *D.* 1988, Somm. p. 405, obs. J.-L. AUBERT; *JCP G* 1989, II. 21313, obs. G. VIRASSAMY; Cass. Civ. 2ème, 28 June 1995, *D.* 1996, Jur. p. 180, note J.-L. MOURALIS; *RTD civ.* 1995. 397; Cass. Civ. 2ème, 26 October 2001, *Defrénois* 2001. 693, obs. E. SAVAUX.

36 Cass. Civ. 2ème, 11 February 1998, *D.* 1999, Somm. p. 109, obs. R. LIBCHABER; *Defrénois* 1998. 1044, obs. D. MAZEAUD; *JCP G* 1998, I. 155, obs. M. FABRE MAGNAN et 185, obs.

questionable methods.[37] Although more satisfactory from a compensation point of view, this solution nevertheless creates a major difficulty in relation to the firmness of the undertaking by the advertiser, which is difficult to prove.

The Chambre mixte of the Cour de cassation recently settled the issue, in a decision of 6 September 2002,[38] in favour of the "quasi-contract" qualification, when it held that "the organiser of a lottery who announces to a named person that a prize has been won, without making it clear that there is some chance involved, is bound on the basis of this purely voluntary act, to deliver the prize". In this way the Court eliminated the negative effects caused by one or the other of the qualifications mentioned above. However, the question arises as to whether this new life given to the notion of quasi-contract has not been granted to the detriment of the unity of the notion: indeed, the Court "carries out a deep change in the criterion of assessment of the notion of quasi-contract. The quasi-contract, if the grounds for the decision have been understood correctly, now depends upon a voluntary act carried out by a person for his own interest, and which resulted in a mere legitimate expectation of a gain in the mind of a third party".[39] The criterion of equity has therefore disappeared: it is merely a false promise, which is sanctioned; and "the origin of the quasi-contractual obligation does not reside in a spontaneous act on the part of the obligor, in this instance, the consumer. Here on the contrary the origin of the obligation is found in the voluntary act on the part of the obligee, an act which is not selfless in the slightest".[40]

C. The adoption by certain civil law systems of the French classification of the sources of obligation

It is clear that the Roman and French ideas concerning the systematization of the sources of obligation have had a strong influence, whether it be under Quebec Law (**1**) or under Belgian Law (**2**).

1. Quebec Law

The way in which Quebec Law is structured is very similar to the French structure. The Lower-Canada Civil Code of 1866 had even used POTHIER's suggestions as a basis (**a**), those very suggestions which had provided a basis for the French Civil Code. However, the 1866 Code has recently seen certain modifications which have, in particular, affected the classification of sources (**b**).

G. VINEY et II. 10156, obs. G. CARDUCCI; Cass. civ. 1ère, 12 June 2001, *D.* 2002, Somm, p. 1316, obs. D. MAZEAUD; *JCP* G 2002, II. 10104, obs. D. HOUTCIEFF.

37 Cass. civ. 1ère, 28 mars 1995, *D.* 1996, Jur. p. 180, note J.-L. MOURALIS; *D.* 1997, Somm. p. 227, obs. Ph. DELEBECQUE; *RTD civ.* 1995. 886, obs. J. MESTRE; Cass. civ. 1ère, 19 oct. 1999, *D.* 2000, Somm. p. 357, obs. D. MAZEAUD; *JCP* G 2000, I. 241, obs. G. VINEY et II. 10347, obs. F. MEHREZ.

38 *Bull. Civ.*, Ch. Mixte, n° 4, p. 9.

39 D. MAZEAUD, above mentioned note below Ch. Mixte, 6 September 2002.

40 Ibid.

a) The classification of the Lower-Canada Civil Code (1866)

The classification instated by the Lower-Canada Civil Code distinguishes, in a classical way, between contractual obligations, quasi-contractual obligations, delictual obligations, quasi-delictual obligations and the law.

Article 1041 of the 1866 Code, made a distinction, within the category of quasi-contracts, between the repayment of monies paid under a mistaken belief and the *negotiorum gestio* (management of another's affairs). As is the case in France, unjust enrichment was a judicial creation. Article 1053 dealt with delictual and quasi-delictual obligations and article 1057 "brought together, in a slightly incongruous group, a number of obligations imposed by law, based on special legal situations (neighbourhood rights, obligations imposed on legal guardians)".[41]

b) The classification of the Quebec Civil Code

The Quebec Civil Code contains a Book Five, entitled, "Obligations", which is divided into two titles: Title I, "Obligations in general" and Title II, "Nominate contracts". This first Title is sub-divided into chapters,[42] with in particular a preliminary chapter entitled "general provisions", followed by a second chapter, "Contract", a third chapter, "Civil Liability" and a fourth chapter, "Certain other sources of obligation".

Article 1372 of the Civil Code distinguishes between two sources of obligations: the contractual source and the source which results from […] "any act or fact in respect of which the law imposes the effects of an obligation". A bipartite distinction has therefore been established between, on the one hand, a contractual obligation and on the other hand, a legal obligation attached to a juridical act or fact. In addition, the Code distinguishes, within those obligations which find their source in the law, between those which result from the application of civil responsibility rules (art. 1457 C.c.) and those which result from "certain other sources" (1482 and following C.c.), that is to say, in fact, quasi-contracts. The classification is finally reasonably close to that suggested by PLANIOL, who distinguished between contract and law.

However, academics in Quebec, like those in France, are moving away from the approach taken in the Civil Code in favour of an arrangement based on the notion of intention, with a distinction made between a juridical act and a juridical fact.

2. Belgian law

The analogy between Belgian and French law is even more marked than is the case with Quebec law: the sections relevant to the present study are contained in a Book III entitled "Different ways of acquiring ownership", within which Titles III and IV distinguish respectively between "contracts and contractual obligations in general" and "obligations which arise without any contract".

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41 J.-L. BAUDOUIN, *Les obligations*, Les éditions Yvon Blais, 4th edition, 1993, p. 30, n° 43.

42 Book V is divided into nine chapters. However, for the purposes of this report we shall only examine the first four.

Article 1370 of the Belgian Civil Code distinguishes, within this last category, between obligations which find their source in the sole authority of the law, and those which arise out of a personal action on the part of the obligee. Within this last category, finally, article 1370 paragraph 4 distinguishes again between quasi-contract, delict and quasi-delict. The Justinian distinction, as was adopted by POTHIER, is therefore reproduced, since the sources of obligation are organised into contract, quasi-contracts, delicts and quasi-delicts (although the distinction is artificial) and finally, the law. The classification, it must be said, gives rise to similar criticism.[43]

D. The development of the juridical act since the XIXth century

After the XIXth century, the French classification found itself more and more isolated. Regarding the sources of obligation, the four part classification was first abandoned, under Austrian law, and gave way to a much more complicated classification in the German, Italian and Swiss systems (**1**). The juridical act was given much more autonomy and separated from the issue of the sources of obligations, so that it became the essential category in the legal edifice of private transactions (**2**).

1. The juridical fact is abandoned

As early as 1811, the Austrian Civil Code ("ABGB"), which was generally very influenced by French law, sets out, in § 859, a tripartite classification of the sources of an obligation: the law, a juridical act *("Rechtsgeschäft")* or a loss suffered (which is equivalent to the delict). The fact that GAIUS's classification should be reused, is a clear rejection of the notion of juridical fact and of the notions of quasi-contract and quasi-delict.[44] The Italian *Codice civile*, in the same spirit, sets out in article 1173, a comparable classification of the sources of the obligation by listing the contract, the delict *(fatto illecito)* and "any other act or fact capable of producing obligations in accordance with the legal system".[45] This last residual category refers expressly to alimony (art. 433 and following cc), inheritance (art. 651 cc), *negotiorum gestio* (art. 2028 and following cc), repayment of monies paid under mistaken belief (art. 2033 and following cc) and unjust enrichment (art. 2041 and following cc). However, in this third open category, the list is not exhaustive, so that it includes any act or occurring fact which may result in an obligation in accordance with the prevailing legal order. It therefore includes, just like the concept of "juridical fact", sources of the obligation which are very varied, but without creating any true legal category, on the basis that the various elements lack any common regime or common function.

The Swiss code of obligations of 1911 is established around another classification, also tripartite. The first title of the first part, entitled "The creation of obligations", is

43 See, for example, H. DE PAGE, *Traité élémentaire du Droit Civil Belge, Principe, Doctrine, Jurisprudence*, Tome II, 3rd edition, Bruylant 1964, pp. 402 to 408.

44 V. E. KRAMER, in Münchener Kommentar zum BGB, 5th edition 2007, Introduction to § 241, nº 53.

45 "Ogni altro atto o fatto idoneo a produrle […] in conformità del ordinamento giuridico".

divided into three chapters: Contract, illicit act (delict) and illegitimate enrichment. The *negotiorum gestio* appears among the contracts (art. 419 and following).

This is the reason why the authors of the German BGB, in 1900, went further still and did not provide any general provision classifying the sources of the obligation, but dealt with the sources of obligation one after the other, placing them in this way at the same level, in section 8 of book 2 (law of obligations), entitled *"einzelne Schuldverhältnisse"* (various obligations): first of all the different types of contract (title 1 to 25, §§ 433 to 811), then enrichment without cause (including the repayment for monies paid under a mistaken belief, title 26, §§ 812 to 822) and the *"unerlaubte Handlungen"* (illegal acts, therefore delicts, title 27, §§ 823 to 853). The *negotium gestio*, for technical reasons, is dealt with after representation (title 13, §§ 677 to 687), on the basis that its legal regime requires references to the law of representation.[46] The Dutch Civil Code (Burgerlijk Wetboek, BW) similarly, adopts a radical approach: there is no more classification of the sources of obligation, and it provides merely that "obligations can only arise in the cases provided by law".[47]

The reluctance on the part of the modern legislators in these systems has enabled academics from the relevant countries to work on more complex classifications, classifications which were more in line with the common function or legal regime appropriate to the various sources of obligation. This approach has led the academics to abandon the notion of juridical fact, which does not cover a homogenous concept with a sole applicable legal regime. In this way, German academics (**a**) as well as Italian academics (**b**), are just two examples of academics developing original classifications.

a) The diversity of German classifications

The classification of sources of obligation is not a subject which caught the attention of the German legislator, nor did it arouse the interest of academics. Contemporaneous German scholarship, in the outlines of most legal works on the law of obligations, only makes a distinction between *"vertragliche Schuldverhältnisse"* (contractual obligations) and *"gesetzliche Schuldverhältnisse"* (legal obligations). It is this *summa divisio* which carries real legal consequences, in that certain provisions contained in the general section on the law of obligations only apply to contractual obligations (see title 3 of the 2nd book of the BGB, entitled "obligations arising out of contracts"[48]).

Of course, within the category of legal obligations, various sources are identified, such as the delict, the enrichment without cause (including repayment for monies paid under mistaken belief), the *negotiorum gestio*, as well as other sources such as reliance/theory of appearance (*"Rechtsscheins-* or *Vertrauenshaftung"*), the objective liability for endangering another person (*"Gefährdungshaftung"*, for example liability for defective products or in the event of a traffic accident) or the sacrifice in the interest of a third party (*"Aufopfe-*

46 A specific section dealing with "obligations arising out of other sources", which was planned in a previous draft, and which was to bring together quasi-contracts and quasi-delicts, was not incorporated into the final draft of the BGB, see Motive zum BGB, II, p. 829.

47 Art. 6:1 BW "Verbintenissen kunnen slechts ontstaan, indien dit uit de wet voortvloeit."

48 "Schuldverhältnisse aus Verträgen".

rungshaftung").[49] But these sources are no longer grouped together because they are governed by different regimes and have different functions. The category of quasi-contracts is therefore not recognised under German law: the *negotiorum gestio* and enrichment without cause are not treated as quasi-contracts, or even as quasi-juridical acts. The *negotiorum gestio* is only punctually affected by certain provisions of contract law, such as for example the legal regime applicable to bad management, or the rules of representation for the reimbursement of costs and expenses incurred by the manager. Cases of enrichment without cause can give rise to legal proceedings which can be divided into two broad categories, the "*Leistungskondiktionen*" and the "*Nichtleistungskondiktionen*". These two categories cover cases which are very different from one another, which makes it impossible to identify a common legal regime.

Furthermore, in German legal theory, a specific obligation is always qualified as contractual or non-contractual in a specific context. The issue could arise, for example, when determining the applicability of European rules of private international law, such as the rules of the Regulation 44/2001 of 22 December 2000 ("Brussels I Regulation")[50] or of the Rome Convention of 11 June 1980 on the law applicable to contractual obligations. A different approach is concerned not only with the qualification of an obligation, but with the global relationship between the parties ("*Schuldverhältnis*", obligation in the wider sense), in order to impose the application of contractual liability rules, which under German law, are much more favourable to the obligee than the rules of tort. The existence of a "*Sonderverbindung*" (special relationship) between two parties is sufficient for the rules of contract to apply. This notion, first advocated by academics, was accepted – not in the wording but as a matter of principle – by the legislator in drafting the reform of the German law of obligations in 2002: In accordance with the new § 311 para. 2 BGB, a "*Schuldverhältnis mit Pflichten nach § 241 Abs. 2*" (a relationship of obligation which creates duties of respect for the property and interests of the other party – and therefore giving rise to "contractual" liability) may result from entering into negotiations or other business contacts. This is the legal basis for the "*culpa in contrahendo*" under German law, which is considered as quasi-contractual. In addition, even a legal obligation under German law can become a "*Sonderverbindung*" which results in the application of contractual responsability. If therefore an obligation to compensate for damage under the rules of delictual liability is badly performed, then rules of contractual liability will apply, even though the initial content of the obligation was defined by law. It is clear that the distinction between contractual matter and non-contractual matter is made differently depending on the approach taken.

b) The Original Categories under Italian law

Italian law contains expressions which are close to those used under French law: the "*fatto giuridico*" seems to be the translation of the expression "*fait juridique*" and "*l'atto giuridico*" seems to be the equivalent of the "*acte juridique*". However, these impressions

49 See, with regard to Swiss law, which in this respect is comparable to German law, E. BUCHER, *Vertrauenshaftung: Was? Woher? Wohin? in: Mélanges Hans Peter Walter*, 2005, p. 235 and 252.

50 Council Regulation 44/2001 dated 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 12/1 of 16 January 2001.

are misleading and the Italian expressions have a particular meaning which is different from the French meaning: the Italian system has not adopted, as did the French system, a general classification based on this binary distinction between juridical act and juridical fact.

The "*fatto giuridico*" includes any event, any action, to which the legal system ascribes a legal consequence.[51] Within this category, "juridical facts" in the narrow sense, and "juridical acts" can be distinguished. "Juridical facts" are events which are not caused by human intervention whilst "juridical acts" refers to events which result from human intervention.

For a century, the category of "*fatto giuridico*" had an equivalent under French law, which is the "*fait juridique au sens large du terme*"[52] (juridical fact in the wider sense). This category includes all events which take place in society and which result in legal consequences, by creating, transferring and extinguishing rights. It is interesting to note that French introductions to law, rather than defining the juridical fact in its wider sense, as it is understood in Italy, proceed directly with the presentation of juridical facts in the more narrow sense, as the sources for the creation, modification and extinction of legal relations. The "*fattispecie*" covers all the circumstances which are necessary and sufficient for a legal effect to occur.[53] There is an echo of this definition in the work of DEMOGUE, who, speaking of a juridical fact *stricto sensu* refers to "*l'ensemble des conditions nécessaires pour produire un effet juridique*"[54] (all the conditions which are necessary to produce a legal effect). Under Italian law, there is a further distinction between the "*fattispecie astratta*", the factual conditions, envisaged in an abstract way, which are necessary to produce a legal effect and the "*fattispecie concreta*", the facts which have really occurred and which are likely to produce legal effects.

The "*atto giuridico*" is a sub-category of juridical facts *lato sensu*. Juridical acts are human, conscious and voluntary actions.[55] When compared to the fact, what is specific about the act is that it always concerns man. There is an act whenever the "power of control and self-control"[56] of the subject can be identified. The theory of fault and imputability is built on this basis, as well as the theory of liability. The act is then human behaviour, whether positive or by omission, controlled or potentially controlled by will. The Italian system is therefore far from the French systematization. In France, "*l'acte juridique*" is defined in a more restrictive sense as a manifestation of will intended to produce legal effects. It is much closer (although not identical) to the Italian category of "*negozio giuridico*".[57] The "*atto giuridico*" which is not a "*negozio giuridico*" would under French law be included in the category of voluntary juridical facts. The category of acts includes "*atti leciti*" on the one hand and "*atti illeciti*"[58] on the other. The former are acts which are in accordance with all legal requirements, such as operations (or real or material acts or behaviour) or declarations, acts which are intended to communicate

51 A. TORRENTE, P. SCHLESINGER, *Manuale di diritto privato*, Milano 2004, p. 139.

52 R. SACCO, P. CISIANO, *Il fatto, l'atto, il negozio*, Milano 2005, p. 10.

53 A. TORRENTE, P. SCHLESINGER, *op.cit.*, p. 140.

54 R. SACCO, P. CISIANO, *op.cit.*, p. 34.

55 R. SACCO, P. CISIANO, *op.cit.*, p. 124.

56 R. SACCO, P. CISIANO, *op.cit.*, p. 125.

57 G.B. FERRI, *Il negozio giuridico*, Padova 2001, p. 24.

58 A. TORRENTE, P. SCHLESINGER, *op.cit.*, p. 155.

one's thoughts, opinions or intention to others. Among these are the "*negozio giuridico*", the "*dichiarazioni di scienza*" and the "*atti dovuti o satisfattivi*". The first is a declaration in which private persons express the intention of settling their interests within the limits allowed by the system. The second is a declaration which announces the knowledge of an act or a situation. The "*atti dovuti o satisfattivi*" constitute the carrying out of a duty. Illicit acts, on the other hand, are acts which are in breach of legal duties and which result in damage to a third party's interests.

A large number of modern systems have moved away from the French classification, abandoning all references to juridical facts. The juridical act, however, has become more independent and moved away from the contract, to become the key element which includes all manifestations of human will.

2. The juridical act breaks free

German law, under the influence of the Pandectists during the XIXth century, marks a clear separation between the juridical act and the contract: the juridical act is a broad category which includes all manifestations of will, whether or not they create obligations (**a**). The Italian system, in the same way, relies on the notion of "*negozio giuridico*" which is separate from the notion of juridical act (**b**).

a) The "Rechtsgeschäft" and similar terms under German law

The BGB has attached a huge importance to the notion of "*Rechtsgeschäft*" (juridical act). A juridical act (*"Rechtsgeschäft"*), in this sense, is made up of one or more declarations of will, which, possibly accompanied by a material action (for example the physical handing over of an asset), produce a legal effect because this is the intention of the parties. The juridical act therefore refers to a private transaction, which carries legal consequences based on the intention of the party who expressed such intention: it is not a mere source of obligation. Among juridical acts, the following can be distinguished: unilateral juridical acts (such as the will, the power of attorney, the rescission, termination, withdrawal and cancellation), bilateral juridical acts (contract imposing obligations or contract requiring performance, such as the transfer of ownership or sale of debt) and multilateral (contract for the creation of a company, assignment of a contract, subrogation). Only some of the juridical acts are a source of obligations, whilst the rest produce other legal effects, such as the cancellation of a contract (unilateral termination, rescission or cancellation) or the transfer of a right (sale of a debt or transfer of ownership).

This category has evolved and become detached from the notion of contract as the result of the works of the XIXth Century pandectists (PUCHTA, SAVIGNY, WINDSCHEID, amongst others). They realised that a number of problems are common to contracts, certain other conventions and to certain unilateral acts. The notion of "*Rechtsgeschäft*" aims to represent the common core for these phenomena; it acts as an anchoring point for provisions which are common to them. This is why approximately 80 articles (§§ 104 to 182) appear in the 3rd section of the General Provisions of the BGB, entitled "*Rechtsgeschäfte*", including rules concerning incapacity, representation, forma-

tion and validity of unilateral and multilateral juridical acts, lack of consent, interpretation of declarations of intention, form and conditions.[59]

The notion of "*Willenserklärung*" (declaration of intention) is very close to that of "*Rechtsgeschäft*": because the "*Rechtsgeschäft*" is made up of at least one "*Willenserklärung*", the latter is an essential element of the former. There are a number of provisions in the BGB which deal with "*Willenserklärungen*" which in fact are directed at the "*Rechtsgeschäft*" of which they form part.[60]

In addition to the "*Rechtsgeschäft*", academics have identified real acts *("Realakte")* and juridical quasi-acts *("geschäftsähnliche Handlungen")*. "Real acts" are acts which produce legal effects which are not declarations and the legal effect of which occurs even if it is not intended because it is imposed directly by law. Traditionally, the categories of legal acts (such as the physical handing over of an asset or the return of an insult)[61] and illegal acts are included in the real acts. Illegal acts, whether they form the origin of tortious liability, or whether they cause enrichment without cause (when there is no fault), are not brought together under any common expression other than "illegal act". It should be noted that the classification of acts does not arouse a great deal of academic interest in Germany. Terminological choices remain largely unexplained, because they do not lead to any legal consequence. The BGB does not in fact contain any provision referring to the notion of "*Realakt*", or to a term which is common to the various types of real acts.

The "*geschäftsähnliche Handlungen*" (juridical quasi-acts) are declarations, the legal effects of which occur, not because they are intended, but because the law imposes them directly upon the relevant declaration[62] (for ex. the issue of a summons to do something, which in accordance with § 286 para. 1 BGB, results in a certain effect for the obligor, although this consequence is not intended by the obligee). They are often declarations of fact or knowledge ("*Tatsachen-*" or "*Wissenserklärung*"). Certain provisions in the general section of the BGB, which apply to juridical acts are applicable to some of these quasi-acts. The application of these provisions occurs in a teleological way, depending on their usefulness. Thus, there is no doubt that the rules on representation also apply to the issue of summons, even though such action is a "*geschäftsähnliche Handlung*" and not a "*Rechtsgeschäft*".

The labelling of the act does not necessarily have repercussions on the labelling of the source of the obligation. For example, the promise of a prize sent to an individual in the context of an advertising lottery is considered to be a "*geschäftsähnliche Handlung*" (juridical quasi-act).[63] Despite this labelling, the German Supreme Court took the view after some hesitation, in the context of the application of the Brussels I Regulation, that the case brought against the person making the promise, finding its legal basis in § 661a

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59 It is interesting to note that the term "*Rechtsgeschäft*" had already been used by the Austrian ABGB, to refer to the source of the obligation (§ 859 ABGB) and also in the provisions on capacity (§§ 151, 154 ABGB). See, following the same principles as German law, the Dutch articles 3:31 to 3:59 of the BW.

60 The notion of "*Willenserklärung*" is also familiar to Austrian law, under which for example the legal treatment of lack of consent applies to any "*Willenserklärung*" (§ 876 ABGB).

61 R. BORK, *Allgemeiner Teil des Bürgerlinchen Gesetzbuchs*, 2001, n° 277; contra, D. MEDICUS, *Allgemeiner Teil des BGB*, 8th ed., 2002, n° 196.

62 R. BORK, *op.cit.*, n° 277; D. MEDICUS, *op.cit.*, n° 197.

63 S. LORENZ, *JuS* 2000, 833, 842 and NJW 2000, 3305, 3307; Th. RIEHM, *Jura* 2000, 505, 513.

BGB and not in the intention of the promissory, came under contractual rules in accordance with article 5.1 of the Regulation.[64] This disparity is due to the fact that the classification is a relative concept which varies, depending on the approach taken, as described above.

b) The "negozio giuridico" under Italian law

In the Italian legal system, the juridical act has also gradually been separated from the declaration of will. The term "*negozio*" has been widely used by academics because of the strong influence exercised by German academics. Initially, many academics tried to adapt the German concept of the "*Rechtgeschäft*", translated as "*negozio giuridico*". After this first period, certain academic authors put forward a general theory of the "*negozio*": BETTI, for example, considered this notion to be an instrument of the autonomy of the parties, consisting of a declaration or mere conduct, the structure of which would be provided by the external act.[65] The "*negozio giuridico*" continues to provide matter for debate now: some argue that the notion is in crisis because it does not have any use,[66] whilst others see it as one of the essential manifestations of individual freedom in private law.[67]

In accordance with the traditional academic definition,[68] the "*negozio giuridico*" is a "declaration of will setting out the intended legal effects and to which the legal system attaches legal effects in accordance with the intended result".[69]

This definition arises out of the general analysis of the role of intention in the legal system.[70] The area of "*negozio giuridico*" is there to provide individuals with a necessary autonomy, the opportunity to organize their affairs, but with the assurance that this private regulation should be enforceable. The legal system grants private persons the power to create a legal rule regulating their relations and changing the preexisting legal situation.

For a long time, the "*negozio giuridico*" was limited to the declaration of will. Any type of behaviour which was not a declaration was initially placed in the residual category of other juridical acts. In the absence of an express declaration of will, the existence of a "*negozio*" was not recognised. During the XXth century, it was gradually accepted that the

64 BGH, 1st December 2005, III ZR 191/03; NJW 2006, 230. This judgment accepts the qualification adopted by the ECJ in the *Engler* decision (see the observations below in the section dealing with acquis).

65 E. BETTI, Teoria generale del negozio giuridico, Torino 1943.

66 See, for example, F. GALGANO, L'atto giuridico come categoria ordinante il diritto privato, in C. e impr., 1990, p. 1001; Diritto privato, 2004.

67 See, for example, SCALISI, Categori e instituti del diritto civile nella transizione al postmoderno, Milano 2005, p. 581 and p. 616; R. SACCO, P. CISIANO, *op.cit.*, p. 306; A. DI MAJO, Contratto e negozio, linee di una vicenda, in: AAVV, Categorie giuridiche e rapporti sociali. Il problema del negozio giuridico (a cura di C. SALVI), Milano 1978, pp. 177.

68 V.R. SACCO, *Introduzione al diritto comparato*, Torino 2003, p. 261.

69 See, the contemporary reference to the programme which the parties intend to carry out, R. SACCO, P. CISIANO, *op.cit.*, p. 426.

70 G.B. FERRI, *Il negozio giuridico*, Padova 2001, p. 43.

will did not necessarily depend on an express declaration. Consequently, the category of "*negozio giuridico*" was extended to all acts in which a manifestation of will could be identified, whether this was done expressly, tacitly and in such case, evidenced by behaviour. Various "*negozi*" have therefore been identified: the "*negozio-dichiarazione*", the "*negozio-manifestazione*", the "*negozio di volontà*" and the "*negozio di attuazione*".[71]

Contracts,[72] wills and marriages are considered to be "*negozi giuridici*".

The classification of the "*negozi giuridici*" can be effected in accordance with a number of criteria. Firstly, a distinction can be operated between the "*negozio unilaterale*" and the "*negozio bilaterale o plurilaterale*". Secondly, by examining the function carried out by the "*negozio giuridico*", reference is made to the "*negozi mortis causa*", the effects of which presuppose the death of a person (the only example is the will) and to the "*negozi inter vivos*", which do not require this condition. Thirdly, a distinction is made between the "*negozi giuridici*" which relate to family law and the "*negozi giuridici*" which affect assets. Finally, reference is made to the "*negozi ad effetti reali*", which determine the transfer or creation of chattels real or another right, and the "*negozi ad effetti obbligatori*", which give rise to a compulsory relationship.

The essential elements of the "*negozio giuridico*" are the declaration of intention and the "cause". The first may be express or tacit and take on various forms. The process of formation and perfection varies according to the nature of the "*negozio*". The "cause" of the "*negozio giuridico*" is only required in cases where the individual autonomy may influence the content of the "*negozio*", and therefore its effects, as in the case of a contract; the "cause" is not, for example, essential for a marriage or an adoption.

The concept of "*negozio*" was not introduced into the Italian Civil Code in 1942. At the time codification took place, there was no commission which had a strong enough influence to change the structure based on the French model, in parallel sections, into a different structure alternating between "general – special" provisions which characterizes the German BGB. That is the reason why the Italian Civil code uses the term "act" following the most ancient French tradition, in order to refer to what are really "*negozi giuridici*", in expressions such as the "*atto di ultima volontà*", "*atto tra vivi*", "*atto di straordinaria amministrazione*". There are references to the term "act" in articles 2, 320, 428, 1324, 1334, 1350 and 2643. If each of these articles applies to "*negozi giuridici*" as a subcategory of juridical acts, it is more difficult to extend their application to the wider category of "*atto giuridico*".[73] There are references to the "*negozio*" in article 428 relating to capacity and in certain special laws (es. l. 1 June 1939, n. 1989, art. 28 now d.lgs. 29 October 1999, n. 490, art. 57). The Code does not establish expressly and in a general way the notion of "*negozio giuridico*" but refers to its various expressions in a punctual way, whether it be in references to the "*contratto*" (art. 1321-1469), the "*testamento*" (art. 587-

71 R. SACCO, P. CISIANO, *op.cit.*, Milano, 2005, p. 126.

72 R. SACCO, *Il contratto*, Tomo I, Torino 2004, p. 62: In the systematization of French civil law, which can be found in XIXth century Italian law, an act was an act of man. In the light of this approach, the contract is treated as having the same force as a law, but remaining an act, an act of man. By reason of the conceptual reorganisation inspired by the German Systematic school, the contract is now seen under Italian law as a sub-category of "*negozio*"; the latter is a "*fattispecie*", that is to say a number of elements of fact which are necessary and sufficient to produce a certain legal effect.

73 R. SACCO, P. CISAINO, *op.cit.*, p. 124.

712), the "*matrimonio*" (art. 84-142) and other "*negozi giuridici*" which appear in specific provisions. It is possible to identify some sort of regulation, although partial, in article 1324, which extends the rules of contract to all "*negozi giuridici inter vivos*" which have a patrimonial content: the "*negozio giuridico*", named "*atto*" by the authors of the Code, as a normative category, is the only "*negozio giuridico*" with a patrimonial content.

E. Scottish law reveals the interaction between civil and common law systems

Scottish law is at the crossroads of two traditions, namely common law and civil law. The work of reference regarding the classification of sources is the work of STAIR, "Institutions of the law of Scotland".

After distinguishing between real rights or dominion on the one hand, which he defines as "a power of disposal of things in their substance, fruits or use" and personal rights or obligation on the other hand, understood as "a power of exacting from persons that which is due", STAIR established a distinction, within this last category, between conventional obligations – defined by the author as the consequences of the expression of intention and consent – and obediential obligations – "put upon men … not by their own will".[74]

The tree diagram below is helpful in understanding the meaning of the divisions advocated by STAIR.[75]

"For modern purposes, however, the fundamental distinction must be taken, following STAIR and ERSKINE, as between obligations assumed by one to another, or both parties to each other, by choice or act of the will, and legal or obediential obligations imposed on parties in particular circumstances by force of law independently of their will. Obligations of the former class comprise both unilateral voluntary undertaking or promises and bilateral conventional or consensual obligations or contracts".[76]

It would therefore appear from the structuring of obligations as inherited from the works of STAIR and ERSKINE, that the "*conventional obligations*" cover contracts as well as unilateral juridical acts and that the word "*obediential obligations*" designates the delict (and/or quasi-delict) and various forms of what civil law countries name as quasi-contracts: negotiorum gestio, on the one hand, and enrichment without cause together with repayment of monies paid under mistaken belief on the other hand.[77]

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74 D. VISSER, N. WHITTY, "The Structure of the Law of Delict in Historical Perspective", in: D.L. CAREY MILLER, R. ZIMMERMANN eds., *The Civilian Tradition and Scots Law: Aberdeen Quincentenary Essays* (1997), pp. 434-435.

75 R. EVANS-JONES, "Unjustified Enrichment", in: *A History of Private Law in Scotland*, Volume 2 Obligations, K. REID, R. ZIMMERMANN eds., OUP 2000, p. 375.

76 D.M. WALKER, *The law of Contracts and related obligations in Scotland*, T & TClark, 3rd edition, Edinburgh, 1995, p. 4, n° 1.6.

77 The analysis is in fact attacked by D. VISSER et N. WHITTY, when they examine the subdivisions of the notion of "*Obediential Obligations*", advocated by STAIR: "*[with regard to the subcategories within Restitution: Recompense, Remuneration and Reparation for delinquence and damage] The first two categories cover roughly what we would today classify under unjustified enrichment and negotiorum gestio, while the last one covers what would today be called delict.*" *op.cit.*, p. 441.

If the classifications suggested by GAIUS and JUSTINIAN are at the heart of Scottish law and have been the basis for academic works on classification, various opinions have been voiced[78] denouncing the lack of effort towards a systematization in contemporaneous Scottish law. Indeed, "in the light of the political and cultural strength",[79] it would appear that the Scottish legal system may be tempted to follow the route taken by English law and therefore to move away from the systematic approach inherited from Roman law.

II. The English Law Approach to the Organisation of the Law of Obligations

Historically, common law has not favoured a systematic approach (**A**). However, a tripartite classification of the law of obligations would appear to have emerged under positive law (**B**).

A. The traditional absence of a systematic approach

Under English law, an analysis of the organization of obligations does not necessarily involve a systematic organization of their sources. In fact, the very idea of a "system" is foreign to common law.[80] This is in some sense what Roman law and common law had in common, at least during a certain period: the adoption of a non-systematic approach to law, with the result that "legal matter" was made up of a list of actions,[81] each one widely documented.

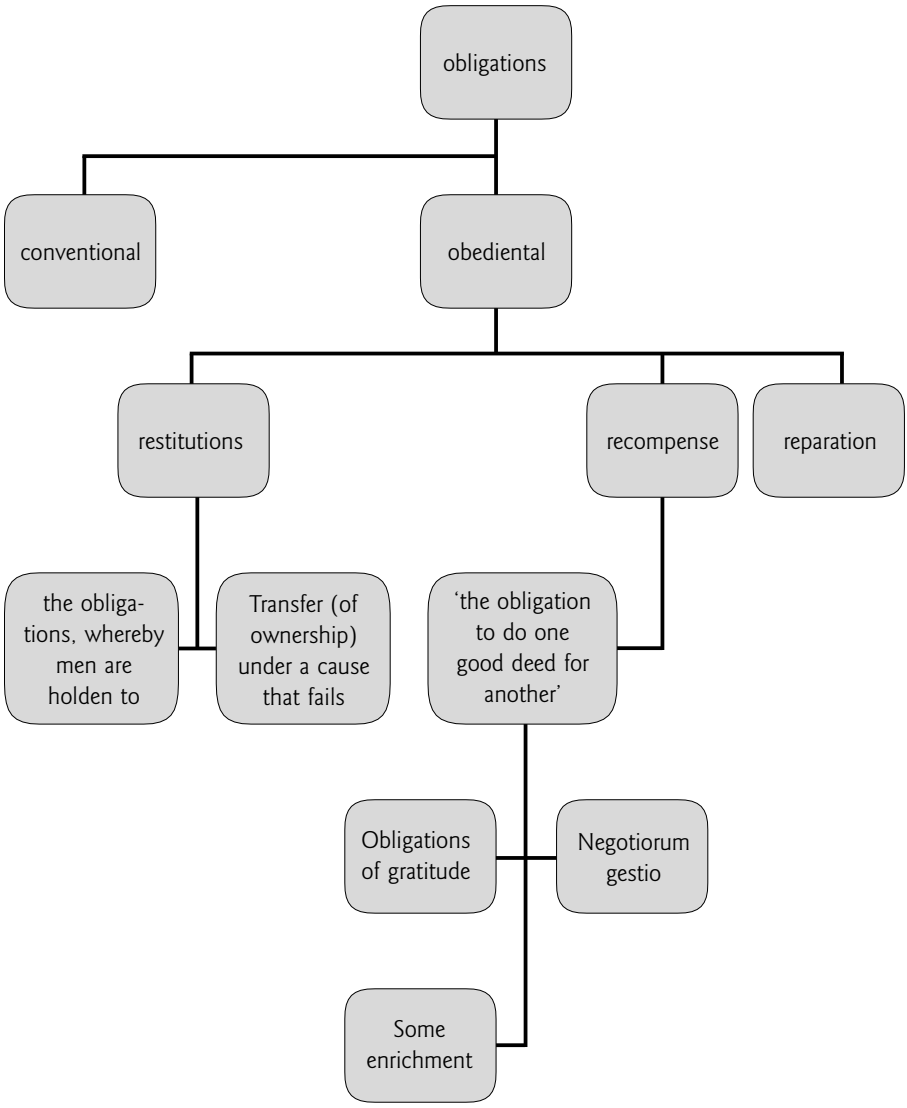
This technique was used under Roman law, until the IIIrd century BC and under English law, until the middle of the XIXth century. However, whilst the solutions sug-

78 P. BIRKS, "The Foundation of Legal Rationality in Scotland", in: *the Civil Law Tradition in Scotland*, R. EVANS-JONES (ed.) 1995, p. 83.

79 R. EVANS-JONES, "Civil Law and Scottish Legal Tradition", in: *the Civil Law Tradition in Scotland*, R. EVANS-JONES (ed.) 1995, p. 3 à 8.

80 P.H.B. BIRKS, "More Logic and Less Experience: The Difference between Scots Law and English Law", in: *The Civilian Tradition and Scots Law, Aberdeen Quincentenary Essays*, D.L. CAREY MILLER, R. ZIMMERMANN, eds., Dunker & Humblot, 1997, 167-168: P.H.B. BIRKS, *ibid "There is no crisis, only a cloud on the horizon. […] If the common law cannot install new mechanisms against intellectual disorder, it will come under increasing criticism and it will not be able to resist the next wave of enthusiasm for codification. More attention must be paid to the rational strength of the law. The search for principle must be conducted more vigorously. That means more logic and less experience, more system and less empiricism"*. He adds, a few lines down, that *"common law has never streamlined the categories of its thought. That is what is meant by the absence of system. At the highest level, the level of the whole law, common lawyers have no shared vision, just lists of more or less familiar topics. At the lowest levels, where individual liabilities are determined, contradictory angles of approach not infrequently co-exist"*.

81 "The earlier principle of organisation was the list of all claims claimable. That is what we mean when we speak of the forms of action. Every 'form of action' was a claim claimable or, in other words, a proposition which a plaintiff was permitted to advance and which, if he could substantiate it, would win his case", P.H.B. BIRKS, ibid.



gested by GAIUS or JUSTINIAN are well known, those adopted under English law remain obscure. With the notable exception of the Rule of Precedent, created with a view to minimise legal instability and incoherence, there does not seem to have been any great effort towards classification, as illustrated by the piecemeal approach which prevails, even today, in anglo-saxon legal publications, in particular with regard to the law of obligations: *"It is interesting, therefore, to read in the Preface of the first edition of 'the law of tort' that Pollock was conscious of the need for writing an English Law of Obligations. The book is dedicated to Willes J. and Pollock says that Willes J. had always urged the writing of an English law of obligations. Pollock then adds that a book on the law of tort added to a book on the law of contract does not of course complete a law of obligations. […] it was not until Goff and Jones that*

real headway was made with obligations arising from miscellaneous events beyond contract and tort. We now have, in different books, an almost complete law of obligations in English".[82]

If an organisation of the law of obligations can be identified in England, it is merely implied. En 1995, the Law Society and the General Council of the Bar[83] listed the seven foundation subjects which students were required to study.[84] It is possible to discern a structure which is reminiscent of Roman law divisions.

B. The modern organisation of the law of obligations

The English law of obligations is now, and has been for a short time, organised quite classically, into three distinct parts: Contract, Tort and Restitution.[85]

A. BURROWS defends this threefold classification, which he acknowledges is an oversimplification,[86] but which deserves to be examined.

The notion of contract, according to A. BURROWS, remains traditional in the anglo-saxon context. It must be understood as a binding promise and include *"[…] what constitutes a binding promise and how such a promise is made; […] the remedies for breach of such a promise and [the person] who is entitled to the remedies*".[87]

In parallel, the notion of tort is defined negatively as relating to *"(common law) wrongs, other than breach of a binding promise*". Certain anglo-saxon authors are reluctant to accept such a category,[88] in that it includes under the same heading cases of liability which are different, and refer sometimes to a type of behaviour (trespass to the person, libel and nuisance), sometimes to a state of mind (tort of negligence) or to cases of objective liability (trespass and libel) which exist side by side with cases for which proof of damage is required (nuisance and negligence).

Finally, there is the category of Restitutions, which is the most recent. It is based on the idea of fighting against unjust enrichment. In outline, the category of Restitution is made up of what used to be called quasi-contracts in England. It includes, therefore action for money had and received to the plaintiff's use, action for money paid to the defendants's use and the quantum meruit for the reasonable value of work done.

Indeed, the undelying principle during the XVIIIth century was as follows: "A man had to pay for a benefit received, when it was his duty to pay, and whether or not that

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82 *Ibid*, p. 184.

83 Notice to Law Schools Regarding Full-Time Qualifying Law Degrees, January 1995.

84 These are "(1) Obligations I, (2) Obligations II, (3) Foundations of Criminal Law, (4) Foundations of Equity and the Law of Trusts (5), Foundations of the Law of the European Union, (6) Foundations of Property Law, (7) Foundations of Public Law". P. BIRKS is particularly eloquent: "The Haphazard sequence is symptomatic of the English indifference to legal taxonomy, and it shows that there was no formulated intention to use civilian categories. Nevertheless, if we reorder the list, we will see that the institutional scheme is present below the surface of this pronouncement." P.H.B. BIRKS, *op.cit.?* p. 185.

85 J. BEATSON, *Anson's Law of Contract*, 28th edition OUP, pp. 22-23.

86 A. BURROWS, *op.cit.*, p. 15; also, P.S. ATIYAH, Contracts, promises and the law of obligations, (1978) 94 L.Q.R. 193.

87 A. BURROWS, *op.cit.*, p. 3.

88 A. BURROWS, *op.cit.*, p. 120. This is the chapter entitled: *"in Defence of Tort*".

duty was acknowledged by a promise, was a secondary. The result is well known: contract and quasi-contract were both enforced by the same action of assumpsit."

XIXth century Anglo-saxon jurists advocated a separation between the two actions, making a distinction (perhaps an artificial one) between the promises implied by facts and those which were implied by laws. In any event, it would appear that Anglo-saxon law has long been familiar with this category of quasi-contracts, which already were based upon the underlying idea of unjust enrichment.

Moreover, in medieval law as well as during the XVIIIth century, a form of *negotiorum gestio* (in the sense of the French *"gestion d'affaires"*) was recognized:

"where the defendant's wife died in England while he was in Jamaica. The Plaintiff, the wife's father, paid the funeral expenses and then reclaimed them from his son-in-law. The defendant was held liable even though he had neither assented nor requested. It is to be observed that the Court saw the problem in terms of "consideration", that is, it perceived the problem as being whether the defendant had received a benefit which he should be made to pay for".[89]

P. BIRKS has recently criticized the place given to the category of Restitutions alongside Contract and Tort, on the basis that it places *"a response-based category (restitution) alongside event-based categories (contract and tort)"*. He adds: *"the division [between contract, tort and restitution] is manifestly unsatisfactory, in a way that carries over into all our thought about the subject. Restitution cannot align with contract and tort, since restitution is a legal response to events (like compensation and punishment) and they are events to which the law responds"*.[90]

Alternative classifications have therefore been put forward by various academics: P.S. ATIYAH[91] suggested that the law of obligations be restructured around the distinction between reliance-based and benefit-based liabilities. Lord COOKE[92] suggested that duties of reasonable care should be recognized as "a distinct chapter of the law whether they originate in contract, tort or otherwise". J. STAPLETON,[93] more recently, argued for an organisation structured around the different ways of assessing damages: *"so that contract would alone be concerned with what she terms the 'entitled result' measure, whereas tort would alone be concerned with what she terms the 'normal expectancies' measure"*.[94]

Although there is no doubt that the mecanisms involved have existed for a long time, the main difficulty lies in the fact that the notion of unjust enrichment cuts across boundaries.

Indeed, this underlying idea transcends the age-old division between common law and equity. The acknowledgment of this category, generally identified in the decision in *Lipkin Gorman v. Karpnale ltd*,[95] is directly linked to a number of factors. The *Restatement*

89 Jenkins v. Tucker [1788].

90 P. BIRKS, *The Classification of Obligations*, OUP 1997, p. 20 quoted by A. BURROWS, *op.cit.*, p. 8.

91 P.S. ATIYAH, *The rise and fall of the freedom of contract* (1979), Oxford, Clarendon Press, pp. 4, 768, 778-779.

92 R. COOKE, "Tort and Contract", in: *Essays on contract*, P. FINN ed., 1987, p. 228-232.

93 J. STAPLETON, "A New 'Seascape' for obligations: reclassification on the basis of Measures of Damages", in: *The Classification of Obligations*, P. BIRKS (ed.), 1997, p. 193-231.

94 A. BURROWS, *op.cit.*, p. 1.

95 [1991] 2 AC 548.

of Restitution, published in 1937 by the American Law Institute, succeeded, thanks to the efforts of professors SCOTT and SEAVEY, in bringing together common law and equity around the notion of unjust enrichment. Furthermore, the publication in 1966, of the first edition of the work of GOFF and JONES, entitled The Law of Restitution, had the same impact in England as the American restatement had had in 1937. In addition, M. BIRKS published, in 1985, An introduction to the Law of restitution which, after GOFF and JONES' work, gave real added value to this category, which is more and more able to claim a real position within the English Law of obligations. At last, the category was finally recognized in 1991, when the House of Lords acknowledged the mecanism of unjust enrichment in the above mentioned Lipkin Gorman decision.

Beyond the debate which is taking place as to the "new" category of Restitutions under English law, the very distinction between contract and tort, which holds such a central role in the English law of obligations, is contested today – whether in the form of a competition between the two categories or the absorption of one category by the other.

When the advocates of one announce the demise of the other,[96] the defenders of such other list its advantages.

There are therefore limits to a categorization from an Anglo-saxon point of view, as there are under French law, even though the categories involved are different in each system.[97]

Is it necessary to state that a single system of categorization for the law of obligations should be considered and is in fact required in order to build a Common Frame of Reference?

Final Observations. On the basis of recent thinking on Community matters, the notion of juridical act[98] could probably be given prominence as a source of obligations, in the context of a global examination of the law of obligations. Such a notion would to a large extent reflect the notion of *"acte juridique"* (translated throughout as juridical act) defined by French academics and which is used as a wider category by other legal systems such as Italian law and German law. The recognition of such a category would be of particular interest to common law countries, which, although they do not harbour such a notion, do not seem averse to an organizational approach to law, following a movement

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96 A significant academic view has favoured the theory according to which contract was dead because the field of tort had been so extended; See G. GILMORE, R.K.L. COLLINS, *The Death of Contract*, 2ème éd., Ohio State University Press 1995 quoted by R. ZIMMERMANN, *op.cit.*, p. 12; also P.S. ATIYAH, *op.cit.*, p. 345, 388, 398, 681 and 716 who argues, based on a historical analysis, that there were initially no real differences between contractual and tortious liabilities in England. According to him, the distinction appeared, with principles and concepts being introduced within the law of contract, around 1870, at the time when the theory of autonomy was strongest, and under the influence of POTHIER and SAVIGNY. He will write concerning the two men: *"Their works continued to exercise a dominating influence on English contractual thought through the next hundred years, and indeed, may be said to still rule us from their graves"*, *op.cit.*, p. 682.

97 The limits are essentially understood in very terms that are very similar, finally, to those used under French law, and which relate to the function of liability, especially contractual liability (compensation or equivalent performance).

98 See *infra*, Acquis Communautaire and Acquis International.

which seems to reflect the continental influence on the insular system, or more simply, of the European Union on England.

Conversely, the notion of juridical fact, which brings together delict, quasi-delict and quasi-contract, comes across as less relevant in the context of a global process of analysis relating to a common frame of reference in Europe.

Indeed, although "contract" (as the main element in the category of juridical acts) and "tort" can clearly be opposed, the category of quasi-contracts gives rise to difficulties. Even if it is possible to identify a general recognition of the notion of unjustified or unjust enrichment or of the concept of benevolent intervention in another's affairs, it would no doubt be premature to group them under the name of quasi-contract; even in France, the position of the quasi-contract remains marginal and uncertain. In this respect, it may appear simpler, in order to be more effective, initially to prefer a less global approach and to identify mecanisms separately before considering any grouping under a common name. Certain authors have in fact shown reluctance, on the basis of a comparative examination of different systems within the European Union, to recognize the existence of quasi-contracts as a homogenous and stand alone category.[99]

Acquis Communautaire and Acquis International

The distinction between juridical act and juridical fact is not commonly made in Acquis Communautaire and Acquis International. Indeed, such a distinction would in principle arise out of a wish to organise the sources of obligations, which is absent from Acquis Communautaire and Acquis International spheres.

However, despite the absence of a classification of sources of obligations in Acquis Communautaire and Acquis International (**I**), it seems possible to identify a movement which, as part of a more global approach, may tend towards a possible classification of the law of obligations based on sources (**II**) and which could probably admit a threefold categorization around the notions of juridical act, non-contractual liability for damages and unjustified enrichment.

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99 Ch. VON BAR, "Die Überwindung der Lehre von den Quasiverträgen in den Privatrechten der Europäischen Union", in: *Mél. H. STOLL* 2001, p. 93. According to Ch. VON BAR, Spain and France are the only countries to have retained the notion of quasi-contract as such, but without there being a specific univocal régime for such notion. Although the author notes that article 4.115 of PECL includes the repayment of sums paid under a mistaken belief within the provisions dealing with contract, he takes the view that this presentation is merely due to the "aesthetics of codification" which does not reflect a qualification (p. 112).

I. There is no Classification of the Sources of Obligations Based on a Distinction between Juridical Act and Juridical Fact

In Acquis Communautaire and Acquis International, the law of obligations is not considered as a whole, and therefore the distinction between juridical act and juridical fact is not, prima facie, relevant, whether under international law (**A**), or under Community law (**B**).

A. The lack of a distinction between juridical act and juridical fact in Acquis International

Acquis International would appear to give more weight to questions relating to contract. Only a limited number of international conventions relate to tortious liability: for example, The Hague Convention on the law applicable to Traffic Accidents of 4 May 1971 and The Hague Convention on the law applicable to Products Liability of 2 October 1973.[100] In addition, these conventions have a limited application since they only deal with questions of private international law. They partially unify certain rules of conflicts but do not affect substantial law.

B. A distinction which is foreign to Acquis Communautaire

Acquis Communautaire, with its piecemeal approach to harmonisation, shows an absence of systematization of the sources of obligation, with the exception of case law relating to the Brussels I Regulation, in which the quasi-contract appears to have acquired a particular role (**1**). Moreover, current developments in European contract law illustrate the interdependence between contract and delict (**2**).

1. A piecemeal approach, incompatible with the systematization of the sources of obligation

Under Community law, there are few direct references to any sort of harmonisation of the rules relating to liability (see for example one of the rare pieces of legislation on the issue: Directive 85/374 of 25 July 1985 relating to liability for defective products[101]).

Whilst the objective of contract is to enable the transfer of wealth, the raison d'être for the rules of liability in Europe is based more upon a requirement for economic effectiveness in the internal market, avoiding the distortion of competition linked to forum

100 The French Cour de cassation, in a judgment of 7 March 2000 (Cass. Civ., 1ère, 7 March 2000, *Torfwerke*), held that the law designated by the contractual conflicts of law rule should govern the relationship between the victim and the person liable for the damage, whether the liability is labelled as contractual or tortious. *Rev.crit.* 2001.101, note P. LAGARDE.

101 Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products (OJ L 210, 7.8.1985, p. 29-33).

and law shopping. The recent judgments of the ECJ dated 25 April 2002,[102] declaring Directive 85-374 as requiring complete harmonisation, follow this logic.

The Rome II Regulation, which is not only the equivalent, for non-contractual obligations, of the Rome convention on the law applicable to contractual obligations,[103] but which also echoes article 5.3 of the Brussels I Regulation (it should be mentioned that the quasi-contract is not expressly referred to in this article), is also relevant to the issue.

In the Rome II Regulation, a distinction is suggested between, on the one hand, *torts/delicts* (Chapter II) which, beside certain particular cases of liability (product liability (Article 5), unfair competition and acts restricting free competition (Article 6), environmental damage (Article 7) and infringement of intellectual property rights (Article 8) and industrial action (article 9)) correspond to cases of tortious liability and, on the other hand *Unjust enrichment, negotiorum gestio and "culpa in contrahendo"* (Chapter III). The Rome II Regulation specifies in recital 7 that the material scope of application should be consistent with the provisions of the Brussels I Regulation, which distinguishes, in its articles 5.1 and 5.3, between "matters relating to contract" and "torts, delicts and quasi-delicts".

Such distinctions do not touch upon the question of the place of quasi-contracts in this classification. Have they been omitted? Should they, if that is the case, be included within "matters relating to contract" in a wide sense? This option would appear to prevail.

Two judgments lean in this direction. First of all, in the *Engler* decision,[104] the ECJ held that a marketing prize draw did not constitute a contract within the meaning of article 13 of the Brussels Convention of 27 September 1968 (now covered by the Brussels I Regulation) but that it came under the definition of "matters relating to contract" as per article 5.1 of this Regulation, on the basis that there existed "a legal obligation which was freely assumed by one person as regards another and upon which the plaintiff's claim is based". Such an obligation was found to have arisen from the facts in the case (points 52-56); the ECJ declares at point 56 that "(…) the intentional act of a professional vendor in circumstances such as those in the main proceedings *must be regarded as an act capable of constituting an obligation which binds its author* **as** *in a matter relating to a contract."*

Hence, this intentional act of the professional vendor is not strictly speaking a contract, but would appear to be treated as forming part of "matters relating to a contract", as suggested by the word "as". Moreover, the terms employed by the ECJ are reminiscent of article 1371 of the French Civil Code, which provides: "Quasi-contracts are purely voluntary acts of man, from which there results some undertaking towards a third party, and sometimes a reciprocal undertaking of both parties". Under French law, the Chambre mixte of the Cour de cassation took the view, in a decision dated 6 September 2002 cited above,[105] that "the organiser of a lottery who announces the winning of a prize to a named person without making it clear that there is an element of chance involved, assumes an

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102 ECJ, 25 April 2002, *Maria Victoria Gonzalez Sanchez c/Medina Asturiana SA*, case 183/00, *Rec.* p. I-03901; ECJ, 25 April 2002, *Commission c/République Française*, case C-52/00, *Rec.* p. I-03817.

103 *OJ* n° C 27 of 26 January 1998, p. 34-46.

104 ECJ, 20 January 2005, *Petra Engler c/Janus Versand Gmbh*, C-27/02, *Rec.* p. I-00481.

105 *Bull. Civ.* Mixte, n° 4, p. 9.

obligation, by this purely voluntary act, to deliver such prize", and qualified such marketing prize draws as quasi-contracts. The German Supreme Court hesitated, as mentioned above, regarding how to qualify such lotteries: after taking the view that the promise of a prize should be analysed either as an obligation resulting from a consumer contract[106] or as a delictual obligation,[107] it finally opted for the contractual qualification in line with that adopted by the ECJ (see the observations in the part on Comparative law below).

Perhaps is the ECJ's position not so different from the position adopted by the French Cour de Cassation.[108] Firstly, the Brussels I Regulation does not contain any reference to the notion of quasi-contract, even though article 5.3 lists delict and quasi-delict as parts of the juridical fact. Moreover, the ECJ does not hold the obligation of the professional vendor to be a contractual obligation: it merely specifies that it constitutes an obligation, which binds its author "as" in a matter relating to a contract. It is possible that this judgment is a solution of convenience for the ECJ, who, within the framework of the Brussels I Regulation, took the view that the undertaking assumed by the professional vendor organising the marketing prize draws was closer to a contractual obligation than it was to the field of delict. Beyond the apparent divergences in classification, what is obvious here is the difficulty encountered when seeking to apply strict legal categories, as sources of obligations. In any event, the scope of the proposed extrapolation is necessarily limited to the specific context of conflicts of jurisdiction.

Apart from this case,[109] there are very few formal references, under Community law, to what French law would call *"fait juridique"*.[110] If a distinction is made, this is more likely to be between contract and delictual liability than between juridical act and juridical fact. Such a distinction is reminiscent of that which is in existence in Anglo-saxon laws, which, aside from the recent emergence of the "Restitutions" category, distinguish between Contract and Tort.

2. A contested autonomy for the notion of contract

Generally, the distinction between juridical act and juridical fact is not particularly relevant in a *corpus* which has, as its primary objective, the setting out of rules applicable to contract law, not to the law of obligations. It is however not absent from the Principles of European Contract Law (PECL), in the context of the distinction which opposes contract and civil delictual liability.

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106 See, regarding this point, the ECJ judgment *Rudolf Gabriel* mentioned hereafter.

107 BGH, NJW 2003, 426, 428; BGH, NJW 2204, 3039.

108 See P. REMY-CORLAY, *Rev. crit.*2003.484 below the ECJ judgment, 11 July 2002 *Rudolf Gabriel*, in which it was held that the lottery was a contract within the meaning of article 13 because in this case the hope to win a prize was indissociably linked to an order for goods.

109 See the claims brought for damage to the environment, for infringement of personality rights, for infringement of intellectual property rights or claims for (action en cessation) in consumer law.

110 General studies on this subject are rare. See for example *Principles of European Tort Law*, published by the European Group on Tort Law, Springer Wien New York, 2005.

More specifically, the way in which the question of the breaking off of negotiations is dealt with in recent European codifications also raises the issue of the autonomy of the notion of contract, and more generally, the question as to whether the classifications are relevant.

Firstly, the Rome II Regulation refers in article 12 to the "*culpa in contrahendo*", defined in article 12.1 as "a non-contractual obligation arising out of dealings prior to the conclusion of a contract". The applicable law is, in principle, "the law that applies to the contract or that would have been applicable to it had it been entered into" (article 12.1). Article 12.2 designates the law applicable in the event that the applicable law cannot be determined in accordance with paragraph 1.

Secondly, on a general level, in the preliminary observations of PECL, the commentators note that certain provisions, and in particular those which appear in chapter 9 section 3, are, for certain countries, cases of quasi-contract.

This observation cannot, it would appear, apply to the French system. Indeed, the various instances of restitution provided in this section relate to the consequences of rescission, as a sanction for breach of contract.

Consequently, this sanction finds its source in the notion of contract itself – more precisely, in the effects which the law attributes to certain sanctions for breach – and not in the rather more vague notion of quasi-contract, understood in the English "*Restitutions*" sense.

Moreover, the commentators mention that "most of the topics dealt with in chapters 10 to 17 relate not only to contractual obligations, but also to obligations generally. Thus, the term '*créance*' frequently employed in these chapters, refers to a right to obtain performance, which is the counterpart of an obligation to perform, whether the source of the obligation be contractual or extra-contractual'. They add that the fact that 'fairly large sections of this part III relate to general obligations rather than to the law of contractual obligations only, caused, for the Commission, a problem of discrepancy with the title 'principles of European contract law'. The view was finally taken that the title should be maintained whilst at the same time it should be recognized that certain principles also apply to non-contractual obligations and it would therefore be preferable to set them out in general terms".[111]

More specifically, articles 2:301 and 2:302 included in a section 3 which is entitled "Liability for Negotiations", touch upon a topic which in a number of Romanist laws falls within the category of extra-contractual liability. However, the basis for the "liability" referred to under articles 2.301 and 2.302 is not clarified.

Although the various commentators seem to take the view that such a provision is not incompatible with the solutions generally adopted in the Member States (and therefore could fall within the scope of extra-contractual liability), such a position could be opposed on the basis that these principles form part of Principles of European "Contract" law. A *fortiori*, if a strict approach of the matter is adopted, it could be argued that if this provision appears in a set of rules which are only intended to govern the area of contract, any sanction attaching to the infringement of any rule belonging to this *corpus* necessarily falls within the contractual domain.

111 *Principes du droit européen du contrat*, Société de Législation comparée, coll. Droit privé comparé et européen 2003, p. 24.

Thirdly, in the European Code of Contracts drafted by the Academy of European Private Lawyers of Pavia ("the Pavia Project"), article 6 contains similar provisions on the question of the nature of the liability. However, the limitation on the sources of compensation is striking:

"1. Each of the parties is free to undertake negotiations with a view to concluding a contract without being held at all responsible if said contract is not drawn up, unless his behaviour is contrary to good faith.

2. To enter into or continue negotiations with no real intention of concluding a contract is contrary to good faith.

3. If in the course of negotiations the parties have already considered the essentials of the contract whose conclusion is predictable, either party who breaks off negotiations without justifiable grounds, having created reasonable confidence in the other, is acting contrary to good faith.

4. If the situations considered in the above paragraphs occur, the party who acted contrary to good faith shall be liable for the harm he has caused to the other party to the extent of the costs the latter had to incur while the contract was being negotiated. Loss of opportunities caused by the negotiations underway shall also be made good."

The limit on the damages allowable would appear to result from the indirect application of JHERING's theory on *culpa in contrahendo*; indeed, the damage referred to is a maximum and the drafting does not allow for much doubt regarding damages for loss of expected gain. It would appear that the Pavia Project favoured predictability, as understood by the faulty party. Once again, the basis for the liability is not made clear.

Finally, this issue has been touched upon in other texts. For instance, the UNIDROIT Principles of International Commercial Contracts (version 2004) sanction "Negotiations in bad faith" in article 2.1.15, which provides:

"A party is free to negotiate and is not liable for failure to reach an agreement.

However, a party who negotiates or breaks off negotiations in bad faith is liable for the losses caused to the other party.

It is bad faith, in particular, for a party to enter into or continue negotiations when intending not to reach an agreement with the other party."

Final Observations. PECL deal with questions which relate to the law of obligations in general; this illustrates how difficult it is to approach the notion of contract in isolation. The study and comprehension of the notion form part of a "complexified (contractual) whole". The last working document relating to the Common Frame of Reference draws the conclusions from this state of affairs and considers not just the law of contracts, but the law of obligations as a whole.

II. Towards a Classification of the Sources of Obligations

The draft Common Frame of Reference (June 2005 version) ("draft CFR") goes beyond the framework of the law of contracts, on the basis of an overriding principle of coherence, in order to deal more broadly with the law of obligations. In Book I ("General provisions"), at article I.–1.101 ("Intended field of application"), it is stated:

"(1) This Common Frame of Reference (CFR) is intended to be used primarily in relation to contractual and non-contractual rights and obligations […]".

The scope of application of the Draft CFR is much wider than that of PECL, since it includes "non-contractual rights and obligations" as well as "related property matters".

However, whilst the scope of application has widened to include non-contractual sources,[112] it also includes what is named as "juridical acts". This is evidenced by article II.-1:104 ("Usages and practices") which, it its paragraph 3, provides that the rules applicable to contracts will also apply to "juridical acts" ("This Article applies to other juridical acts with any necessary adaptations").

Another example is article II-1:105, ("Good faith and fair dealing") (1), according to which "A person has a duty to act in accordance with good faith and fair dealing in negotiating or concluding a contract or other juridical act […]", or article II.–1:106, ("Imputed knowledge"): "if any person who with a party's assent was involved in making a contract or other juridical act …"

The definition of the expression "juridical act" is provided by paragraph 2, of article II.-101, which provides: "A juridical act is any statement or agreement or declaration of intention, whether express or implied from conduct, which has or is intended to have legal effect as such. It may be unilateral, bilateral or multilateral". It is different from the definition given to a contract: "A contract is an agreement which gives rise to, or is intended to give rise to, a binding legal relationship or which has, or is intended to have, some other legal effect. It is a bilateral or multilateral juridical act".

A number of points should be highlighted. From a positive point of view, it would appear relevant to include the notion of "*juridical act*"[113] in a more global thought process, based in particular on the Pavia Project, which provides in article 4 entitled Rules relating to unilateral acts: "Unless otherwise provided for in this code or Community Law or mandatory rules in force in European Union Member States, the following rules relating to contracts must be observed, insofar as they are compatible, for *unilateral acts carried out for the drawing up of a contract or during the subsequent relationship, even if intended to extinguish or invalidate said contract*".

By analogy, it can be deduced from the drafting of article II.–1:101, that a contract is a type of "*juridical act*" which comes into existence in the form of a plurality of consents.

It would no doubt be relevant to mention, bearing in mind the English concept of consideration, that PECL recognize the validity of unilateral contracts. Yet this can only be inferred from a reading of article II.–1:103 ("Binding effect") (which repeats, at paragraph (b), article 2:107 of PECL): "A valid unilateral promise or undertaking is binding on the person giving it if it is intended to be legally binding without acceptance".

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112 Certain features relating to property rights should be borne in mind, although they do not fall within the scope of the present study.

113 The name "*juridical act*" was left in English in the French original text, on the basis that, although it is reminiscent of the French law "acte juridique", at least etymologically, its history is too specific for it to be used without an in-depth analysis as to whether such a use would be appropriate, as is apparent from the comparative law section.

From this wording can be inferred that the binding effect does not necessarily arise out of an exchange of consents, but can result from a unilateral act, and, should the case arise, from a unilateral undertaking. However, it is not specified in any place that PECL apply to unilateral acts.

The notion of *"juridical act"* matches, in many respects, the notion of *"acte juridique"* (translated thoughout as "juridical act"). However, the categorization of the different sources of obligations does not appear clearly from the plan followed by the Draft CFR.

Indeed, the scope of application of the project was initially "contractual and non-contractual rights and obligations". It was possible to imagine a classification broadly organised around those two sources. However, chapter 4 ("Application of preceding rules of this book to non-contractual obligations"), within Book III ("Contractual and non-contractual rights and obligations") follows Book II, which is entitled "Contracts and other juridical acts" which itself precedes Book IV, dedicated to "Specific contracts". Should this be seen as the sign that certain contractual effects extend to non-contractual obligations? This would imply, however, a much more realistic approach to "contractual matter".

Moreover, and perhaps this is more obvious, a Book V is dedicated to "Benevolent intervention in another's affairs", which precedes a Book VI, entitled "Non-contractual liability for damage" and a Book VII, which deals with" unjustified enrichment".

From a French point of view, there appears to be a succession of mecanisms which all come under the category of *"faits juridiques"*. The proposed organisation, however, shows to some extent an absence of systematization. Indeed, it would appear that the mecanisms of Benevolent intervention in another's affairs and Unjustifed enrichment have, on the whole, been included for reasons of equity, in order to avoid the enrichment of one person to the detriment of another – even though this is not the former's exclusive objective. It is regrettable that these two mecanisms were not dealt with one after the other.

The distinction between "acte juridique" and "fait juridique" is not formalised in the PECL but is not totally absent. The new category of *"juridical acts"*, to which the contract belongs, seems to match the category of" acte juridique". However, difficulties are encountered when it comes to the determination of the content of the "fait juridique". Unlike for the *"juridical act"*, it is not considered as a whole.

Three types can be distinguished: Benevolent intervention in another's affairs, Unjustified enrichment and non-contractual liability for damages. These three topics are dealt with one after the other, but do not appear to form part of a whole.

Therefore, following the example of comparative law, if it may seem premature at the moment to suggest grouping Benevolent intervention in another's affair, unjustified enrichment and non-contractual liability for damages in one same category entitled "quasi-contract", it remains possible that one day the sources of the European law of obligations will be classified in accordance with a tripartite distinction, namely *"juridical acts"*, "non-contractual liability" and "quasi-contracts".[114] Such a classification would better reflect

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114 The name would not in fact be shocking for common law countries, since it appears that the notion of "quasi-contracts", now named "Restitutions", was used during the XVIIth and XVIIIth centuries. V. P.S. ATIYAH, *The Rise and Fall of Freedom of Contract*, Clarendon Press, Oxford, 1979, reedited 2003, p. 149.

the decline of intention as all-powerful source of obligations – intention which is the criterion for distinction between "*acte juridique*" and "*fait juridique*".

A number of difficulties may however arise in relation to the area of quasi-contracts and to the notion of contractual liability. Should quasi-contracts be interpreted strictly, as only including Benevolent intervention in another's affair and unjustified enrichment, that is to say those quasi-contracts which are specifically named, or should the opportunity offered by Community law be seized in order to develop the notion of unnamed quasi-contract, with criteria which remain to be defined?

Moreover, could it be envisaged, as it is in the French Reform Proposals, that the contractual and extra-contractual liabilities be grouped at European level, within one same general category named "Civil liability"?

In any event, it is certain that a classification of obligations based around juridical act and juridical fact would only be relevant if it were the basis for a specific legal regime (prescription, evidence …).

Chapter 4:
Mandatory Rules and Ordre Public

Main concerns

I. Observation

The terms "*mandatory rules*" and "*ordre public*" (mandatory rules of public policy) are often seen as being interchangeable. Yet each notion taken separately is used in various circumstances, to refer to different situations. The present study shows that present day terminology does not reflect the range of mandatory rules (and the degree to which such mandatory rules must apply) found in Acquis Communautaire and Acquis International or in comparative law.

Firstly, the same terms are used to refer to rules which must be complied with without exception and rules which may sometimes be avoided. Secondly, identical expressions are used to refer to rules which find their origin in European law or domestic law. Finally, the same terms apply to rules which are different in content. For example, the expression "*mandatory rules*" can be used with reference to fundamental principles but also to rules protecting private interests, which only apply to a certain category of persons such as workers, and which can be replaced with more favourable provisions.

II. Terminological Guidelines

The present study shows that the notion of "*mandatory*" rules does not have a univocal meaning. There are various degrees in the extent to which a mandatory rule must be applied.

This complexity cannot be simplified to a twofold distinction between mandatory rules on the one hand and non-mandatory rules on the other. As a result, terminology should reflect insofar as possible these varying degrees, both in referring to the rule and the consequences of its breach. It should also take into account the content of such rules as well as their scope of application. The content of standard notions elaborated specially is necessarily variable. Such content depends on time and sociological factors, as well as on the interpretations made by the judge or arbitrator.

The expression "*ordre public*" (mandatory rules of public policy) is commonly used. It raises a number of questions as a matter of terminology. Firstly, it is relevant to ask whether it is worth maintaining certain distinctions which are commonly accepted. For instance, bearing in mind the diversity of the rules which is attempts to cover, is the distinction made between *political* public policy and *economical* public policy relevant? The same question arises in respect of the distinction between public policy of *protection* and public policy of *direction*, as it does in respect of the traditional split between mandatory and non-mandatory rules. We should also determine whether the expression "*ordre public*" or public policy is wide enough to cover notions which, although indivi-

dually identifiable are often understood as sub-categories: public order regulations, mandatory rules are sometimes treated as being synonymous with public policy. If distinctions are maintained, then *ordre public* or public policy should be clearly and strictly defined.

This leads us to recommend the use of qualified terminology. In this perspective, could a distinction be made between rules which are based on fundamental principles and the other rules which although mandatory do not arise out of such principles?

On that basis, could an agreement be reached regarding the superiority of such fundamental principles? This superiority would find its expression both with regard to the content of such principles and to the sanctions incurred in the event of a breach. As regards the content, its aim would be to protect values which apply across the board, in an unlimited way and would take the form of "internal public policy" rules or principles such as the freedom of association guaranteed by article 11 of the European Convention on Human Rights. A breach would result in the contract being deprived of any effect.

Can distinctions be made among those rules which do not represent fundamental principles? For example, could a distinction be made between transnational public policy, Community public policy and mandatory rules, both internationally and internally? If so, the distinction should not only be based on the sanctions incurred for a breach – which will need to vary depending on how mandatory a particular rule is – but also on the scope of application of these rules. Transnational public policy would see its scope limited to the protection of specific interests of parties operating in the field of international trade and its application would be justified by the fact that its rules are widely accepted. The intention behind Community public policy would be to create or improve conditions for the establishment and functioning of the internal market. Mandatory rules which apply internationally (public order laws) or internally are the product of State legal systems, and apply, depending on the case, to transborder or internal contracts. Should such a distinction be adopted, is it possible to develop precise instructions for the judge or the arbitrator regarding the appropriate sanction in each case?

Acquis Communautaire and Acquis International

Mandatory rules and *ordre public* (public policy) obviously call to mind the obligatory nature of the concepts, the command. Although this element is what these notions have in common, the terminology used to refer to them is very hesitant and is not limited to one unambiguous term: "there is no longer just one *ordre public* but several *ordres publics* which all add up and jostle together".[1]

There is a definite element of indecision in Acquis Communautaire and Acquis International in this respect, whether referring to mandatory rules, *ordre public* (public policy), public order laws, laws of immediate application. A clarification should be made, at the very least to determine whether these terms are synonymous or whether they apply to rules which are different in nature (**I**).

1 B. FAUVARQUE-COSSON, "L'ordre public", in Le Code civil: un passé, un présent, un avenir, Dalloz, 2004, p. 473, esp. n° 3, p. 475.

Such a clarification will in particular be affected by the way in which the breach of such rules is sanctioned. There again, the terminology used reveals a lack of coherence, as illustrated by the use of such diverse sanctions as declaring the contract invalid, declaring it to have no effect, or declaring it totally or partially void (**II**).

I. Terminological Uncertainties Regarding the Content of the Mandatory Nature of Rules

In common usage, the mandatory nature of a rule can be defined as an absolute command which cannot be avoided.

However, the mandatory nature of a rule is interpreted in a number of different ways according to Acquis Communautaire and Acquis International. These different meanings are not necessarily referred to by the use of different terms, which adds to the inconsistencies in terminology.

In a traditional interpretation, close to that mentioned above, mandatory rules are those rules which the parties cannot intentionally avoid or limit, whether such rules are domestic or contained in Community or international legislation such as the Principles of European Contract law for example. A second interpretation sees mandatory rules defined as those domestic legal provisions which, under domestic internal law, cannot be avoided by the parties, but which can be set aside in the event of a cross-border contract: this would be an instance of the internal mandatory character being tempered by reason of the international elements of the contract. In a third interpretation, mandatory rules refer to rules of various origins (national, international or supranational) which must apply, irrespective or the law applicable to the contract.

Thus various degrees in the extent to which mandatory rules must be applied could be identified: absolutely mandatory rules, which the parties cannot intentionally avoid (**A**), domestically mandatory rules, which could be avoided in the case of a cross-border contract (**B**) and absolutely (or externally) international mandatory rules which would apply irrespective of the law otherwise applicable to the contract (**C**).

A. Traditionally mandatory rules: the absolute command

In PECL, the use of the expression "mandatory rules"[2] can be found in two provisions: article 1:102 and article 1:103. We are concerned with the first of these two provisions.

The expression is used in article 1:102 (entitled "Freedom of contract"): Parties are free to determine the content of their contract subject to the requirements of good faith and fair dealing and the mandatory rules established by PECL. In order further to define the mandatory character of such rules, paragraph 2 of this article provides that parties may exclude the application of any of the principles, derogate from or vary their effects, except as otherwise provided. Mandatory rules, in this context, therefore means rules

2 On the different meanings of this expression in English private international law, see T. HARTLEY, "Mandatory rules: a common law approach", *Rec. cours de l'Acad. de dr. intern. de la Haye* pp. 342 and following esp. pp. 35 to 349 1997 Vol 266.

which may not be intentionally avoided by the parties. They apply imperatively as an absolute command. Such a command can only arise out of an express provision of the text, since freedom of contract is considered to be the basic rule.

Several rules established by PECL have a similar mandatory character. Without the word "mandatory" being used expressly, these rules provide that parties may not exclude or limit their application. Mandatory rules therefore means that the relevant rules must apply in their entirety, even against the will of the parties.

The following provisions illustrate this traditional interpretation of mandatory rules. Article 1:201 relating to the duty of good faith and fair dealing provides that parties may not exclude or limit this duty; article 2:105 on merger clauses sets out that the rule according to which if a merger clause is not individually negotiated, it will only establish a presumption that the parties intended that their prior statements, undertakings or agreements were not to form part of the contract may not be excluded or restricted; article 4:118 on the exclusion or restriction of remedies in the event the contract is invalid provides that parties may not exclude or limit remedies for fraud, threats and excessive benefit or unfair advantage, nor can they exclude or limit the right to avoid an unfair term which has not been individually negotiated; article 6:105 provides that where the price or another contractual term is determined unilaterally by one party and that party's determination is grossly unreasonable, then notwithstanding any provision to the contrary, a reasonable price or other term shall be substituted; article 9:509 allows the parties to agree a payment for non-performance and provides that this sum, despite any agreement to the contrary, may be reduced by the court where it is grossly excessive in relation to the real loss; article 14:601 fixes mandatory maximum (30 years) and minimum (1 year) periods of prescription.

In the same vein, article 2 of the Pavia Project provides that parties may freely agree the content of their contract "subject to the limits imposed by mandatory rules, good morals and *ordre public*, as set out in the present code, under Community law or in the domestic law of the Member States of the European Union".[3] The main principle, as in PECL, is that of freedom of contract. It is of interest to note that the terms referred to are mandatory rules, good morals and *ordre public*, without any clear indication as to whether this list reflects three different categories or a global concept, and in the case of different categories, how they should be distinguished from mandatory rules. The same list reappears in article 30 which defines the lawfulness of the contract and in article 140 relating to the grounds for avoidance.

Article 1.5 of the UNIDROIT Principles provides that parties may exclude in whole or in part the application of any provision of the Principles or vary the effect of any of their provisions, except where the Principles provide for the mandatory character of a particular provision. The commentary emphasises the principle that the Principles are non-mandatory. As an exception, certain rules set out by the Principles are seen as so important with regard to the "system" instated by the Principles that the parties cannot exclude or limit their application. This is an instance of a traditional approach to mandatory rules: the rules set out in the UNIDROIT Principles and considered as mandatory cannot be intentionally avoided by the parties. It is likely that these mandatory rules are limited in number. The mandatory character of a rule is in principle expressly stated.

3 On the distinction between *ordre public* and good morals, see the part of the study dealing with comparative law.

Indeed, certain provisions are designated as such: article 1.7 relating to good faith and fair dealing – the articles contained in chapter 3 on validity (article 3.19 expressly states that the provisions of the chapter are mandatory except insofar as they relate to the binding force of mere agreement, initial impossibility or mistake) – article 5.1.7(2) relating to price determination – article 7.4.13(2) relating to agreed payment for non-performance – article 10.3(2) relating to limitation periods. However, the mandatory character of a rule can exceptionally be implied. For example, article 1.8 relating to inconsistent behaviour is considered in commentaries as being mandatory; in the same way article 7.1.6 relating to clauses which exclude or limit liability is impliedly mandatory.

The Rome Convention of 19 June 1980 on the law applicable to contractual obligations sets out three different categories of mandatory rules: domestic mandatory rules (articles 3, 5 and 6) – public order rules (foreign or of the forum) – article 7) – and finally, rules which form part of international *ordre public* (article 16).[4] The mandatory rules referred to in articles 3, 5 and 6 are those which cannot intentionally be derogated from by the parties choosing a different applicable law. Such rules are mandatory in a traditional sense. Article 3 refers to a situation in which there is no conflict of laws in the contract: where all the elements of the contract are located in one country at the time of the choice of law, such choice shall not prejudice the application of rules of the law of that country which cannot be derogated from by contract. The mandatory character in this instance has the purpose of avoiding a fraudulent choice of foreign law in a domestic contract with the intention of avoiding the mandatory rules contained in the law with which the contract is most closely connected: the internal mandatory character of such rules must not be set aside because of a formal internationality arising solely out of the choice of applicable law. Articles 5 and 6 set out rules of conflict which protect respectively the consumer and the employee. The choice of applicable law is permitted only on the condition that the consumer or the employee is not denied the protection afforded by the mandatory provisions of the law which is objectively applicable. The mandatory character is used here to counter the choice of a law which is less protective for the party seen as the weakest. In these three provisions, mandatory rules mean internal rules the application of which cannot be avoided by the choice of a different law; the mandatory character gives precedence to the rules of a country with which the contract has a particular connection (in article 3, such country is the one in which all the elements of the contract are located; in articles 5 and 6, mandatory rules are those of the law which is objectively applicable).

A number of conventions are optional in their application and such application can therefore be intentionally avoided by the parties. A typical example of this lack of mandatory character is the Vienna Convention dated 11 April 1980 on the international

4 See articles 3.4 and 3.5 of the Proposal for a Regulation on the law applicable to contractual obligations (Rome I), COM (2005) 650 final 2005/0261 (COD). Article 3.5 refers to mandatory rules of Community law. Article 5 is amended in order to apply, directly and in a fixed way and in its entirety, the law of habitual residence of the consumer. Article 6 relating to the determination of the law applicable to an employment contract is from this point of view, unchanged. On this project, see P. LAGARDE, "Remarques sur la proposition de règlement de la Commission européenne sur la loi applicable aux obligations contractuelles (Rome I)", *Rev. crit.* 2006.332.

sale of goods[5] (CISG). The Ottawa Conventions on international financial leasing and international factoring signed on 28 May 1988 under the patronage of UNIDROIT provide that the parties may avoid its application. Both conventions are not however drafted in the same way. Article 5 of the Convention on international financial leasing provides that the application of the Convention may be excluded only if each of the parties to the supply agreement and each of the parties to the leasing agreement agree to exclude it. In their contractual relationship, the parties may partially derogate from a provision of the Convention or vary its content, except for certain provisions which remain mandatory. In the Convention relating to international factoring, article 3 allows the parties to exclude the application of the rules of the Convention but specifies that such exclusion must necessarily be made as regards the Convention as a whole.

Provisions which protect the consumer in European directives on consumer contracts are mandatory.[6] The directive on unfair contract terms[7] sets out the model for the provisions which can be found in a number of subsequent directives.[8] Article 6.2 of this directive provides that Member States shall take the necessary measures to ensure that the consumer does not lose the protection granted by such Directive by virtue of the

5 See observations under point B.

6 For completeness, we should mention the mandatory character of the provisions contained in Community legislation, reinforced by ECJ case law, in an area also relating to consumers: that of liability for defective products, covered by the directive of 25 July 1985 (Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products *OJ* L 210 of 7 Aug 1985). In a decision dated 24 April 2002, the ECJ found that France had badly transposed the directive into national legislation by providing a higher level of protection than that afforded under the directive (ECJ 25 April 2002, C-52/00, *D.*2002.2428, J.-C. AULOY and *D.*2002.2462, note Ch. LARROUMET). The ECJ considered that the directive could not authorise Member States to maintain a different level of protection than that provided in the directive. The directive is mandatory in that the level of protection which it specifies is the only regime that must be applied on the basis of an obligation of safety. Any different national regime resulting from the transposition of such Community legislation must be set aside.

7 Directive 93/13/EEC of 5 April 1993 on unfair clauses in consumer contracts *OJ* L 995 of 21 April 1993. Directive 85/577 of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises *OJ* L 372 of 31 December 1985 provided only in article 6 that the consumer could renounce the rights conferred upon him by the directive.

8 In particular, Directive 97/7/EC of 20 May 1997 on the protection of consumers in respect of distance contracts (article 12 entitled "binding nature"), *OJ* L 144 of 4 June 1997; Directive 99/44 on certain aspects of the sale of consumer goods and associated guarantees of 25 May 1999, *OJ* L 171 of 7 July 1999 (article 7.1 entitled "binding nature"); Directive 2002/65/EC of 23 September 2002 concerning the distance marketing of consumer financial services (article 12 entitled "imperative nature of this directive's provisions"). Directive 94/47/EC on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis dated 26 October 1994, *OJ* L 280 of 29 October 1994 provides a protection for the purchaser in different terms by reason of the subject matter of the contract: article 9 provides that Member States should take all necessary measures so that, no matter what the applicable law, the protection of the buyer as provided under the directive applies if the property is situated on the territory of a Member State.

choice of the law of a non-Member country as the law applicable to the contract if the latter has a close connection with the territory of the Member States. The mandatory character of the provisions in the directive which are collectively covered by a reference to the protection granted to the consumer results in the application of a law being prevented if it does not contain equivalent guarantees. This is an instance of the traditional function of public policy in private international law: that of excluding the application of a law. It may however be relevant to note that this function also applies in internal public policy in that the law of the third country in question was chosen by the parties: the mandatory character of the provisions of the directive results in the intention of the parties not being taken into account.[9] The public policy of protection is used to ensure that the consumer is afforded a level of protection seen as necessary. But as pointed out in the directive on unfair commercial practices, this public policy of protection enables a public policy of direction to be maintained, in accordance with which competition within the Internal Market can continue to thrive.[10]

B. The internal mandatory rules give way: such rules are set aside in the context of a transborder contract

Article 1:103 of PECL entitled "Mandatory rules" makes use of the term "mandatory" with a different meaning from that used in article 1:102, in order to qualify certain rules which exist outside PECL: parties may provide that the contract should be governed by PECL where this is permitted by the applicable law and in such case, domestic mandatory rules will not apply. But the parties cannot avoid the application of national, supranational or international rules which apply in accordance with relevant rules of private international law notwithstanding the law applicable to the contract. This mandatory character is therefore of a dual nature: domestic rules although mandatory may be derogated from by a reference to PECL when this reference is permitted by domestic law. The mandatory character of internal rules therefore disappears in the case of a transborder contract. The rules which remain mandatory are those which are national, supranational and international and which apply notwithstanding the law applicable to the contract.[11]

The CISG has, from this point of view, a particular characteristic: it is entirely dispositive. Indeed, article 6 allows the parties to exclude its application entirely even in cases where it should, in accordance with its own criteria, be applicable, or to derogate

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9 See also the observations of J. BASEDOW, "Recherches sur la formation de l'ordre public européen dans la jurisprudence", *in Le droit international privé: esprit et méthodes, Mél. en l'honneur de P. LAGARDE, Dalloz*, 2005, p. 55, esp. pp. 58 and 59. On the difficulties encountered regarding the transposition of this provision, see ECJ 9 September 2004, C-70/03 Commission v. Royaume d'Espagne.

10 Directive 2005/29 relating to unfair business-to-consumer commercial practices in the internal market of 11 May 2005, *OJ* L 149 of 11 June 2005. In the preamble, for ex. 1, 3 and 4, reference is made to consumers' economic interests as well as those of legitimate businesses, even though the legal basis for the directive is stated as being article 95 of the EU Treaty which relates to the establishment and functioning of the internal market.

11 See below.

from any of its provisions.[12] This would appear to be an instance of traditional mandatory rules mentioned at point A above. If the parties totally or partially exclude the provisions of the CISG, any issue which might arise in relation to the contract would be resolved in accordance with the law designated by the conflicts rule. However, certain academics take the view that if the parties have agreed to be governed by the law of a contracting State and that State provides a mandatory rule on a particular point within the scope of the Convention, where that rule is contrary to the Convention then it is the CISG which should prevail.[13] For example if the parties have submitted to French law, French mandatory rules relating to a warranty against hidden defects would loose their mandatory character: France has accepted by ratifying the Vienna Convention to forego, in international sales of goods, its internal mandatory rules in favour of more flexible contractual rules. The mandatory character of internal rules disappears because of the international qualification of the contract.

The notion of mandatory rules is one which is found in conflicts of jurisdiction. It is used in the context of direct competence rules. For example, French cases have established that a choice of jurisdiction clause is valid so long as the French courts do not claim exclusive jurisdiction.[14] Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters[15] sets out for instance certain mandatory rules applicable to consumer contracts, contracts of employment and contracts of insurance, from which the parties may not derogate by a choice of jurisdiction clause. (Article 23.5 of the Regulation). The notion of mandatory rules also comes into play with regard to the effect given to foreign judgments: a foreign judgment may be denied any effect if it is found not to comply with public policy (as a matter of law or procedure).

Under international commercial law, public policy is sometimes put forward as the grounds for avoiding internal mandatory rules in favour of favorable material rules adapted to international contracts. Thus in the case of *Messageries maritimes*, the Cour de cassation accepted the validity of a gold clause on the basis of the international qualification of the contract on the grounds of public policy.[16] Public policy was used in this case to exclude both the application of Canadian law and the domestic French rule forbidding the use of such clauses and mandatory for domestic contracts. Public Policy excludes the application of a foreign law – which is its traditional role – and creates a French rule for international contracts which excludes the application of the French domestic mandatory rule (see also on the ability of States to submit to arbitration, the *Galakis* case[17]).

But this is already an instance of a reinforced international mandatory rule.

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12 There is only one exception to this possibility, if one of the parties has its place of business in a State which has made the declaration provided for in article 96.

13 V. HEUZE, La vente internationale de marchandises, règles uniformes, LGDJ 2000, n° 97, p. 94.

14 Civ. 1ère, 17 December 1985, B. ANCEL and Y. LEQUETTE, *Grands arrêts de droit international privé, Dalloz*, n° 72.

15 Regulation n° 44/2001 of 22 December 2000, OJ L 12 of 16 January 2001.

16 Cass. 21 June 1950, Rev. crit. 1950.609, note H. BATIFFOL, Grands arrêts de droit international privé, Dalloz, n° 22.

17 Cass. 2 May 1966, Grands arrêts de droit international privé, Dalloz, n° 44.

C. Reinforced international mandatory rules: a compulsory application

These reinforced international mandatory rules originate both in the domestic private international laws and in substantive international and Community texts. These rules can therefore not be categorised on the basis of their origin but rather with regard to their content and their role. The terminology used to refer to these rules varies from one piece of legislation to another: mandatory rules (**1**), public order laws (**2**) or *ordre public* (public policy) (**3**) are all used to refer to this category.

1. Reinforced mandatory rules

In article 1:103 of PECL mentioned above, the expression "mandatory rules" is used with two different meanings: as domestic internal mandatory rules which can be derogated from by a reference to PECL if permitted by domestic law (see B above) and also, and this meaning is closer, as the public order laws referred to in article 7 of the Rome Convention of 19 June 1980 on the law applicable to contractual obligations. (The commentary under article 1:103 refers, with regard to this second meaning, to public order rules which are "laws of immediate application or those mandatory rules which claim application irrespective of which law is applicable to the contract (*'lois d'application nécessaire'*) and which are the expression of a fundamental public policy of the country which has passed them". The commentary refers directly to the provisions of the aforementioned article 7). For certain academics, it is not worth making such a distinction, other than, with regard to the first meaning, in order to avoid internal law provisions which could otherwise make an international contract invalid (examples of such provisions include monetary law provisions or a choice of arbitration clause – the commentary gives the example of the guarantee for hidden defects under French law which is mandatory under domestic law but which may be avoided by a reference to PECL).

The Pavia Project refers in article 2, as mentioned above, to mandatory rules, good morals and public policy as set out in the Pavia Project rules themselves, under Community law or in the domestic to mandatory rules adopted for the protection of public interest or situations of primary importance for society.

The UNIDROIT principles refer to mandatory rules in articles 1.4 and 1.5. Article 1.4 refers to rules which apply internationally and which have a reinforced mandatory character. This article provides that the Principles shall give way to any mandatory provision, whether national, international or supranational origin, which applies in accordance with the rules of private international law. The commentary relating to this provision, expressly refers to those mandatory rules which claim application irrespective of which law is applicable to the contract *(lois d'application nécessaire)* and to public order laws and examples of these rules are provided: article VIII(2)(b) of the Bretton Woods agreement, rules on import or export licenses (see article 6.1.14 of the UNIDROIT Principles on public permission requirements), regulations pertaining to restrictive trade practices.

2. Public order laws

The Rome Convention refers to public order laws in article 7. This provision deals with rules which have an "international mandatory character" (*"impérativité internationale"*) to use the phrase coined by M. Bernard AUDIT:[18] the mandatory character means such rules should be internationally applied, notwithstanding the fact that the contract may be international. Although the expression "public order laws" is generally recognised as the appropriate expression, synonyms such as "laws of immediate application" or *"lois d'application nécessaire"* (those mandatory rules which claim application irrespective of which law is applicable to the contract). The use of these different expressions illustrates two particularities of these laws: the expression "public order laws" places the emphasis on the content of such laws, with public policy being one of the criteria, whilst the terms "immediate application laws" and *"lois d'application nécessaire"* highlight the specific way in which they apply, without any reference to a conflict of laws analysis.

Legal academics, whilst acknowledging the fact that public order laws cannot be defined in an abstract and generic way, have attempted to determine the criteria defining such provisions. The criteria which have been put forward include factors which fall under the category of "public policy of direction" (definition put forward by FRANCESCAKIS[19]) and elements which form part of a "public policy of protection" (regarding consumer protection for example).

The ECJ has not made any decision regarding the interpretation of article 7 of the Rome Convention. It did however consider the notion of public order law on two occasions.

In the *Arblade* case,[20] it gave for the first time a Community definition of public order laws in relation to the freedom of establishment: The question was whether a Member State could oppose the exercise of freedom of establishment on the basis of labour laws[21] which are seen as public order laws. The ECJ defines public order laws as "national provisions compliance with which has been deemed to be so crucial for the protection of the political, social or economic order in the Member State concerned as to require compliance therewith by all persons present on the national territory of that Member State and all legal relationships within that State." (paragraph 30).[22]

In the *Ingmar* case,[23] the ECJ had to decide whether the English law implementing the directive of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents could apply despite the parties having chosen Californian law to govern the contract, Californian law being less protective for the agent. The ECJ took the view that the directive had a double objective: to protect, for all

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18 Droit international privé, Economica, esp. n° 113, p. 99.

19 "Quelques précisions sur les lois d'application immédiate et leurs rapports avec les règle de conflit de lois", *Rev. crit.* 1966.1.

20 ECJ, 23 November 1999, C-369/96 et C- 376/96, *Rev. crit* 2000.710, note J.-M. JACQUET.

21 On Community *ordre public* in labour law more generally, see B. TEYSSIE, *Droit européen du travail, Litec* 2006, pp. 114 and following.

22 Compare with the definition suggested in the Draft regulation Rome I cited above, article 8.

23 ECJ, 9 November 2000, C-381/98, *Rev. crit.* 2001.107, note P. LAGARDE; *JDI* 2001.511, note J.-M. JACQUET.

commercial agents, the freedom of establishment and the operation of undistorted competition in the internal market. The ECJ found, based on this double aim, that it was essential for the Community legal order that a principal established in a non-member country, whose commercial agent carries on his activity within the Community, cannot evade those provisions by the simple expedient of a less favourable choice-of-law clause (paragraph 25). As a result, the Court found that English law should apply, notwithstanding the law applicable to the contract, in this instance, Californian law.[24]

Mr. BASEDOW highlights the connection between this new Community source of public order laws mentioned by Advocate General LEGER in this case and "a real profession of faith in favour of the establishment of a European public policy which must take precedence over material laws of non-member States which are designated as applicable by the conflicts law of Member States."[25]

3. Ordre public/public policy

International *ordre public* is also a mechanism which shows the existence of reinforced international mandatory rules.

Public policy as a concept of private international law applies in a number of ways, whether it be in conflicts of laws or conflicts of jurisdiction (**a**). This expression is also used in the field of international arbitration (**b**). Finally, it seems that a true European public policy is emerging (**c**).

a) Rules regarding conflicts of laws and jurisdiction

The Rome Convention refers in article 16 to the public policy of the forum (*"ordre public"*[26]) which cannot be excluded by the application of the law designated by the Convention (on the basis of the choice of the parties or the objective determination provided by the Convention) if manifestly incompatible with such law. The *ordre public* in question is more specifically *ordre public* in a private international law sense. It is an exceptional mechanism which enables the application of the foreign law designated by the conflicts provisions to be refused in favour of the law of the forum. This mechanism comes into play depending on the content of the foreign law which is designated. Therefore it is not so much the internal mandatory character of the rules which triggers the application of the *ordre public* but rather the content of the foreign law (all academics make a distinction between the provisions which belong to the internal *ordre public* and those which form part of the international *ordre public*, at least in a private international law sense: any provision which belongs to the internal *ordre public* is not necessarily placed on the basis of its mandatory character in the more narrow category of interna-

24 In the Draft Regulation Rome I cited above, article 3.5 generalises the principle of this case "by elevating any simply mandatory provision in Community law to the status of internationally mandatory provision" (obsv. P. LAGARDE, art. cit., n° 10, p. 337).

25 Art. cit., p. 60.

26 The French expression is however maintained in the title.

tional *ordre public*). This notion of *ordre public* does not follow any particular definition. It is functional and therefore necessarily contingent.[27] It cannot be defined by the ways in which it is applied. The *ordre public* reacts against foreign laws the application of which is contrary to natural law principles: it sanctions the absence of a shared legal system between the foreign law and the law of the forum. It can also exclude the application of foreign laws if such application is contrary to the political and social basis of French civilisation or to the preservation of certain legal policies.

Similarly, in most conventions signed under the auspices of the Hague Conference and relating to contract, there are references to *ordre public* and sometimes public order laws. For example, the Hague Convention of 15 June 1955 on the law applicable to the international sale of goods provides in article 6 that the application of the law designated by the Convention may be excluded on the grounds of public policy *(ordre public)*. In the same way, in the Hague Convention dated 14 March 1978 on the law applicable to agency, article 16 provides that effect may be given to the mandatory rules of any State with which the situation has a significant connection, if and in so far as, under the law of that State, those rules must be applied whatever the law specified by its choice of law rules; under the terms of article 17, the application of a law specified by the Convention may be refused only where such application would be manifestly incompatible with public policy *(ordre public)*.

The *ordre public* used in the context of conflicts of laws has not remained a State controlled *ordre public* in a private international law sense. Certain decisions have referred to a genuinely transnational *ordre public*. For example, French courts have cancelled contracts for smuggling or arms sales which had been entered into in breach of a genuinely international *ordre public*.[28] The *Banque Ottomane* case which raised the question of the information provided by a foreign company to French shareholders enabled the Paris Appeal Court to reaffirm the existence of *"an ordre public which is, if not universal, at least common to the various legal orders which protect the interests of persons involved in the existence of companies"*.[29]

In relation to rules of conflicts of jurisdiction, *ordre public* fulfills, as it does in the field of conflicts of laws, a function of exclusion. Within the European judicial area, it is one of the grounds for refusing to recognise a judgment rendered by a Member State court or an act carried out by a foreign authority.[30] This reference is found for example in article 34 of Regulation n° 44/2001 and in article 26 of the Regulation known as the "insolvency" Regulation.[31] The content of this *ordre public* is both substantial and procedural. In the latter sense, *ordre public* will allow a court to reject a decision or an act which has been made or carried out in conditions which are considered to be intolerable with regard to defence rights. The sources for the *ordre public* whether procedural or substantial appear to have become more numerous with the development of case law and have gone beyond

27 P. LAGARDE, Recherches sur l'ordre public en droit international privé, 1959.

28 Paris, 9 February 1966, *Rev. crit*. 1966.264, note P. LOUIS-LUCAS.

29 Paris, 3 October 1984, *JDI* 1986.156, note GOLDMAN; *Rev. crit*. 1985.526, note H. SYNVET.

30 On the role of *ordre public* in ordinary law, see the cases *Munzer* and *Bachir*: Cass. 7 January 1964 and Civ 1ère, 4 October 1967, *Grands arrêts de droit international privé*, n° 41 et 45.

31 Regulation n° 1346/2000 of 29 May 2000 relating to insolvency proceedings, *OJ* L 160 of 30 June 2000.

merely national sources. For example, it is relevant to consider the provisions of article 34 § 2 of Regulation n° 44/2001 on the protection of a defendant in default of appearance: the ECJ judgment in the *Krombach* case adopts a wide vision of the procedural *ordre public* when it states that the infringement would have to constitute a manifest breach of a rule of law regarded as essential in the legal order of the State in which enforcement is sought or of a right recognised as being fundamental within that legal order.[32] With regard to substantive law, the principle of equality between spouses has for example been invoked by French courts in various ways, whether at Community level or in a French private international law sense, in order to refuse the effects of unilateral Muslim repudiations authorised by the Marrocan or Algerian authorities against a wife domiciled in France[33] (sometimes with her spouse).

The notion of *ordre public* is used to create substantive rules in particular in the field of international arbitration.

b) International arbitration

In this field, the terminology is also irresolute. In theory, a different reasoning applies when considering the method which applies to public order laws or to that applying to public policy. The first, unlike the second, is not based, in theory, on a value judgment or on a moral assessment of the content of the law in question: "the essence of the method is that it is based on the existence of a close connection between the law and the legal situation. It is quite possible that the law which claims its applicability does not conform more to moral standards than the law of the contract, in fact it could even lead to a more unfair result".[34] Identical examples are "cited sometimes as an illustration of the public order laws method, sometimes as instances where arbitrators have taken international *ordre public* into account"[35] (see also the observations set out at II.B hereafter). However, in practice, arbitrators will examine the applicability of a given foreign public order law in the light of values which if not universal are at least widely accepted by the international community.[36]

The following examples illustrate this mingling of reasonings and the terminological hesitations which result therefrom.

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32 ECJ, 28 March 2000, *Krombach c. Bamberski*, aff. C-7/98, *JDI* 2001.690, note J. HUET, *Rev. Crit.* 2000.481, note H. MUIR-WATT.

33 Civ. 1ère, 17 February 2004, 5 cases, *D.* 2004.815, P. COURBE.

34 P. MAYER, "La règle morale dans l'arbitrage international", *Etudes Bellet*, *Litec* 1991, n° 16.

35 Ph. FOUCHARD, E. GAILLARD et B. GOLDMAN, *Traité de l'arbitrage commercial international*, *Litec* 1996, n° 1521, p. 863.

36 See the resolution of the Institute of International law of 31 August 1991 "on the autonomy of the parties in international contracts between private persons or entities": "If regard is to be had to mandatory provisions, […] of a law other than that of the forum or that chosen by the parties, then such provisions can only prevent the chosen law from being applied if there is a close link between the contract and the country of that law and if they further such aims as are generally accepted by the international community".

In the *Dalico* case,[37] the Cour de cassation took the view that the arbitration clause was independent in accordance with a substantive rule of international arbitration according to the intention of the parties, but subject to mandatory rules of French law and to international *ordre public*. The Cour de cassation later deleted the reference to mandatory rules so that it only referred to international *ordre public*.[38] Academics have not all agreed on the meaning of the judgment of the Cour de cassation in the *Dalico* case: some argued that the mandatory rules represent the public order laws of the forum and are therefore a separate category from international *ordre public*, whilst others took the view that the expression was redundant. The Cour de Cassation would appear to have chosen the second interpretation. In this way, the international *ordre public* which it relies on fulfills a similar function to internal *ordre public*: unlike the *Messageries maritimes* case referred to at point I.B above in which *ordre public* fulfills a positive role enabling the creation of a substantive rule, the *ordre public* referred to in the *Dalico* case sets aside the intention of the parties regarding the autonomy of the arbitration clause.[39] The substance of the *ordre public* in question is significantly different from that of internal *ordre public*. All the terms relating to the validity of the arbitration agreement are subject to this specific *ordre public* as opposed to a contract, where *ordre public* will only be called upon regarding its purpose and in some cases the consideration (the other terms are subject to the rules governing the consent of the parties rather than *ordre public*). This international *ordre public*, specific to arbitration, will have a bearing upon whether the dispute can be submitted to arbitration, lack of consent, the capacity to enter into a contract, and the ability of the parties to agree to arbitration.

In the *Hilmarton* case, the sole arbitrator sitting in Geneva took the view that the contract entered into by a French company and a Swiss company, governed by Swiss law and under the terms of which the Swiss company agreed to provide consulting and coordination services in the administrative field for the obtention and execution of a public contract in Algiers was contrary to the Algerian law prohibiting the use of intermediaries. The arbitrator considered that the contract was contrary to a public order law and therefore to good morals *("bonnes mœurs")* as per the Swiss Code of obligations.[40] The Swiss court considered that the mere use of an intermediary was not contrary to Swiss law which applied to the merits of the case: if Algerian law had been applied because of public policy which universally prohibits corruption, the arbitrator's decision would not have been overturned.[41] A reasoning based on public order laws must be underpinned by moral considerations, more suited to the application of public policy.

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37 Civ. 1ère, 20 December 1993, *JDI* 1994.432, note E. GAILLARD; *JDI* 1994.690, note E. LOQUIN; *Rev. arb.* 1994.116, note H. GAUDEMET-TALLON; *Rev. crit.* 1994.663, note P. MAYER.

38 Civ. 1ère, 21 May 1997, *Rev. arb.* 1997.537, note E. GAILLARD.

39 For a new vision of the function of public policy, see H. ARFAZADEH, Ordre public et arbitrage international à l'épreuve de la mondialisation, Bruylant 2005.

40 CCI award n° 5622 (1988), *Rev. arb.* 1993.327, note V. HEUZE.

41 17 November 1989, *JDI* 1994.701, note E. GAILLARD.

c) The emergence of a European public policy

The international mandatory character of a rule has found a place in Community law. This is illustrated by a number of examples:

Firstly, the ECJ ruled that article 85 of the Treaty (now article 81) was a public policy provision as per the New York Convention on the recognition and enforcement of foreign arbitral awards of 10 June 1958.[42] A pointed out by M. J. BASEDOW, "the national judge, in addition to his own national public policy, must respect European public policy and [that] too soft an attitude in this area may offend European public policy rules".[43]

Secondly, imperious public interest reasons are often referred to in the context of Community freedoms. Such reasons may, exceptionally and subject to certain conditions, constitute a justification for non-discriminatory restrictions to Community freedoms. This "European mandatory character" is a sort of "super mandatory" character which applies to national mandatory provisions as an additional filter before their application.

The Commission issued an interpretative communication on the freedom to provide services and the interest of the general good in the banking sector, which was partially harmonised by directives.[44] It considers that domestic mandatory provisions which are in the public interest are not defined generically. They are recognised as such by the ECJ on a case by case basis. A number of imperative reasons have thus been identified as being "in the general good": protection of the recipient of services, consumer protection, protection of workers, protection of creditors, preservation of the good reputation of the national financial sector, prevention of fraud, protection of intellectual property, protection of the proper administration of justice. This list is "open-ended", according to the Commission itself. The applicable law, no matter how it is designated (intention of the parties, objective determination, through the application of public order laws or public policy) can only be applied effectively once it has proved compatible with the public interest and only if it passes the proportionality test applied by the Courts (the measure should not duplicate an existing domestic measure and must be proportionate to the objective sought).

In this way, the 1996 directive on the posting of workers[45] provides in article 3 that Member States should ensure that, whatever the law applicable to the employment relationship, certain provisions can be applied by the Member State on whose territory the work is carried out. A first level of mandatory rules is therefore established, similar to public order rules: notwithstanding the law applicable to the contract, the mandatory character of certain provisions of the Member State on the territory of which the work is carried out must be ensured. Article 5 of the directive provides that Member States should ensure that adequate procedures are available to workers and/or their represen-

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42 ECJ, 1er june 1999, Eco Swiss China Time Ltd c. Benetton International N.V., C-126/97, Rec. 1999, I 3055.

43 Art. cit., p. 65.

44 Interpretative Communication of 20 June 1997 of the Commission "Freedom of services and public interest in the second banking directive", SEC (97).1193.

45 Directive 96/71/EC on the posting of workers in the framework of the provision of services, OJ 1997 L 18, p. 1.

tatives for the enforcement of obligations under the directive and in particular the obligation on undertakings regarding the minimum rates of pay which apply to the workers posted on their territory. The ECJ has had the opportunity of clarifying the interpretation of the rules set out in the directive, in particular in a judgment of 12 October 2004.[46] It confirmed that it was clear from settled case law that where national legislation created a restriction on freedom to provide services, it may be justified where it meets overriding requirements relating to the public interest insofar as such interest is not safeguarded by the rules to which the service provider is subject in the Member State in which it is established and insofar as it is appropriate for securing the attainment of the objective which it pursues and does not go beyond what is necessary in order to attain it. The protection of the workers is an overriding requirement; the prevention of unfair competition from undertakings which pay their workers less than the minimum salary could also constitute, according to the ECJ, an overriding requirement. These two overriding requirements, one in relation to the protection of the workers and the other in relation to the upholding of fair competition and therefore to the protection of the free market, are complementary. They allow the restriction imposed by the law of the State where the work is carried out to be avoided, so long as the conditions set out by the ECJ are fulfilled.

Thirdly, certain substantive rules enable the imposition of public policy rules which apply as part of a genuine autonomous European public policy. German case law has thus directly applied regulation n° 295/91/EEC of 4 February 1991 establishing common rules for a denied-boarding compensation system in scheduled air transport[47] to grant a fixed indemnity to the passengers of a Tunis Air flight from Munich to Monastir: Tunisian law which was applicable to the contract of carriage in accordance with article 4 paragraph 2 of the Rome Convention gave way to the Regulation provisions applicable by virtue of article 1 of the Convention on the basis that the flight had departed from a Member State airport, notwithstanding the State of establishment of the carrier, the nationality of the passenger and the destination.

Finally, European mandatory rules have been reinforced by the ECHR. The fundamental rights acknowledged by the ECHR form more and more frequently the ground upon which to set aside a contractual clause which is found to be contrary to such rights, in a movement of "fundamentalisation" of the sources of contract law.[48] The French Cour de cassation has rendered a number of judgments confirming this principle, particularly in the field of leases. The Court approved the decision of the judges who had held that a clause which forbade the lessee from allowing his family other than his children to occupy the leased premises ("personal occupation clause") was "contrary to the right to lead a family life, acknowledged by the Convention".[49] More recently, the Cour de cassation rendered a judgment on 12 June 2003 in relation to a commercial lease. The contractual clause at issue obliged the lessee to join the shopkeepers' association and to

46 ECJ 12 October 2004, C-60/03 Wolff&Müller Gmbh&Co. KG c. José Filipe Pereira Felix.

47 *OJ* 2001 n° L 36, p. 5.

48 J. ROCHFELD, see observations below Cass. civ. 3e, 18 December 2002 and Cass. civ. 3e, 12 June 2003, *Rev. des contrats*, 2004, p. 231.

49 Cass. civ. 3e, 6 March 1996, Bull. civ. III, no 60, p. 41, D. 1997, p. 167, note B. DE LAMY, JCP. G 1996, I, 3958, obs. C. JAMIN, RTD civ. 1996, p. 897, obs. J. MESTRE and p. 1024, obs. J.-P. MARGUÉNAUD.

pay membership dues.[50] Whilst the court of appeal had rejected the claim for repayment of the membership dues on the grounds of the binding force of a contractual obligation, the Cour de cassation overtuned the decision on the basis of articles 11 of the ECHR and 4 of the 1st July 1901 law. It decided that "a clause in a commercial lease obliging the lessee to join a shopkeepers' association and remain a member during the term of the lease is null and void".[51] As noted by a commentator, "the solution does not, prima facie, appear as innovative".[52] The Cour de cassation had already found that the principle of freedom of association prevented a membership from being automatic and compulsory: it considered that except as otherwise provided by the law, there could be no obligation on a person to join a 1st July 1901 (non profit making) association or to remain a member after joining.[53] But the novelty of this judgment lies in the grounds put forward,[54] which show evidence of the increasing importance of European public policy based on fundamental principles of the ECHR. The effect which the Cour de Cassation has agreed to give to the ECHR is still at this stage that of enabling the avoidance of a clause. It has yet to accept a possible "supplementing" effect which could be given to the same ECHR, by imposing positive obligations upon the contracting parties.[55]

This ever increasing part played by European public policy found a direct confirmation in a ECHR Court decision dated 13 July 2004: "Admittedly, the Court is not in theory required to settle disputes of a purely private nature. That being said, in exercising the European supervision incumbent on it, it cannot remain passive where a national court's interpretation of a legal act, be it a testamentary disposition, *a private contract*, a public document, a statutory provision or an administrative practice appears unreasonable, arbitrary or, as in the present case, *blatantly inconsistent with the prohibition of dis-*

50 This is a clause frequently met in commercial leases "because it enables to work out and coordinate a group policy" (J. ROCHFELD, *Rev. des contrats*, 2004, p. 231).

51 Cass. civ. 3e, 12 June 2003, JCP 2003, II, 10190, note F. AUQUE, D. 2003, AJ, p. 1694, obs. Y. ROUQUET, RTD civ. 2003, p. 771, obs. J. RAYNARD, D. 2004, 367, note C.-M. BENARD, *Rev. des contrats*, 2004, p. 231, obs. J. ROCHFELD and *Rev. des contrats*, 2004, p. 465, obs. A. MARAIS.

52 A. MARAIS, obs. below Cass. civ. 3e, 12 June 2003, *Rev. des contrats*, 2004, p. 465.

53 Cass. civ. 3e, 18 December 1986, *Dr. sociétés* 1997, com. 36, obs. Th. BONNEAU; RDI 1997.122; Cass. Ass. Plén., 9 February 2001, BICC 531, concl. O. GUERIN, note M. SEMPERE; *D.* 2001.1493, note E. ALFANDERI.

54 A. MARAIS, obs. below Cass. civ. 3e, 12 June 2003, *Rev. des contrats*, 2004, p. 465.

55 Cass. civ. 3e, 18 December 2002, *Amar et autres*, no 01-00.519, RTD civ. 2003, p. 290, obs. J. MESTRE et B. FAGES, p. 382, obs. J.-P. MARGUENAUD and p. 575, obs. R. LIBCHABER, RDC 2003, p. 220, obs. A. MARAIS, RDC 2004, p. 231, obs. J. ROCHFELD: the Court refers to articles 1134 of the Civil Code, 9 §§ 1 and 2 of the ECHR, and 6 a) and c) of the law of 6 July 1989 dealing specifically with residential leases and takes the view that "the practices dictated by the religious convictions of the lessees do not, except if specifically agreed, come within the contractual scope of the lease and do not impose upon the lessor any particular obligation". In the case, lessees invoked their freedom of cult protected by article 9, §§ 1 and 2 of the ECHR: in order to respect the Shabbat, they were not to use electricity from Friday night to Saturday night, or during specific holidays, which was incompatible with the recent installation of entrance codes by the lessor. But the Court refused to impose on the lessor the positive obligation to install a mechanical lock.

crimination established by Article 14 and more broadly with the principles underlying the Convention.[56] The Court thus prescribes a method of "interpretation" which enables it to "interpret the testamentary disposition in the manner that most closely corresponds to domestic law and to the Convention as interpreted by the Court's case law". The Court also places itself, together with the national judge, as guardian of such interpretation in the event of a conflict with one of the main principles acknowledged by the Convention. Such a decision is clearly part of a movement tending towards the reinforcement of a new public policy in which European conventions play a major role.[57]

II. The Uncertainty of Sanctions Incurred for the Breach of Mandatory Rules

The diversity of the sanctions incurred in the event of a breach of a mandatory rule is reflected in hesitations in the use of terminology. The study of this theme will be more limited, partly because these hesitations concern the use of terminology at least as much as they concern substantial issues, and also because the terms "invalidity, ineffectiveness, etc …" will be the subject of a separate study.

What should be noted here is the fact that the uncertainty regarding the terminology used for the sanctions impacts on the definition of the nature itself of the mandatory character of the rules and therefore leads to a confusion regarding terminology.

Both international acquis and Community acquis offer a large choice of sanctions (**A**), the nature of which appears to vary depending upon the types of mandatory rule which is breached and the strength of its mandatory character (**B**).

A. The diversity of sanctions

The diversity in the terminology applied to the sanctions is particularly well illustrated in PECL.

Whilst they appear uniform, PECL provide complex rules which apply exclusively to the sanctions of illegality. PECL make a distinction according to the nature of the rule which is breached: fundamental principle on the one hand – mandatory rule as per article 1:103 on the other hand. Article 15:101 provides that a contract is of no effect to the extent that it is contrary to the principles recognised as fundamental by the law of the Member States. The commentary takes the view that to deprive a contract of any effect is a Community law concept which avoids, on one hand, a reference to national concepts, and on the other, the necessity of defining a global concept of ineffectiveness which would bring together nullity, cancellation, unenforceability. This new concept, however, corresponds neither to a definition of fundamental principles, nor to a uniform system instated by PECL. Article 15:102 refers to contracts which infringe mandatory rules.

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56 ECHR, 13 July 2004, *Pla et Puncernau c/Andorre*, § 59, *AJDA* 2004, 1812, obs. J.-F. FLAUSS, *RTD civ.* 2004, p. 804, obs. J.-P. MARGUENAUD, *JCP* 2005, I, 103, obs. F. SUDRE, *Rev. Des contrats*, 2005, p. 645, obs. J. ROCHFELD (our underligning).

57 On the same point, see D. FENOUILLET, "Les bonnes mœurs sont mortes! Vive l'ordre public philanthropique", *in Le droit privé français à la fin du XX^e siècle: études offertes à Pierre CATALA*, *Litec*, 2001, p. 487 and following.

Under the terms of this provision, a contract which infringes a mandatory rule as per article 1:103 of PECL (see above) calls for the application of the sanctions provided in such rule. If no sanction is provided, PECL state that the contract can remain in force, be declared totally or partially void or be subject to modification. Such declaration must be an appropriate and proportional response to the infringement having regard to all relevant circumstances and in particular the purpose of the rule which has been infringed and the category of persons for whose protection the rule exists. Here again, it should be noted that the regime governing the sanctions is not structured. Moreover, the commentary on this provision explains that the difference between articles 15:101 and 15:102 lies in the importance of the infringement and therefore in the rule which is infringed (see also on this point the comments in the section dealing with comparative law).

Chapter 4 of PECL should also be mentioned. This chapter on validity excludes sanctions for immorality and illegality. However, in the event of an infringement of the rules contained in the chapter, the sanctions incurred are manifold: invalidity in the event of initial impossibility (article 4:102), avoidance of a contract (for example, article 4:104 relating to a fundamental mistake as to facts or law – article 4:107 on fraud – article 4:108 on threats) – avoidance of a term (article 4:110 on unfair terms not individually negotiated) – partial avoidance (article 4:116). Such invalidity or avoidance, which is far from being governed by an organised set of rules in PECL, can be added to the sanctions provided for in article 15:102 to the extent that it is possible that certain provisions of chapter 4 should be viewed as mandatory as per article 1:103 under the category of internationally mandatory rules.

In the Pavia Project, the infringement of mandatory rules is sanctioned with nullity. Nullity is incurred under the terms of article 140 if, on the one hand, the contract is contrary to public policy or morals or a mandatory rule adopted for the protection of general interest or situations of primary importance for society; and on the other hand, the contract infringes any other applicable mandatory rule.

The UNIDROIT Principles exclude from their scope of application the issue of invalidity of a contract based on immorality or illegality (article 3.1). No particular sanction is provided for the infringement of the rules established by the UNIDROIT Principles and considered to be mandatory.

Under private international law, public policy is enforced under the rules of conflicts of law by a refusal to apply a foreign law, the application of which is considered to be contrary to public policy. The law of the forum will then apply. Such a refusal does not however always lead to the application of the law of the forum. For example, article 5 of the abovementioned Rome Convention provides that the choice of applicable law must not result in the consumer being deprived of the protection afforded by the mandatory provisions of the law of the country in which he has his habitual residence in certain circumstances. It is therefore the law of habitual residence which will apply to the relevant points.[58] With regard to conflicts of jurisdiction, substantive or procedural public policy can be invoked to prevent a foreign decision from taking effect. Such decision will not be incorporated into the French legal system.[59]

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58 Compare with the new rule suggested in the Draft Regulation Rome 1 on the contract entered into with a consumer. See also article 6 relating to the determination of the law applicable to a work contract.

59 See for example, the French case law on abovementioned Muslim repudiations.

European directives which build protection systems for the consumer also provide various sanctions for the infringement of mandatory rules. Firstly, the consumer – the protected person – cannot renounce the benefit of such protection;[60] furthermore, in certain cases, the clauses which contravene the protective provisions do not bind the buyer and the sanction is therefore based on unenforceability;[61] finally, most directives enforce the protection system by an indirect rule of conflicts of law imposing on Member States an obligation to ensure, when the directive is transposed, that the application of the law of a non-Member State cannot deprive the consumer of the protection afforded by Community law.

If these sanctions are varied, or even uncertain and incomplete, it is perhaps a sign the mandatory rules should be graded depending on their force, grading which is not clearly reflected in the terminology used at the moment.

B. Towards a grading of mandatory rules?

The sanctions for infringement of a rule appear to be named differently depending on the nature of the rule which is infringed. The more a rule is considered to be mandatory, the more its infringement is likely to be sanctioned by the contract or the offending decision being deprived of any effect (the expression "deprived of effect" is used purposefully since the present study does not purport to analyse the terminology applied to the sanctions themselves).

This approach is particularly obvious in PECL. The "Fundamental Principles" referred to in article 15:101 are not mentioned in any other provision, but suddenly appear in relation to the sanctions for illegality. The rules which fall within the category of fundamental principles appear to possess a "super-mandatory" character which results in the most severe sanction in the event of breach. It would seem that such rules were not intended to be treated in the same way as the rules mentioned in article 1:103, which is only referred to expressly in article 15:102. The commentary on article 15:102 is particularly enlightening in this respect: article 15:102 is concerned with less serious infringements. The commentary on article 15:101 clarifies the content of these "super-mandatory" rules. They may form part of the law of the Member States or of European law itself. From the point of view of the origin of such rules, it is not clear how they can be distinguished from the rules referred to in article 1:103 which may also have a national, supranational or international source. The differences lie perhaps in their content. The commentary refers essentially with regard to these rules to European freedoms and ECHR provisions. The application of these fundamental principles should allow contracts which undermine individual freedom, commercial freedom, family life or proper administration of justice to be sanctioned.

In the Pavia Project, the nullity which affects an illegal contract would appear to follow stricter rules in cases where "public policy or morals or any mandatory rule adopted for the protection of public interest or of a situation of primary importance for society" is

60 See for example article 12 of the distance selling directive mentioned above or article 12 of the directive on the distance selling of financial services referred to at 7 above.

61 See for example article 8 of the time share directive or article 7.1 of the sale and guarantee of consumer goods directive referred to at 7 above.

breached under the terms of article 140.1.a). Indeed, such a contract would be totally null and void and it would not be possible to "confirm" it, as opposed to a contract which is merely in breach of "another mandatory rule" (article 140.1.b) which is either partially void or can be "confirmed". Paragraph 5 of article 140 provides, however, without making any distinction between the causes of illegality, that a contract which "is entered into in the context of an illegal activity is not void for a party who does not take part in such illegality". This appears to be contradictory with the rules on nullity set out above.

These "super-mandatory" rules feature in the debate regarding the existence of a transnational public policy[62] in international arbitration. It is argued that transnational public policy embodies a set of values which are common to the greatest number of States and economic players.[63]

Transnational public policy has been mentioned in relation to a number of questions raised before the arbitrator. It has found applications, which are particularly interesting for our purposes regarding the competence of an arbitrator on the one hand and the law applicable to the merits on the other hand. (Of course, at the stage of control of the award, public policy plays a part in relation both to the procedure and to the merits of the dispute).

With regard to the issue of the competence of an arbitrator, the question has arisen both before French and foreign jurisdictions, as to whether an arbitral tribunal could validly come to a decision concerning a failure to perform or the validity of a contract which is contrary to public policy and more generally where the legality of a party's behaviour is contested. The trend in case law would appear to be allowing the arbitrator to sanction contracts and instances of behaviour which are contrary to international public policy. For example, French courts have taken the view that "although arbitrators are prevented by European competition law, because it is concerned with economic public order, from issuing injunctions or imposing fines, they may however draw the contractual consequences arising out of behaviour which is illegal under public policy rules which apply directly to the relationship between the parties".[64] This solution has been widely adopted in comparative law.[65] The competence of the arbitrator may stop at certain non-pecuniary issues (extra-patrimonial) which are at the heart of international public policy, but the trend is now to widen the scope of the arbitrator's competence, no matter how much the issue is affected by public policy.[66]

Public policy also enables the arbitrator to refuse the application of the law which is normally applicable. It may in fact play a positive role, since the arbitrator sometimes

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62 Expression borrowed from J.B. RACINE, *L'arbitrage commercial international et l'ordre public*, *LGDJ* 1999, esp. n° 628 and following, pp. 353 and following. See also, P. LALIVE, "Ordre public transnational" (ou "réellement international") et arbitrage international", *Rev. arb.* 1986.323.

63 For a critical view, see P. MAYER, "La règle morale dans l'arbitrage", *Etudes offertes à P. BELLET*, Paris 1991, p. 379; V. HEUZE, "La morale, l'arbitre et le juge", *Rev. arb.* 1993.179.

64 Paris, 19 May 1993, *Labinal, JDI* 1993.957, note L. IDOT.

65 See the references provided *in Traité de l'arbitrage commercial international, LITEC*, Ph. FOUCHARD, E. GAILLARD et B. GOLDMAN, esp. n° 568 and following, pp. 353 and following.

66 On the criterion required for the submission of a dispute to arbitration and the role of public policy in this area, see B. FAUVARQUE-COSSON, *Libre disponibilité des droits et conflits de lois*, *LGDJ*, 1996, pp. 93 and following.

annuls a contract which infringes transnational public policy, and although by doing so he refuses to follow the intention of the parties, he applies a rule from this particular public policy in a positive and direct way.

In the same way that the fundamental principles are the subject of controversy, so is the content of transnational public policy. The relevant question is that of determining whether such or such value deserves to be included in such public policy by virtue of the fundamental value which it represents. The issue is again that of fundamental values. Mr. J.-B. RACINE suggests a distinction based on whether the values protect "the interests of a society of merchants" or "superior interests". Transnational public policy would therefore cover questions relating to the validity of hardship clauses, to the performance in good faith of obligations, to the prohibition of usury, to the prohibition of corruption, to the protection of human rights (which correspond in part to the fundamental principles mentioned in PECL and which, in international arbitration, find an application regarding the protection of property and the prohibition of racial boycott),[67] to the principle that certain items cannot be subject to any commercial exchange and to the protection of the cultural and natural environment.

Comparative Law

In his thesis on *ordre public* (public policy) in comparative law, Mr. Philippe MALAURIE presents no less than twenty-two existing definitions of *ordre public*, before setting out his own definition, the 23rd[68]… Nevertheless, the study of comparative law leads to two observations: firstly, the traditional notion of *ordre public*, paired with the notion of good morals (boni mores), exists, directly or indirectly, in most legal systems, as a means of imposing overriding mandatory rules (**I**). Secondly, there are rules which are more or less mandatory and which exist alongside this notion (**II**).

I. The Traditional Notion of Ordre Public and Good Morals (Boni Mores)

The notion of *ordre public* in its traditional meaning is known throughout the different legal systems, and is referred to with different words. It sometimes has the purpose of safeguarding society's fundamental values (**A**). However, its content tends to vary (**B**), but can be ascertained by reference to the generic notion of "fundamental principles" (**C**).

67 P. HAMMJE, "Droits fondamentaux et ordre public", *Rev. crit.* 1997.1.

68 Ph. MALAURIE, L'Ordre public et le contrat. ètude de droit civil comparé, France, Angleterre, URSS, préf. P. ESMEIN, éd. Matot-Braine, 1953. See also on these difficulties, M.-C. VINCENT-LEGOUX L'ordre public – étude de droit comparé interne, PUF 2001.

A. The safeguarding of society's fundamental values

The latin adage from the *Digeste*[69] is well known: *"Privatorum conventio juri publico non derogat"*.[70] The Roman jurisconsults used to make a distinction between the law which applied *"ad singulorum utilitatem"* (to the private interests of individuals) from which it was possible to derogate, and what they called the *jus publicum* – a notion covered by public law today – which was used to designate a rule which affected society more directly than it affected the citizens themselves. The distinction was therefore made between public law and private interests.

It was BOULAY DE LA MEURTHE who suggested that the term *"public"* in the French Civil Code be replaced with *"ordre public"*.[71] Indeed, the year VIII project mentioned "laws with affect *the public*" whilst the year XII project established that it was prohibited to derogate from the *"laws which form part of public law"*. The choice of the expression *"ordre public"* seems to reflect the intention of maintaining a broad meaning for the notion.[72] *Ordre public* was traditionally understood as a form of public law in the wider sense: it regards the safeguarding of principles which are essential to society. Article 6 of the French Civil Code clearly follows this concept: "Laws relating to *ordre public* (public policy) and good morals *(bonnes mœurs)* cannot be derogated from by private agreements". A very meaningful judgment rendered by the Belgian Cour de casssation is readily cited in support of this idea: "A law can only, strictly speaking, relate to *ordre public* if it concerns essential interests of the State or the community, or if it establishes, under private law, the legal bases for the economic or moral order of society".[73] *Ordre public* therefore could be defined as "a body of rules of conduct, based on a sense of duty, of dignity of the human being, of honesty or public propriety, commonly accepted by citizens, no matter what religious or philosophical opinions they hold".[74]

The codes all deal with this question by setting out general rules, which also make use of the key concepts which are that of illegality or immorality.[75] In some cases, the two expressions are paired in a set phrase, "*ordre public* (public policy) and good morals", and in this instance the first expression is so close to the second that it seems to take precedence over it **(1)**. In other cases, the reference is merely to "good morals", which in such instance represents a much wider legal reality since it becomes a criterion for the overriding mandatory character of a rule **(2)**.

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69 D. 50, 17, 45.

70 "La convention privée ne déroge par à l'ordre public". Voir H. ROLAND et L. BOYER, *Adages du droit français*, Paris, *Litec*, 1999, n° 340.

71 V. J. FOYER, "les bonnes mœurs", in Le Code civil, un passé, un présent, un avenir, Dalloz, 2004, p. 503.

72 P. DEUMIER et T. REVET, V° "Ordre public", *in Dictionnaire de la culture juridique*, 2003, *PUF*, p. 1119.

73 Cass., 9 December 1848, Pas. I, 699.

74 RENARD, VIEUJAN, et HANNEQUART.

75 *The civil Law in European Codes*, *in D*.L. CAREY MILLER and R. ZIMMERMANN (eds), *The civilian Tradition and Scots Law*, Berlin, 1997, p. 267. See also G.H. TREITEL, *The Law of Contract*, 11e éd., 2003, chaps. 11 and 12; E. MC KENDRICK, *Contract Law*, 4e éd., 2000, chap. 15.

1. The association of ordre public/public policy and good morals (boni mores)

The association of *ordre public* and good morals is obvious in the French Civil Code, with article 6: "Laws relating to *ordre public* (public policy) and good morals *(bonnes mœurs)* cannot be derogated from by private agreements". There is an similar expression in the Spanish Civil Code, in article 1255: "The contracting parties may freely enter into agreements, clauses and conditions, insofar as they are *not contrary to the laws, morals or public policy*".[76] Articles 1461 and 1467 of the Chilean Civil Code also forbid agreements which are contrary to public policy or good morals. Article 1354 of the Italian Civil Code, entitled "Illicit or impossible conditions", provides in its first paragraph as follows: "A contract is null and void if it contains a condition, precedent or subsequent, which is *contrary to mandatory requirements, to public policy or to good morals*".[77] Article 3.40 (1) of the Dutch BW follows the same logic. It provides that: "A legal agreement which is contrary to public policy on the basis of its content or of its necessary implications is null and void". The expression also appears in articles 280 and 281 of the Portuguese Civil Code *("ordem publica et bons costumes")* and in article 178 of the Greek Civil Code.

A number of legal systems exercise a control over the *"cause"* (consideration) of the contract to ensure conformity with public policy or good morals. Article 1133 of the French Civil Code provides that: "The cause is illicit when it is prohibited by law, when it is contrary to good morals or public policy." Thus under French law, contracts for corruption or trading of favours are void for "immoral cause".[78] Similarly, the French Cour de cassation ruled that a contract for sale of goods was void if the goods sold were intended to be used for criminal purposes.[79] Article 1343 of the Italian Civil Code reads as follows: "The cause is illicit when it is *contrary to mandatory requirements, to public policy or good morals*".[80] Article 1275 of the Spanish Civil Code provides that: "Contracts *without a cause or with an illicit cause*, are of no effect. The cause is illicit when it is *contrary to laws or morals*".[81] Occasionally, under Spanish law, good morals are not referred to expressly, but it would appear that such a reference can be implied. For instance, Article 1271 provides

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76 "Los contratantes pueden establecer los pactos, cláusulas y condiciones que tengan por conveniente, siempre que no sean contrarios a las leyes, a la moral, ni al orden público".

77 "Condizioni illecite o impossibili. à nullo il contratto al quale è apposta una condizione, sospensiva o risolutiva, contraria a norme imperative, all'ordine pubblico o al buon costume". To be compared with article 634 of the same Italian Civil Code: "Impossible or illegal conditions. In testamentary provisions, impossible conditions and conditions which are contrary to mandatory rules, public policy or good morals are considered null and void (non apposite) except insofar as provided in article 626" ("Condizioni impossibili o illecite. Nelle disposizioni testamentarie si considerano non apposte le condizioni impossibili e quelle contrarie a norme imperative, all'ordine pubblico o al buon costume, salvo quanto è stabilito dall'art. 626").

78 Com., 7 March 1961, *Bull. civ.* III, n° 125, p. 112.

79 Civ. 1, 12 July 1989, *JCP* 1990,II, 21 546.

80 "Causa illecita. La causa è illecita quando è contraria a norme imperative, all'ordine pubblico o al buon costume".

81 "Los contratos sin causa, o con causa ilícita, no producen efecto alguno. Es ilícita la causa cuando se opone a las leyes o a la moral".

in fine: "A contract may be entered into in respect of any services which are not contrary to laws or to good morals".[82]

Under English law – as under American law in fact,[83] – the judge relies on notions of public policy and especially of immorality to identify grounds of illegality on the basis of which to refuse the performance of the contract. Public policy and good morals cover more or less the French expression *"ordre public et bonnes mœurs"*. There is a common law distinction based on the source of illegality. A contract is illegal in two situations. Firstly, it is illegal when its purpose is to carry out an act which is contrary to applicable law (statute), or when its object or its consideration are illegal. This is the case with contracts imposing usurious interest rates, evading tax, limiting freedom of trade in breach of the laws establishing free competition … Secondly, a contract is illegal when it infringes rules which protect public policy. In such case, notwithstanding the fact that no particular law has been contravened, or that the object or consideration is not illicit, the law considers the contract to be undesirable and unworthy of protection by the courts. The validity of the contract is assessed by reference to morality: the contract must not be contrary to good morals. The Court will refuse to give effect to a contract, not because it infringes a statute, but on the basis that such contract is contrary to public policy.[84] The same distinction appears under Scottish law, Irish law as well as American law.[85]

Agreements which are likely to be prejudicial to family life or which may induce the parties not to perform their matrimonial duties are considered to be contrary to public policy at common law. The English definitions of public policy therefore contain the traditional element of public interest seen as the superior interest of the State, which restricts individual freedom of contract. As stated by Lord Wright in a famous case: "there are considerations of public interest which require the Courts to depart from their primary function of enforcing contracts and exceptionally to refuse to enforce them. Public policy, in this sense, is disabling".[86]

For example, a maintenance agreement conditional on a spouse agreeing to separation was held to be void.[87] Similarly a promise to marry made by a person who was already married was void: indeed such promise could become, for the promisor, a reason to kill her spouse or to divorce.[88] On the contrary, every time a party has made a promise to marry after obtaining a divorce judgment, such promise is valid and can give rise to a claim for compensation, if it turns out that the divorce decision was not yet enforceable.[89] A promise by a man to pay a woman in the event she agreed to become his

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82 "Pueden ser igualmente objeto de contrato todos los servicios que no sean contrarios a las leyes o a las buenas costumbres".

83 The notions surrounding public policy are common to American and English law: see E. A. FARNSWORTH, *Contracts*, 4e éd., New York, 2004.

84 Lemenda Trading Co. Ltd. V. African Middle East Petroleum Co. Ltd., [1988] QB 448.

85 W.W. MCBRYDE, *The Law of Contract in Scotland*, 2e éd., 2001, Chap. 19; *The Laws of Scotland: Stair Memorial Encyclopedia*, vol. 15 (1996), § 763 and following; on Ireland, see CLARK, *Contract Law in Ireland*, 4th ed., 1998, part 5 *(Public policy)* and chap. 14 *(Illegal contracts)* and 15 *(Void contracts)*.

86 Fender v. St. John Mildmay [1938] A.C.1.

87 *Brodie v. Brodie* [1917], p. 271.

88 *Spiers v. Hunt* [1908] 1 K.B. 720.

89 *Fender v. St. John-Mildmay* [1938] A.C. 1: see Lord Atkins.

mistress was considered to be illegal and the judge refused to lend his support to its performance.[90] The same principle applies to contracts considered to have undesirable effects on family relationships – an agreement not to marry – or which interfere with the administration of justice (the payment made to a witness to give false evidence for example). Case law can be found according to which a contract cannot be enforced by a party who, at the time of making it, intended to perform it illegally or knew that the other party so intended.[91] The fact that a party has entered into a contract in order to commit an offence, or knew that the other party so intended and entered into the contract for that purpose automatically renders the contract unenforceable.[92] Are also illegal an undertaking to commit a crime or a tort,[93] agreements with a foreign enemy (under the Trading with the enemy Act of 1939) or, on the contrary, an agreement hostile to a friendly State,[94] an agreement which is prejudicial to the State, such as the sale of Honours or the sale of a public service, agreements which pervert the course of justice (for example: stifling criminal proceedings, except when civil and criminal remedies coexist), agreements which restrict the freedom to marry[95] or contracts to procure marriage.[96]

2. Good morals in the widest sense, a concept which encompasses public policy

In certain legal systems, the notion of public policy is ignored in favour of the notion of good morals, which seems to encompass it. Expressions such as "contrary to law", to public policy and good morals" are no longer found, but instead appears a more concise expression, without any reference to public policy.

Thus, under German law, the infringement of law is dealt with in paragraph 134 of the BGB, which declares that contracts which contravene a legal prohibition are void. However, this article only covers provisions which prohibit – expressly or impliedly – certain legal transactions, such as provisions of labour law, competition law or criminal offences. As for paragraph 138, it merely refers to "being contrary to good morals". The notion of good morals does not have the same meaning as the meaning conferred upon it by the Napoleonic Code. Of course, the judge may control whether certain moral standards are met: a German judge thus decided that a claim for the performance of a loan which had been granted upon very favourable terms to a woman with whom the lender entertained an illicit relationship was receivable on the basis that such loan had not initially been understood as payment for sexual favours.[97]

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90 *Walker v. Perkins* [1764] 1 W.B1.517.

91 Archbolds (Freightage) Ltd v S Spanglett Ltd [1961] 1 QB 374, 384 (Pearce LJ), 388 (Devlin LJ) et St John Shipping Corp v Joseph Rank Ltd [1957] 1 QB 26 ("a contract cannot be enforced by a party who, at the time of making it, intended to perform it illegally or knew that the other party so intended").

92 *Langton v Hughes* [1813] 1 M & S 593; 105 ER 222.

93 *Clay v. Yates*, [1856] [1] H and N 73.

94 Foster v. Driscoll [1929] KB 470.

95 *Lowe v. Peers* [1768] 4 Burr 2225.

96 Hermann v. Charlesworth [1905] 2 KB 123.

97 BGH, 12 January 1984, NJW 1984.2150.

But the notion reflects a much more general idea, the idea of "unwritten principles of contractual morals – including business morals – the detailed content of which is determined by the judge, without the sexual connotation which is attached to the notion under French law".[98] Certain academics prefer in fact to translate the expression *"guten Sitten"* not with the expression *"bonnes moeurs (boni mores)"* but with the word "*morale* (morals)", in order for this extra dimension to be taken into account.[99] As underlined by Mr. Pascal ANCEL, "it is very significant that the persons who drafted the BGB should have included in the section on what is contrary to good morals, in paragraph 138 II, the particular example of usurious practice *(Wucher)*, defined as "the legal transaction, whereby a person, by taking advantage of a situation of duress, of the inexperience, of the lack of capacity to judge, or a significant weakness of will of another person, obtains a promise or a pecuniary advantage for himself or for a third party which is manifestly disproportionate to the consideration provided."(paragraph 879 ABGB has a similar structure)".[100] There is no question here of any connotation between good morals and sexual behaviour.

Under today's positive law, the interpretation of the notion of "*guten Sitten*" from article 138, 1st paragraph of the BGB does not even refer to morals, with the meaning of non-legal social rules. On the contrary, the notion of *"guten Sitten"* has now become one of the key provisions used to include fundamental rights into civil law (see also the observations hereunder on the relationship between public policy and fundamental rights). In a pluralistic society which no longer imposes one standard of behaviour but accepts widely differing customs, the only way to define this notion in a way which is unambiguous and likely to be widely accepted is by reference to the constitutional order, and in particular to the fundamental rights which establish an objective system of values *("objektive Wertordnung"*[101]*)*, which is supposed to be accepted by all citizens. It is therefore possible to speak of a *"constitutionalisation"* of good morals, which has transferred them from a moral context to the legal context of constitutional law.

In this way, German case law has found that a non-competition clause which had no time limit was immoral under article 138 paragraph 1 of the BGB on the basis that such clause restricted the freedom to carry on business (art. 12 GG).[102] Similarly, agreements entered into by couples in respect of contraception methods are considered to be immoral on the basis that they infringe the right to personality and family protection (art. 2 and 6 GG); a woman who stops taking the pill without warning her partner is therefore not liable under contract law.[103] Finally, in order to protect negative contractual freedom (art. 2, 1st para. GG), usurious contracts entered into in situations of "a structural imbalance in bargaining power" *("strukturell ungleiche Verhandlungsstärke")*, such as ruinous guarantees signed by close relatives of the debtor or abusive marriage contracts entered

98 P. ANCEL, "Sur une application de l'idée de proportionnalité dans le droit des contrats allemand et autrichien", *RDC* Dec. 2003, p. 225 and following, *in fine*.

99 M. FROMONT, Droit allemand des affaires, Montchrestien, 2001 n^{os}177 s.

100 P. ANCEL, "Sur une application de l'idée de proportionnalité dans le droit des contrats allemand et autrichien", *RDC* Dec. 2003, p. 225 and following, *in fine*.

101 See Bundesverfassungsgericht (BVerfG – Federal constitutional court) of 15 Jan. 1958, BVerfGE 7, 198 – Lüth.

102 BGH, 28 April 1986, NJW 1986, 2944; BVerfG, 7 Feb. 1990, BVerfGE 81, 242.

103 BGH, 17 April 1986, BGHZ 97, 372, 379.

into in situations of grave imbalance between the spouses (for example the exclusion of any alimony payment in the event of divorce was agreed by one spouse under psychological pressure during her pregnancy), have also been held to be immoral[104]

German law reveals a much wider conception of the notion of "good morals". It differs from French law in that under article 138 paragraph 1 of the BGB, if a contract is contrary to good morals, this is a ground for nullity, but without any reference to the subject matter or the cause of the contract. It is drafted very concisely: "a legal transaction which infringes good morals is void". Mrs. ZWEIGERT and KÖTZ draw the conclusion that "such distinctions are artificial. In principle, it should suffice to say that the contract is void, insofar as an examination of its content and the surrounding circumstances, including the purpose of the parties shows that such contract contravenes" the law, good morals or public policy.[105] The appeal was clearly not heard in France since the French Reform Proposals do not suggest abandoning the notion of cause.[106]

Austrian law sets out, in paragraph 879 of the ABGB, a wide notion of good morals, using wording which is close to that used under German law: "A contract entered into in breach of *a legal prohibition* or *good morals* is void. In particular, the following contracts are void: 1° where something is agreed in exchange for the negotiation of a contract of marriage; 2° a lawyer takes on for his own account all or part of a dispute which he is handling, or obtains the promise of a certain proportion of the sums recovered by his client; 3° somebody disposes of a legacy which he expects from a third party during the lifetime of such party; 4° somebody takes advantage of the foolishness, of pressure applied, of the mental weakness, of the inexperience or the confusion of another person to obtain the promise for himself or a third party of consideration, the value of which is grossly disproportionate to the services provided".[107]

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104 BVerfG, u 19 Oct. 1993, BVerfGE 89, 214 (guarantee) and BVerfG, 6 February 2001, BVerfGE 103, 89 (marriage contracts); this last case also referred to art. 6, para. 4 GG (constitutional protection of families and mothers) in the gounds for the decision.

105 K. ZWEIGERT et H. KÖTZ, *Introduzione al Diritto comparato*, II, Istituti, Milan, Giuffrè, 1995, IV, § 5, p. 80.

106 See D. MAZEAUD, "Observations conclusives", *RDC*, Dec. 2005, § 16: "The cause was another principle, the maintaining of which gave rise to a wide exchange of views during the day and provoked the incomprehension of foreign or comparative law participants. Unknown to most foreign laws, in particular by modern European codes (Germany, the Netherlands), set aside by projects for the European harmonisation of contract law led by G. GANDOLFI and O. LANDO, and criticised by a number of French academics who attack the complexity of this notion which is impossible to master and which is inundated 'today by tons of contradictory academic writing and even more uncertain case law', this 'French contractual exception' is maintained in the French Reform Proposals. As was the case yesterday, as is today and will be tomorrow, the cause is still considered to be one of the pillars of French contractual law".

107 § 879 (1) Ein Vertrag, der gegen ein gesetzliches Verbot oder gegen die guten Sitten verstößt, ist nichtig.

(2) Insbesondere sind folgende Verträge nichtig:

1. wenn etwas für die Unterhandlung eines Ehevertrages bedungen wird;

1a. wenn etwas für die Vermittlung einer medizinisch unterstützten Fortpflanzung bedungen wird;

In a similar way, under Finnish law, contracts which are contrary to good morals are void and under Danish law, the rule contained in the *Danske Lov* (art. 5.1.2) provides that contracts that contravene "decency" are void. This includes contracts entered into to commit a crime or to reward a person for committing a crime, promises made by a person to unduly limit his freedom of action, such as a promise to vote for a political party or to change or not change religions; similarly, a promise to pay a person for carrying out something which is encouraged or required by law may be immoral and impossible to enforce: for example, a promise to pay a person to tell the truth as a witness in a trial.[108]

In Switzerland, article 20 of the Civil Code (entitled "nullity"), first paragraph, merely envisages immorality, without a reference to public policy: "A contract is void if its subject matter is *impossible, illegal or contrary to mores*". However, article 19 of the Swiss Code of obligations refers to "mores, public policy or rights to personality".

B. A notion with a variable content

The notion of public policy/*ordre public* is a standard notion.[109] Although in certain cases it would appear to find common applications, it refers to a varying content in comparative law. This is due in particular to the sources of public policy (**1**). As a result, the notion varies both in time (**2**), and in space (**3**).

1. The sources of public policy

Public policy originates from a number of sources. It can find its origin in legislation but there is also a "virtual", implied public policy: this observation is valid for all the legal systems which were reviewed.

Public policy can have a legislative origin. The legislator "may refer to it, article by article, or provide for its application by means of a general text which encompasses a series of articles"[110] (see under French law, article 2 of the law of July 1989 on leases), or

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2. wenn ein Rechtsfreund eine ihm anvertraute Streitsache ganz oder teilweise an sich löst oder sich einen bestimmten Teil des Betrages versprechen läßt, der der Partei zuerkannt wird;

3. wenn eine Erbschaft oder ein Vermächtnis, die man von einer dritten Person erhofft, noch bei Lebzeiten derselben veräußert wird;

4. wenn jemand den Leichtsinn, die Zwangslage, Verstandesschwäche, Unerfahrenheit oder Gemütsaufregung eines anderen dadurch ausbeutet, daß er sich oder einem Dritten für eine Leistung eine Gegenleistung versprechen oder gewähren läßt, deren Vermögenswert zu dem Werte der Leistung in auffallendem Mißverhältnisse steht.

108 *Les Principes du droit européen du contrat*, commentary below Andersen and Andersen 235.

109 See Ph. MALAURIE, *L'Ordre public et le contrat. Étude de droit civil comparé, France, Angleterre, URSS*, pref. P. ESMEIN, ed. Matot-Braine, 1953; P. CATALA, "À propos de l'ordre public", *in Mélanges Pierre DRAI*, *Dalloz*, 2000, p. 511; G. COUTURIER, "L'ordre public de protection: heurs et malheurs d'une vieille notion neuve", *in L'ordre public à la fin du XXème siècle*, *études FLOUR*, *Defrénois*, 1979, p. 55.

110 B. FAUVARQUE-COSSON, "L'ordre public", *art. cit.*, p. 477.

the legislator may "provide that any clause or agreement is void or provide a criminal sanction in the event or a breach of the rule",[111] or use wording such as "notwithstanding any agreement to the contrary…" or "agreements contrary to this law are void…". In such cases, it is by induction, starting from the sanction provided in the text, that it is possible to deduce the "public policy" character of a rule, in a functional approach of the notion.

Some legal systems have attempted to limit public policy to its legislative form. The Italian legislator thus attempted, in 1942, to reduce public policy to a single written standard, article 31 paragraph 2 of the "pre-laws". A decision of 1942 thus reduces public policy to principles based on "real rules of law, or which could be translated into rules of law".[112] But this conception did not fair well.

Indeed, public policy can also be *virtual or implicit*: an agreement may be declared to be contrary to public policy because its subject matter "contravenes fundamental principles of our legal system and the present social organisation".[113] In the absence of detailed legislation, it is the judge who decides whether such law or such provision relates to public policy. This is the situation in which the English judge finds himself when he has the task of determining not whether a contract is consistent with a *statute* (or legal origin), but whether it is in accordance with *public policy*: it is his role to determine rules to assess conformity with public policy. As highlighted by the Italian comparative law specialist Rodolfo SACCO, "In this field [that of the definition of public policy], definitions do not really affect the practical applications! In order truly to reflect reality, the best definition would be one which was able to generalise a number of solutions found in real life. Such a definition cannot be found in academic treaties, nor is it found (of course) in case law[114]".

The distinction between virtual public policy and formal public policy is relevant in most civil law countries. It also occurs in dual systems, such as in Quebec, where *categories of legislative public policy and virtual public policy* are considered to be relevant, and where a cross over between the two can be observed, as illustrated by the example of clauses restricting competition. From now on, indeed, article 1089 of the Civil Code of Quebec provides that a clause restricting competition is contrary to public policy if it is not limited in time, with regard to the territory it covers and with regard to the scope of activities. Until that piece of legislation, it was case law which had set out those rules.

Whether legislative or virtual, public policy is a framework – notion, which only exists in its practical application, which varies with time.

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111 Ibid.

112 Cass., 4 Jan. 1942, n° 26, *Giur. it.*, 1942, I, 1, 92.

113 Cass. civ., 4 Dec. 1929, *DH*, 1930, 50, *S.*, 1931, 1, 49, note P. ESMEIN; H. CAPITANT, F. TERRÉ, Y. LEQUETTE, *Les grands arrêts de la jurisprudence civile*, t. I, *Dalloz*, 2000, n° 8.

114 R. SACCO and G. DE NOVA, Il contratto, t. II, 3rd ed., UTET, 2004: "In questo campo le definizioni non condizionano né tanto né poco le applicazioni pratiche! Dal punto di vista dell'aderenza al reale, la definizione migliore sarebbe quelle che si riducesse ad una generalizzazione delle solutioni tratte dall'esperienza. Tale definizione non si trova, peraltro, né nei trattati dei teorici, né (ovviamente) nelle massime giurisprudenziali".

2. The evolution of the notion in time

The observation is valid both for the notion of public policy strictly speaking and for that of good morals *(boni mores)*: the notion evolves, in its content, and with the passing of time. Something which was immoral yesterday can become moral today: "They [public policy and good morals] both have the same conceptual nature. They are rules with an undetermined content, standards, which do not conform to any precise definition and which often require the assistance of the judges to find a practical application".[115]

The same can be said in Quebec, where reference is sometimes made to a "moral public policy" the aim of which is to ensure that *boni mores* are respected: "More still than other branches of public policy, moral public policy is a changing notion. Life-insurance contracts or marriage brokering contracts used to be considered immoral; their validity is now accepted".[116]

Under English law, the precise question as to whether the content of public policy could evolve has given rise to hesitations. On the whole, the prevailing view appears to favour a limited application of public policy of judicial origin. Lord HALSBURY is frequently quoted in support of this opinion, speaking out against the creation of new heads of public policy.[117] However, judges occasionally get around this principle when necessary.[118] Opinions differ as to the scope for interpretation which is left to the judges: some argue that public policy, like any other branch of common law, should be governed by the rule of precedent.[119] For others, "the function of the courts regarding public policy is not necessarily to accept what public policy was fifty or a hundred years ago, but to state the rule of policy which is valid for the present time".[120]

The necessity to adapt seems to have prevailed: "The determination of what is contrary to the so-called 'policy of the law' necessarily varies from time to time. Many transactions are upheld now by our courts which a former generation would have declared void as contrary to the supposed policy of the law. The rule remains, but its application varies with the principles which for the time being guide public opinion";[121] "Surely what is immoral may be judged by the current standards of morality of the community".[122]

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115 F. TERRÉ, Y. LEQUETTE, Ph. SIMLER, *Les obligations*, Dalloz, 2005, § 387.

116 PINEAU, BURMAN and GAUDET, *Obligations*, n° 166, p. 318.

117 Janson v. Drufontein Consol. Mines [1902] A.C. 484. Concording: "You are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing which, more than another, public policy requires, is that men of full age and competent understanding shall have the utmost liberty of contracting" (per Jessel M.R., Printing, etc. Co. v. Sampson [1875] L.R. 19 Eq. 462, p. 465). See also Fender v. Mildmay [1938] A.C.1.

118 Regazzoni v. K.C. Sethia (1949) LTD, [1958], A.C. 301: "If based on public policy, your Lordship will not hesitate, while disclaiming any intention to create any new head of public policy, to apply an old principle to new circumstances".

119 Such was the opinion of Lord Wright, expressed in *Fender v. St. Johon Mildmay* [1938], A.C. 1.

120 Lord Watson, in Nordenfeldt v. Maxim Nordenfeldt Guns an Ammunition Cxo. [1894], A.C. 535.

121 *Evanturel v. Evanturel* [1874], L.R. 6 P.C. 1, 29.

122 Juge Stable, in the Australian decision *Andrews v. Parker* [1973], Qd. R. 93, 104.

The English judge has thus in the past refused to lend his assistance to the performance of a lease where the lessor leased residential premises to a woman. She was the mistress of a man who visited her at such premises and whom the lessor expected to pay the rent.[123] Such a solution would no longer be applied today.[124]

Italian law, in particular, takes an identical approach: "the concept of public policy is by essence relative and historical: it varies according to the different political and legal rules in force; in space and in time. It is for the judge to use his vigilance and patience in order to identify its content and determine its limits, by evaluating the special provisions of the law, the general legal system, the necessity of the life which the rules seek to protect, in keeping with the prevailing political and social conditions".[125]

French case law has gradually adapted the notion of "*bonnes mœurs*". Although marriage brokering contracts were held, during the 19th Century,[126] to be contrary to good morals, such contracts have since been upheld. A similar evolution occurred with regard to liberalities. Gifts made in view of creating, pursuing or renewing an illegitimate relationship were initially void, except if such gifts were made to ensure a mistress was not left bereft of any resources after a break up. Case law then extended these principles to homosexual couples, before holding that a gift made to a woman who was the mistress of the donor at the time but whom he intended to marry (and did subsequently marry after the dissolution of his first marriage) was not illegal.[127] The first civil chamber of the Cour de cassation went one step further in 1999 when it ruled that "a liberality made in the course of an adulterous relationship was not void for being contrary to good morals".[128] The Court in its full formation confirmed the principle when it held that "a gift granted 'in the course of an adulterous relationship' was not contrary to good morals".[129]

The notion varies with time, as is clear from comparative law; it also varies in space.

3. The relativity of the notion in space

When considering the prospect of harmonisation of contract law in Europe, it is impossible to ignore the fact that the notion of public policy does not represent the same reality in every country. This is reflected in the diversity offered by positive law in respect of

123 *Upfill v. Wright* [1911] 1 K.B. 506.

124 *Dwyer* [1977] 93 L.Q.R. 386.

125 Cass., 21 February 1940, n° 645, Giur. It., 1942, I, 1, 92: "Il concetto di ordine pubblico è essenzialmente relativo e storico: varia secondo i diversi ordinamenti politici e giuridici; nello spazio e nel tempo. Spetta al vigile e paziente intuizione del giudicie identificarne il contenuto e fissarne contorni, valutando le disposizioni speciali della legge, il sistema generale del diritto, la necessità della vita che, in relazione alle condizioni politiche e sociali dell'ora che volge, l'ordinamento intende assicurare".

126 Civ. 1ère, 1 May 1955, *D.P.*, 56, 1, 47, rapp. LABORIE.

127 Civ. 1ère, 11 February 1986, *Bull. civ.* I, 21.

128 Civ. 1ère, 3 February 1999, *JCP* 1999. II. 10083.

129 Ass. pl., 29 October 2004, *Bull. civ.* Ass. Plén., n° 12. See also Civ. 1re. 25 January 2005, *RDC* 2005/4, p. 1273 and following.

contracts involving prostitution (**a**), contracts on surrogate motherhood (**b**) and, finally, contracts relating to the administration of justice (**c**).

a) Prostitution and public policy

Case law dealing with prostitution varies considerably from one system to the next. In France, a large body of case law has held that contracts for the setting up or running of a brothel were void, at least if the parties had an agreement to this effect, on the basis that the cause of the contract was immoral.[130] Similarly under English law, a contract for the lease of a car to a prostitute to enable her to exercise her profession is illegal, unless the lessor was not aware of the intended purpose;[131] a conspiracy to corrupt public morals is a crime, such as the publication for profit of a ladies' directory advertising the services of prostitutes.[132]

German law, however, takes a completely different approach. A German judge held that a contract for the lease of a brothel could be enforceable.[133] Such contracts will only be void if the landlord demands an excessively high rent from the prostitutes thereby exploiting them financially or if he limits their independence and forces them to work. In addition, since 1st January 2002, even contracts for prostitution entered into between prostitutes and clients are not void in all circumstances: paragraph 1 of the law on prostitution dated 20 December 2001 establishes the validity of prostitution contracts with regard to the client's obligation to pay the agreed price so long as the "service" was carried out, even partially, by the prostitute. The BGH even goes further in stating that prostitution as such is no longer considered to be immoral, so that an advertisement for prostitutes in a newspaper is permitted.[134] This recent law should have an impact on other questions concerning the "remuneration" of sexual services such as gifts between adulterous couples.

b) Agreements relating to surrogate motherhood

Different legal systems offer diverging solutions to the question of determining whether contracts for surrogate motherhood are in conformity with public policy. In France and in Germany, for example, the law would appear to condemn such an agreement as contrary to public policy. But England or the Netherlands have reached a different, less clear-cut solution.

In France, the Cour de cassation held that a childless wife who entered into an agreement under the terms of which another woman bore the child of her husband could not adopt the child. The contract infringed the public policy principle according to which the human body cannot be the subject matter of a contract (*"indisponibilité"*).[135]

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130 Civ. 1ère, 4 December 1956, *J.C.P.*, 1957. II. 10008, obs. J. MAZEAUD.

131 *Pearce v. Brookes* (1866) L.R.1 Ex. 213.

132 Shaw v. D.P.P. [1962] A.C. 220 (the ladies Directory).

133 8 January 1975, BGHZ 63, 365.

134 BGH, 13th July 2006, NJW 2006, 3490, esp. No 24.

135 Cass. Ass. pl., 31 May 1991, *D.* 1991.jur. 417.

In this decision it applies the traditional definition of "*indisponibilité*", in accordance with which "the condition of persons cannot be the subject of a contract. The condition of persons is defined as being made up of relationships established by nature and by law, notwithstanding the intention of the parties, and which cannot be sold or disposed of by the person whom they concern".[136] This Cour de Cassation decision, which was made after a series of provoking decisions on the part of the appeal courts, found its legal basis in law n° 94-653 of 29 July 1994 on the respect for the human body. Article 16-7 of the Civil Code provides that: "Any agreement for procreation or gestation for the account of a third party is void". Article 16-9 expressly provides that all provisions contained in this chapter of the Civil Code relating to "the respect for the human body" are a matter of public policy.

In Germany, the courts could validly decide that an arrangement for surrogate motherhood was illegal and that the money paid to the surrogate mother was irrecoverable, even though the husband of the mother could prove that the child was his.[137] In the same decision, the Court highlighted that "good morals" could be capital in determining whether a contract for surrogate motherhood was compatible with the values which underpin the content of the law. The legislator later intervened by prohibiting surrogacy purely and simply, by indirect means. Paragraph 1 of the Law on the protection of the embryo of 1990 provides for instance that in the event of the artificial insemination of a surrogate mother, or of the introduction of an embryo into a uterus, the personnel which carries out the operation (and not the surrogate mother herself) is liable to criminal prosecution. Similarly, the law on the adoption agency dated 1989 provides that it is an administrative offence to publicise through advertisements the search for a surrogate mother or one's own willingness to become a surrogate mother. The prohibition falls within public policy rules.

In England, however, the legislator acted at an earlier date to regulate this field: the Surrogacy act of 1985 thus established a specific legal framework for surrogacy agreements. One of the determining criteria is, for example, the absence of remuneration in the agreement (even if the surrogate mother may claim compensation for any expenses incurred, including lost income). In the Netherlands, the question has been left to the courts, which have ruled in a more liberal way than, for instance, French law. For example, it was held that a parental bond could be found between a child borne to a surrogate mother and its "desiring" parents, by using a clever combination of the law relating to parental authority and the rules on adoption.[138]

c) Quota litis pacts and public policy

A *quota litis* pact is a contract under the terms of which a plaintiff undertakes to pay his advocate a proportion of what he recovers through court proceedings. Such pacts have traditionally, since Roman law, been prohibited, as is still the case under French and Austrian law for example (**i**), however, such prohibition is less strictly applied under

136 Civ., 12 June 1838, Jur. Gén. Dalloz, t. XXXV, 1855, V° "Paternité et filiation", n° 633-2°, p. 379.

137 OLG Hamm, 2 December 1985, NJW 1986, 781.

138 *Hof* de Gravenhagen, 21 August 1998, *NJ* 1998, 865.

English law (**ii**). Apart from *quota litis* pacts in a narrow sense, contracts relating to the way the justice system functions are also regarded in different ways from a public policy perspective (**iii**).

i. The traditional prohibition of quota litis pacts

The traditional rule, originating in Roman law, imposes the prohibition of *quota litis* pacts.[139] This principle arises out of public interest considerations: the concern is that the advocate, if he is directly interested in the case, will loose his independence and his equanimity if he shares his client's passion. He could then, lured by potential gain, be led to exaggerate the damage suffered, arrange for evidence to disappear or intimidate or bribe a witness. The prohibition is therefore inspired by the wish to protect the integrity of public justice, and it would therefore appear to fall within the scope of public policy.

Under French law, paragraph 3 of the law dated 31 December 1971 relating to the new profession of advocates provides that "any agreement relating to fees which depends on the result of the legal proceedings is prohibited". However, the prohibition only refers to the fees being agreed exclusively by reference to the outcome of the proceedings. An agreement which, before the start of the proceedings, provides, in addition to the remuneration for legal services, an additional fee dependent on the result obtained or the service provided could be valid. This flexibility was only introduced at a late stage and reluctantly.

Austrian law explicitly prohibits *quota litis* pacts at paragraph 879 of the ABGB: "A contract made in breach of a legal prohibition or good morals is void. In particular, are void any contracts under the terms of which: […] 2° an advocate takes on for his own account the whole or part of a dispute in respect of which he has agreed to act, or secures the promise of a certain proportion of the sums recovered by his client".

ii. Quota litis pacts have found favour with English law

On this issue English law would appear to take a different approach from other national laws.

Traditionally, English law has condemned what it called "champerty", that is to say a contract under the terms of which a person who agrees to act in defence of another must receive part of the damages awarded, and until recently, English judges were very strict in condemning such agreements.[140] But since 1990, conditional fee agreements have appeared in England. In particular, section 58 of the Courts and Legal Services Act of 1990 allows certain claims to be brought on a "no win, no fee" basis. And the same statute establishes the validity of agreements under the terms of which the fees can be increased by a certain percentage in the event of success, provided such agreements are in writing and comply with the relevant requirements.[141] In accordance with the Conditional Fees

139 *Digeste*, 2, 14, 53 et 50, 13, 12.

140 *Wild v. Simpson* [1919] 2 K.B. 544; *Re Trepca Mines Ltd.* [1963] Ch. 199. See also the *Solicitors Act of* 1974, s. 59.

141 Conditional Fees Agreements Regulations 1995 (S.I. 1995 n° 1675).

Agreements Regulations 1995 (S.I. 1995 n° 1675), this type of agreement is authorised, for clients who do not benefit from legal aid, for personal injury claims, for claims against insolvent companies and before the ECHR. A further step was taken with the Access to Justice Act 1999, which radically restricts access to legal aid. Indeed, the law compensates this restriction by authorising conditional fee agreements for any claim for damages except in relation to matrimonial affairs. In particular, section 27 provides expressly that a conditional fee agreement which provides for a success fee is enforceable.[142]

The notion of public policy has clearly shifted in this instance to reflect cultural factors which show a wide gap between common law countries and civil law tradition countries. In countries in which it is accepted that society has become more litigious and in which the relationship to money is different, in particular under the protestant influence – as shown in the analyses carried out by Max WEBER – the old Roman prohibition is largely outdated. The same word, public policy or *ordre public*, covers two different realities under French and English law in relation to *quota litis* pacts.

These different approaches may however evolve. For example, recent German case law shows that even a civil law country which until recently applied a strict and express prohibition of *quota litis* pacts (§ 49, al. 2 BRAO – Bundesrechtsanwaltsordnung) can change directions: In a recent court decision, the German Federal Constitutional Court (Bundesverfassungsgericht) held that the legal prohibition of *quota litis* pacts infringed the freedom of enterprise (art. 12, al. 1er GG), in that the law prohibits such agreements even in the event that the client's financial situation will only allow him to assert his claim by entering into such an agreement.[143] The Court therefore declared that the absolute prohibition on *quota litis* pacts was anticonstitutional and granted the legislator a delay expiring on 30 June 2008 to adapt the law to this decision, either by providing exceptions to the principle, or by lifting the prohibition altogether. In France, the question is of great importance and has come back to the fore in relation to the debate on whether class-actions should be allowed in France and whether advocates should be allowed to bring such actions. An academic has pointed out that if such actions were allowed, this would constitute, in France, a genuine "cultural revolution".[144]

iii. Contracts relating to the administration of justice

Similarly, English law and American law treat agreements which interfere with a fair administration of justice very differently: English law prohibits bargains which are harmful to the administration of justice, such as agreements under the terms of which a party agrees not to report a breach of the law. However, under American law, it is not necessarily illegal for one party to an action to promise to pay a witness for providing evidence: this follows from the fact that witnesses, under American legal procedure, are not called by the tribunal, but it is for the parties themselves to convince them to submit evidence. In the event a witness fails to appear, he can only be subpoenaed if he resides in the state over which the court has jurisdiction. Therefore, promises of payment to a witness are

142 On all these questions, see K. ZWEIGERT and H. KÖTZ, *Introduzione al Diritto comparato*, II, Istituti, Milan, Giuffrè, 1995, IV, § 5, p. 84.

143 BVerfG, 12 December 2006, NJW 2007, 979.

144 S. GUNICHARD, "Une *class action* à la française?", *D.*2005.2180.

void on the basis that they might influence the evidence given, however, promises of payment to a witness who resides outside the jurisdiction of the court are valid to induce such witness to appear at the hearing, but only if such payments are not conditional on the content of the evidence or on the outcome of the hearing.

C. The generic notion of "fundamental principles"

Beyond the differences which exist between the various legal systems, it is possible to identify a public policy based on fundamental rights, which can be found in particular at a European level (**1**). This notion has been further explored in PECL (**2**).

1. Public policy based on fundamental rights

The public policy based on fundamental rights, which has been qualified as "philantropic", is a public policy which "aims to protect the essential values of which there are many, such as freedom, safety and especially, dignity".[145]

It is this public policy which the law seeks to uphold in matters of surrogacy[146] and, more generally, which manifests itself in the development of case law influenced by the ECHR.[147] The law which applies to non-compete clauses vividly illustrates the way in which fundamental principles come to be considered as part of public policy. The fundamental principle of freedom to work appears to lead to a number of converging solutions in comparative law.

Under English law, contracts which are in restraint of trade may be struck down by the courts as being contrary to public policy. Often, the necessity of not curtailing this freedom excessively must be reconciled with the will to protect a weaker or less experienced party against unreasonable terms in a contract.

It was thus held that a contract entered into between a young composer and a publisher was void as being in restraint of trade when the contract granted the publisher the exclusive right to publish the songs of the composer over a lengthy period, without any obligation on the publisher to carry out any promotion of the works.[148] It was also held that a contract entered into between an oil company and a petrol station which bound the company to sell oil for 5 years was reasonable, whilst the same contract which bound the petrol station for 21 years was void as being in restraint of trade.[149] In the same way, a non-compete clause which extended 25 miles around London was not reasonable when the employee had only worked in one branch. The clause was found to be of no effect and the employee could not be prevented from working of a competitor situated close to the previous employer.[150]

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145 D. FENOUILLET, "Les bonnes moeurs sont mortes! Vive l'ordre public philanthropique!", *in études offertes à P. Catala, Le droit privé à la fin du XXe siècle*, Paris, *Litec*, 2001, sp. p. 509.

146 See *supra*.

147 See *supra*.

148 House of Lords, Schroeder Music Publising Co v. Macaulay, [1974] 3 All ER 616.

149 House of Lords, Esso petroleum Co. Ltd v. Harper's garage (Stourport) Ltd [1968] AC 269.

150 House of Lords, Mason v. Provident Clothing and Supply Co. Ltd.

Similarly, under Swiss law, it was held that a management contract under the terms of which a young singer places his entire career in the hands of a manager for a period which the manager can extend indefinitely was an excessive restriction on the personal freedom of the singer, contrary to article 27 of the ZGB.[151] This reflects more generally a requirement of proportionality, which is more and more relevant in positive law. Thus under German law, an exclusive distribution agreement entered into between an oil company and a petrol station which grants the right to the former to renew the contract indefinitely is void as being contrary to good morals.[152] In the same way, an exclusive beer distribution agreement which bound a restaurant for twenty four years is excessive, but the same clause limited to six years would be reasonable and this should be taken into account when determining the penalty for non-performance.[153]

Under French law, a clause which imposes an excessive restriction on an ex-employee competing with his ex-employer could nevertheless be enforced in order to prevent him from working in direct competition with a person in the same town. In accordance with longstanding case law, a non-competition clause is only invalid if it is not sufficiently limited in time and/or in space.[154] As is other legal systems, under French law, the courts control the validity of these clauses in accordance with the principle of proportionality.[155] A non-competition clause which appeared to be disproportionate having regard to the economic freedom of the obligor and the legitimate interests to be protected was thus held by the Cour de Cassation to "lack cause".[156] More generally, the control exercised by the courts is tending to shift from public policy in the strict sense towards fundamental freedoms. Indeed, the Cour de cassation made it clear in 2002 that a non-competition clause was only valid if it was "indispensable for the protection of the legitimate interests of the undertaking, limited in time and in space, taking into account the specific characteristics of the work and was linked to a compensation".[157] It is interesting to point out that the decision is based on the "fundamental principle of the freedom to exercise a professional activity". It finds its place in the current promoting the principle that fundamental rights and liberties cannot form the subject matter of a contract.[158] Having started with traditional notions of public policy, the trend seems to be towards a public policy based on fundamental rights, originating in particular in the European Convention on Human Rights in countries which do not have an equivalent instrument in internal law. This is the new modern face of public policy: from now on "the conquering army of fundamental rights, headed by the Convention on the protection of human rights and fundamental freedoms, has propagated, in internal law, a public policy based on fundamental rights".[159]

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151 BG, 23 May 1978, BGE 104. II.108.

152 BGH, 31 March 1982, BGHZ 83, 313.

153 BGH, 16 and 17 September 1974, NJW 1974, 2089.

154 Cass. civ. 26 March 1928, DP 1930. 1.145, note P. PIC; Cass. com., 20 March 1973, *Bull. civ.* IV, n° 127; Cass. com., 19 May 1987, *JCP, ed. N* 1988, II. 277, note J.-G. RAFFRAY.

155 Cass. com. 4 January 1994, *D.* 1995. 205, note Y. SERRA, *RTD civ.* 1994, p. 349, obs. J. MESTRE.

156 Civ. 1ère, 11 May 1999, *D.* 2000, somm. p. 312, obs. Y. SERRA, *Defrénois*, 1999, p. 992, obs. D. MAZEAUD.

157 Cass. soc. 10 July 2002, *D.* 2002, p. 2491, note Y. SERRA, *RTD civ.* 2003. 58, obs. J. HAUSER.

158 J. HAUSER, note below Cass. soc., 10 July 2002, *RTD civ.* 2003, p. 58, obs. J. HAUSER.

2. The notion of fundamental principles in PECL

There is a close link between a public policy which is limited to the organization of public authorities or the safeguarding of society's economic interests, a moral public policy, concerned with "good morals" on the one hand, and a public policy based on fundamental rights as recognised by the ECHR, on the other hand.

PECL have chosen the use of the expression "fundamental principles" to refer to all three categories of public policy, in article 15:101 of PECL. The commentary on the article specifies that the text applies to contracts which infringe, without any justification, individual freedom (for example, restraints of an excessive duration or restrictions on competition), the right to work or freedom of commerce, as well as to contracts contrary to generally accepted rules of family life and sexual morality and to contracts which interfere with a proper administration of justice. The notion of "fundamental principles" goes therefore beyond the concept of public policy as defined by European Court of Human Rights case law, but includes such principles. The adjective "fundamental" is particularly ambivalent. On the one hand, French judges will occasionally declare an agreement contrary to public policy on the basis that the subject matter of such agreement "contradicts the *fundamental principles* of our law and the existing social organization".[160] On the other hand, the adjective "fundamental" refers back to the fundamental character of the rights protected by the ECHR. In this way, it is possible to reconcile the most classical view of public policy with the most modern.

It may seem confusing to refer to public policies of such different nature with the same expression. Indeed, the public policy associated with good morals protects society against the power of individuals; the new public policy, however is a response to the need for the protection of the individual against possible abuses, by police forces in particular. But these apparent differences are brought together under one same banner: that of a reinforced mandatory character applying to the effects of the rule of law in question. Thus the sanction provided is radical: a contract which fails to respect these fundamental principles is "of no effect" (article 15:101 of PECL).

It has not always been so. Beside the rules which have an unquestionable absolute mandatory character, there are other rules, the mandatory character of which is variable.

II. Varying strength of the Mandatory Character

By comparing legal texts which do not expressly and directly fall within the scope of the fundamental principles as set out in the PECL, it is possible to examine the relationship between public policy, mandatory rules and illegality (**A**). Such an examination leads to the observation of a scale, starting with the absolute mandatory character and decreasing to a relative mandatory character (**B**). This scale is reasonably well reflected in the diversity of sanctions provided for by law (**C**).

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159 B. FAUVARQUE-COSSON, "L'ordre public", art. cit., p. 475.

160 Cass. civ., 4 December 1929, *DH*, 1930, 50, *S.*, 1931, 1, 49, note P. ESMEIN; H. CAPITANT, F. TERRÉ, Y. LEQUETTE, *Les grands arrêts de la jurisprudence civile*, t. I, *Dalloz*, 2000, n° 8.

A. Public policy, mandatory rules, illegality

Because of the complexity which affects the wording used in relation to public policy and mandatory rules (1), there is a trend which favours the use of the generic word "illegality" (2).

1. Public policy and mandatory rules

In addition to the *content* element of public policy – obvious in the notion of fundamental principles – there is also a *technical* aspect, which appears in article 6 of the Civil Code. ("*cannot be derogated from…*") The public policy rule could therefore be, fundamentally, the rule which cannot in any event be derogated from: "The public rule is the rule which cannot not be applied".[161] It has an absolute mandatory character. According to this approach, public policy would mean "all the provisions which cannot be avoided or modified by any legal agreement".[162] Often, this second aspect takes precedence over the first, to the extent that public policy can be seen as "a *functional* and purely technical notion […], a step on the scale measuring the mandatory character of legal texts, without any global content which might be determined at a philosophical or even legal level".[163] A confusion then easily occurs between "public policy" and "mandatory rules". Indeed, in accordance with this view, "in internal law, public policy is the basis for the distinction between mandatory rules and non-mandatory rules: the parties can only derogate from the latter".[164] "When today's legislator qualifies a legal text as being a public policy law, he does so less because of the content of the law, which he might otherwise have elevated to a higher status, than on the basis of an aim to be achieved, and there ensues a confusion between public policy and the mandatory character of a rule".[165]

Such an approach, which identifies, for functional reasons, public policy and mandatory rules, presupposes that there is a clear distinction between mandatory rules and non-mandatory rules. However, at common law there is no such distinction: "The *summa divisio* [between mandatory rules and non-mandatory rules] only really applies to legal systems which form part of the roman-germanic law family. Within this family, the rule of law is both abstract and general. By contrast, English law, because it is shaped by court decisions, makes many more distinctions: the English rule of law is indissociable from the facts of a case and therefore cannot be turned into an abstract legal formula".[166] Although the notion of *ordre public* exists, with notions such as public policy and good morals, the

161 P. MORVAN, Le principe de droit privé, éd. Panthéon Assas 1999, n° 124.

162 Ph. MALAURIE, Report, in Travaux de l'Association Henri Capitant, t. VII, La notion d'ordre public et des bonnes mœurs dans le droit privé, p. 749.

163 J. HAUSER and J.-J. LEMOULAND, "Ordre public et bonnes mœurs", *Rép. Civ. Dalloz*, March 2004, § 2.

164 B. FAUVARQUE-COSSON, "L'ordre public", art. cit., p. 474.

165 J. HAUSER and J.-J. LEMOULAND, "Ordre public et bonnes mœurs", *Rép. Civ. Dalloz*, March 2004, § 2.

166 C. PERES-DOURDOU, *La règle supplétive*, Préf. G. Viney, Paris, L.G.D.J., 2004, n° 407.

notion of "mandatory rules" however, does not appear very much,[167] except in the context of international law.[168] As observed by René DAVID and Camille JAUFFRET-SPINOSI: "The category of 'non-mandatory law' has not […] found a place in English law, because this law has always been seen as a law based on precedent, in which the role of the legislator is secondary".[169] More generally, even under French law for example, the development of alternative sanctions to replace absolute nullity constitute evidence that "the clear cut dichotomous presentation of mandatory and non-mandatory rules no longer reflects the legal reality".[170]

2. A preference for the notion of illegality

In fact, on the whole, English law favours the notion of illegality, which goes beyond and includes the notion of public policy.[171] French law is not far from this solution, as can be seen from the definition of illegal cause (*"cause illicite"*, article 1133 of the Civil Code: "The cause is illegal, *when it is prohibited by the law*, when it is contrary to good morals or public policy"). The French Reform Proposals headed by Pierre CATALA follows this direction; it maintains the generic meaning of the notion of illegality and extends the meaning to cover public policy, good morals and "mandatory rules". The result is a proposed article 1126 drafted as follows: "An undertaking is without justification, and *lacks a legal cause*, when it is made, by at least one of the parties, *with a purpose which is contrary to public policy, good morals or more generally contrary to a mandatory rule*". Illegality is defined through a triple relationship with public policy, good morals *and mandatory rules*, notion which is now preferred to that of "laws". (see article 1133 above: *"when it is prohibited by the law"*). Furthermore, the text clearly endorses the idea that the notion of "mandatory rule" is wider than that of public policy *("more generally")*.

Under the guise of illegality, it is therefore a wide notion of rules of mandatory character which is set out: which rules, according to Pierre CATALA's proposals, may be mandatory to a varying degree – the notion of mandatory rules being more general than that of public policy and good morals.

B. From absolute to relative mandatory character

All the countries considered have "mandatory" rules, notion which covers laws of mandatory character, sometimes absolute **(1)** sometimes graded **(2)**.

167 B. FAUVARQUE-COSSON, "L'ordre public", art. cit., p. 474.

168 On Community and international acquis, see *supra*.

169 R. DAVID et C. JAUFFRET-SPINOSI, *Les grands systèmes de droit contemporain*, Dalloz 2002, n° 274, p. 270.

170 B. FAUVARQUE-COSSON, "L'ordre public", art. cit., p. 488.

171 See *supra*.

1. Normative texts which are absolutely mandatory

The mandatory character of laws appears to be absolute when such laws appear in legislation which also prohibits agreements which infringe morals or public policy. Legality (meaning conformity with the law) and mandatory character are in such case linked. The same applies to article 1133 of the French Civil Code, which sanctions an illegal cause "prohibited by law". In the same way, article 1255 of the Spanish Civil Code provides that "The parties may agree on the terms and conditions, so long as they are not *contrary to the laws*, morals, or public policy".[172] Under Italian law, the same expression substitutes "mandatory rules" to "laws". Article 1343 of the Italian Civil Code thus provides: "The cause is illegal when it is *contrary to any mandatory rules*, public policy or good morals"[173] and article 1344 specifies that the cause is illegal when the contract is the means to avoid the application of a mandatory rule. The same reference to laws appears in the Portuguese Civil Code in article 280 n° 1. Similarly, under the terms of article 134 of the BGB, a transaction is void if it infringes a prohibition established by the law.

2. Degrees of public policy

A breach of a law is not sufficient to lead to an annihilating sanction. Alongside this absolute mandatory character exists a relative mandatory character. The distinction in terminology between public policy of direction and public policy of protection sheds a strong light on the complexity of the relationship between public policy and mandatory rules (**a**). However, such distinction does not appear relevant to the elaboration of a common law of contract (**b**).

a) The distinction between public policy of direction and public policy of protection

In order to refine the notion of public policy, a distinction has been suggested between political public policy and economical public policy.[174] Political public policy would aim to prohibit certain contracts (rather than determining their content): it is the means for the legislator to attempt to subject the activities of citizens to certain superior rules, which would apply for the smooth running of society, by protecting certain institutions, such as the State and the family. On the contrary, economical public policy relates to measures which are imposed by the legislator in order to organise the economic relations but which do not affect the fundamental principles or ethical values: economical public policy takes effect through positive measures, whilst general public policy is more con-

172 "Los contratantes pueden establecer los pactos, cláusulas y condiciones que tengan por conveniente, siempre que no sean contrarios a las leyes, a la moral, ni al orden público".

173 "Causa illecita. La causa è illecita quando è contraria **a norme imperative**, all'ordine pubblico o al buon costume".

174 See G. RIPERT, "L'ordre économique et la liberté contractuelle", *Mélanges Gény*, 1934, t. II, p. 374 and following; R. SAVATIER, *L'ordre public économique*, *D.* 1965, chron.31, G. FARJAT, *L'ordre public économique*, thesis Dijon, 1963.

cerned with prohibition. Its aim is to determine the content of contracts. Economic public policy is therefore more fluid, but is based however on fundamental values such as the freedom to trade.

However, from a terminological point of view, such a distinction is not useful because it does not provide any information as to the extent to which a rule is mandatory. This is not the case, though, regarding the distinction between public policy of protection and public policy of direction, as established by French academics.

In accordance with this distinction, *public policy of direction* refers to measures which aim to organise the national economy by eliminating from private contracts anything which might interfere with such direction; it aims to protect the general interest and attempts to impart a political, social or economic direction upon the acts of individuals. It is not allowable to forego the application of the rule since the interests protected by the legislator are that of society as a whole. Therefore any infringement of this provision will be sanctioned with absolute nullity.

Public policy of protection aims to protect the contracting party by granting such party a right for his protection; the party which the law seeks to protect may forego the benefit of such right. From a conceptual point of view, public policy of protection is unusual since it is possible to derogate from the rules in favour of rules more favourable to the protected party. The mandatory character of the relevant rule appears to be toned down. Certain academics have even described "the possibility of improving the condition of workers […] as an exception to the principle of intangibility of the mandatory rule". This public policy could almost be defined as less mandatory than the public policy of direction, to the extent that it would be possible to refer merely to "the application of the most favourable rule" rather than *public policy* in such case. But the terminology is probably too well established to be changed. At least, it should be accepted that this public policy – *on the basis that it prohibits unfavourable derogations* – is "a strange, partial, *relative* public policy, since it accepts, and even perhaps encourages, favourable derogations".[175]

The distinction between public policy of protection and public policy of direction is operative for a number of civil law countries.

It has been largely adopted under Quebec law. Article 1417 of the Civil Code of Quebec provides as follows: "A contract is absolutely null where the condition of formation sanctioned by its nullity is necessary for the protection of the general interest". And article 9 clearly establishes the distinction between mandatory rules and rules which supplement intention (non-mandatory rules): "In the exercise of civil rights, derogations may be made from those rules of this Code which supplement intention, but not from those of public order". Public policy of protection also has its place, as evidenced by the rules which govern non-marine insurance contracts (art. 2414 of the C.C.Q.) or consumer contracts (ss. 8, 9, Consumer Protection Act, R S.Q. c. P-40-1), or the provisions of the Civil Code on residential leases, which constitute mandatory texts which cannot be derogated from, with any illegal clause being sanctioned with nullity, albeit relative nullity.

175 Th. REVET, "L'ordre public en droit du travail", *in L'ordre public à la fin du XX° siècle* (Dir. Th. REVET), *Dalloz*, coll. "Thèmes et commentaires", 1996.

b) Critical appraisal of the terminological distinction between public policy of protection and public policy of direction

Although this distinction is useful for understanding the relativity of the mandatory character of rules, it does not appear likely to be made use of in the context of the elaboration of a common frame of reference. Indeed, these expressions do simply not appear in common law terminology. The words "*public order of protection*" or "*public order of direction*" are only rarely found, in comparative law texts, in reference to civil law principles. It is true that occasionally, a breach of a statute protecting the weaker party to a contract has been found to render the contract voidable, not void.[176] However, this is an example of a graded mandatory character, which is not expressly based on the general principle of protection of the weak party.

The generalisation of the terminological distinction between "public policy of protection" and "public policy of direction" is not possible. It is not certain that this should be a matter for regret. Indeed, it is often noted that the distinction, established by civil law academics is often contested: "it is not easy to use in practice, because there is often an interaction between the economic and social objectives of a policy"[177] and the distinction between public and private interests is not always obvious. The example of legislation dealing with indexation is a good illustration: naturally, the legislation seeks to control monetary fluctuations and on that basis comes under public policy of direction, but the fact that it protects a contracting party gives it a flavour of public policy of protection. In effect, the distinction is "a matter of degree",[178] and from this point of view, the common law approach is perhaps more satisfying in that it reflects more accurately the legal reality constituted of varying degrees of mandatory character.

PECL have not in fact sought to make use of such distinction and would appear to have followed a pragmatic approach. Beside the "fundamental principles" which correspond to the hard core of mandatory rules, PECL highlight the existence of "contracts which infringe mandatory rules of law: illegal contracts which contravene a law, without infringing any fundamental principle; contracts which are contrary to the law, as opposed to contracts which are contrary to fundamental principles of morality or public policy" (Article 15:102).

C. A variety of sanctions applying to a breach of mandatory rules

In reality, the notion of "mandatory rules" increasingly covers a very flexible content: from a functional point of view, the "mandatory rule" is akin to a public policy rule – in that its infringement leads to the contract being totally void – but it can also lead to other sanctions. The sanction brings us back to the notion: "The choice is not only technical, it also affects the notion. Its importance is illustrated in certain projects for a European

176 Advance Rumely Thresher Co. v. Yorga, [1926] S.C.R. 397; Dorsch v. Freeholders Oil Co., [1965] S.C.R. 670; *Pinsky* v. *Wass*, [1953] 1 S.C.R. 399, but see *British American Oil Co.* v. *Kos*, [1964] S.C.R. 167.

177 Ph. MALAURIE, L. AYNES and Ph. STOFFEL-MUNCK, *Les obligations*, 2nd ed., *Defrénois*, n° 650.

178 Ibid.

code of contracts in which the notion of mandatory rules is only ever used in a sense which does not always clearly cover the notion of '*ordre public*' under French law. The fact that the sanctions which are suggested to ensure that these mandatory rules are respected should be so varied shows a certain distance with regard to the laws on public policy, at least in the usual sense".[179]

Breaches of mandatory rules lead, in different legal systems, to varying sanctions, which reflect the strength of the mandatory character of the rules. The sanctions imposed vary according to the legal traditions which were examined, whether civil law **(1)** or common law **(2)**. We shall only consider these in outline: the notions of "nullity/void contract" and "rescission" will be treated in a separate study document.

1. In civil law countries

Civil law countries follow a traditional body of rules based on the distinction between public policy of protection and public policy of direction **(a)** However, alternative sanctions, more punctual and less drastic in their effects, are starting to be applied **(b)**.

a) The traditional regime based on the distinction between public policy of protection and public policy of direction

Different sanctions will apply with regard to *ordre public* under French law, depending on the strength of the mandatory character of the relevant rule. A breach of political and economic public policy of direction leads, in principle, to the agreement being totally void. However, a breach of public policy of protection should in principle be sanctioned by a relative nullity.[180]

The French Reform Proposals suggest the recognition of a public policy of individual protection (art. 1129-1). The article confirms the present position adopted by case law on the issue. It established a distinction, regarding the cause of the contract, as to whether the cause is absent or whether it is illegal. In the event the cause is *absent*, that is to say, under the terms of article 1125 of the project, when "from the outset, the agreed consideration is illusory or derisory", then the issue is only that of "the protection of a private interest" (article 1129-1, para. 2), which leaves the option for the protected party of claiming the cancellation of the contract or confirming its existence (article 1129-1, para. 3). When the cause of the contract is *illegal*, that is to say, under the terms of article 1126, "when it is entered into, by at least one party, with a purpose which is contrary to public policy, good morals, or, more generally, to a mandatory rule", "the protection of the public interest" (article 1129-1, para. 1) requires that the cancellation may be "claimed by any interested person, as well as by the prosecuting magistrate" and that it may "also be imposed by the judge" (article 1129-2). The illegal purpose pursued by one

179 J. HAUSER and J.-J. LEMOULAND, "Ordre public et bonnes mœurs", *Rép. Civ. Dalloz* préc., n° 109. See also J. HAUSER, "L'ordre public et les bonnes mœurs", *in Les concepts contractuels*, p. 105.

180 Civ. 1ère, 21 January 1992, *Bull. civ.* I, n° 22; Civ. 1ère, 10 January 1995, *Bull. civ.* I, n° 18, *Defrénois* 1995. 345, obs. AUBERT.

party is therefore sufficient to impose, for "the protection of the public interest" (article 1129-1, para. 1 of the project), absolute nullity for absence of legal cause, without having to consider whether the other party to the contract was pursuing the same purpose or if it was aware of such purpose.

The distinction should, under positive law, lead to a different treatment of the rights which result from such rules: although it is not possible renounce the rights which arise out of the application of a strict public policy rule, it should be possible to give up the benefit of public policy of protection, at least under certain conditions. However, case law goes sometimes so far as to simply prohibit any renunciation, even for such rules, even if the right in dispute is acquired and can be disposed of.[181] The rules arising out of public policy of protection are not just mandatory, they also aim to protect a contracting party who is placed in a situation of inferiority. For as long as the situation of inferiority, which explains and justifies the intervention of the legislator, exists, then the renunciation of the benefit of the law, even if it concerns acquired rights, appears to infringe the requirements of public policy of protection.

As for the role played by the judge, it would be easy to believe that his duty is to invoke, of his own motion, grounds which have a purely public interest law content.[182] The New French Code of civil procedure draws the consequences of this situation by imposing on the judge the obligation to invoke of his own motion a purely legal ground, whether it is a public policy rule or not. It is the mandatory character of the law which counts, more so than its public policy qualification. In accordance with this logic, among all the purely legal grounds, only those which have a public policy qualification should be invoked by the judge of his own motion. However this idea is outdated by the New Code of civil procedure. As stated by Henry MOTULSKY, "the judge must spontaneously apply the law because it is the law, and not because it forms part of public policy".[183] There is therefore no systematic link between the public policy qualification of a rule of law and whether it can be applied by the judge of his own motion.[184] Whether a purely legal ground belongs to public policy or covers a private interest is irrelevant, it must be invoked by the judge of his own motion.

If nullity is a sanction which is often applied in Roman law tradition countries, the areas to which it applies are variable. In Germany, an infringement of law or good morals is expressly considered to be a cause for nullity not only in respect of contracts, but in respect of any legal transaction. Swiss law reaches the same result in practice by applying the rules on nullity which appear in the contractual rules under "other civil law relationships" (art. 7 ZGB) and under aux "unilateral transactions between living persons, with a monetary content" (art. 1324 Code Civil).

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181 Civ. 3e, 7 November 2001, and Civ. 1ère, 7 July 1993, *Rép. Defr.*, 1994, p. 358, obs. D. MAZEAUD.

182 On this point, see L. WEILLER, *La liberté procédurale du contractant*, Thesis Aix-Marseille, 2003.

183 H. MOTULSKY, "La cause et la demande", n° 25.

184 B. FAUVARQUE-COSSON, Libre disponibilité des droits et conflits de lois, *op.cit.*, n° 318 and following.

b) The gradual appearance of less drastic sanctions

Beside the rigid sanction of declaring a contract void, the technique of treating an offending clause as "unwritten" has seen an increasing success.[185] This is a means of avoiding the nullity of a contract by deleting the contractual clause which causes the unbalance, when it is severable. Similarly, judges may modify a contractual provision which offends public policy. This occurs when a French judge uses his power to reduce a non-competition clause the scope of application of which is excessive or when he reduces the term of a lease for advertisements because it exceeds the term authorised by a public policy law. Finally, provisions have appeared recently, which are especially intended to deal with the consequences of invalidation of transactions or decisions contrary to public policy. In this way, an employment contract with a definite term may be requalified as an indefinite term (permanent) contract. All this forms part of a movement of "transformation of sanctions" which is particularly remarkable.

Germany has followed the same path, and its case law has often reduced the scope of so-called immoral clauses with regard to the duration of a non-competition clause[186] or an exclusive distribution agreement.[187] In addition, under German law, the general rules governing unfair clauses, which even apply to contracts entered into between professionals, allow the clauses which create a significant imbalance (and only those) to be set aside, thus maintaining the rest of the contract (§ 306a, 1er al. BGB), along the same lines as the French law treatment of severable offending contractual clauses.

The common law tradition is, and has been for longer than the civil law tradition, amenable to the application of varied sanctions, which correspond to a more flexible notion of the mandatory character of rules.

2. Common law

Under common law rules, the general rule is that the courts will not enforce performance of an illegal contract or transaction.

The contract is void and the courts will lend their assistance to neither party to the contract. If the contract has not yet been performed, neither party may require its performance. If the contract has been performed in part, a claim for restitution under principles of quasi-contractual liability will not be allowed. The law will not assist parties to a contract which is held to be illegal. An illegal contract is void (with certain exceptions) and the parties cannot ask the courts to enforce performance of their illegal transaction.

However, English courts acknowledge the fact that not all contracts are equally illegal and that not all illegal contracts deserve to be ignored by the courts.

In the interest of justice, the law has therefore created exceptions by developing the technique of severance of illegality, which involves eliminating the illegal elements. When a transaction is made up of several parts and it is possible to divide it up so that one part is preserved and the other set aside, the contract is said to be "severable". A

185 S. GAUDEMET, La clause réputée non écrite, Economica, 2006.

186 BGH, 8 May 2000, NJW 2000, 2584.

187 BGH, 14 June 1972, NJW 1972, 1459.

clause which is unreasonably wide but contains various restrictions, some of which are reasonable and others not, can be "severed", and the reasonable parts can be performed.[188] Thus, if one of the promises is to carry out an act which is a criminal offence or contra bonos mores, the entire contract is void, but if the offending part is merely subsidiary, then the contract may be performed without it.[189] In principle, the technique of severance does not apply when the obligations involve criminal offences.[190]

Sometimes, the blue pencil test is applied, which makes it possible to separate various obligations contained in one same clause, so long as by deleting an obligation, the rest of the sentence continues to be correct.[191]

At common law also, a party which is not *in pari delicto* is considered less guilty than the other party to the illegal contract. In accordance with this theory, the less guilty party will be entitled to recover money, goods or advantages granted following an illegal contract, so long as the illegality does not constitute a serious offence or a breach of good morals. This occurs in particular when the law which has been infringed was intended to protect a particular category of persons, and if the plaintiff belongs to this protected category. For example, an employee who works longer than is permitted by the law is not treated as *in pari delicto* with his employer and he is entitled to be paid for his overtime. A borrower who pays a usurious rate of interest may recover the excessive interest paid; the laws prohibiting usurious interest rates are intended to protect the borrowers, who are therefor not *in pari delicto* with the lender.

Finally, the theory of *locus poenitentiae* (place for repentance): such theory allows the restitution of benefits granted under the terms of an illegal contract, when the claimant has repented and refused to honour the contract before the performance of any illegal obligation. The purpose of this theory is to incite persons who have entered into illegal contracts to change their minds and put an end to their illegal transaction. In the interval between the moment the money is paid (or the goods are delivered) for an illegal purpose, and the moment the illegal purpose is carried out, the person who paid money or delivered the goods may recover them.

More generally, recent projects for reform have put forward a more fluid conception of illegality, which appears to have influenced the way PECL have been drafted significantly. This is the case of the proposition drafted by the Law Commission.[192] In the part dealing with illegal transactions ("Illegal transactions: the effect of illegality on contracts and trusts"), the Commission attempts to answer the following question: To what extent should the fact that one or both parties to a transaction has been involved in some illegal activity should affect either party's normal rights and remedies? The Commission starts from the idea that the present complex and technical rules governing the effect of illegality on contracts are probably not sufficiently flexible to take into account the huge range of different factual circumstances that may arise. The main proposal of the Commission is that these technical rules should be replaced by a structured discretion. Statute would give the courts a discretion to decide whether or not to enforce performance of an illegal contract. It is only by exercising such discretion that the court would decide

188 Court of appeal, *Goldsoll v. Goldman* [1915] 1 Ch. 292.

189 *Bennett v Bennett* [1951] 1 KB 249, 254.

190 Ibid.

191 Mason v. Provident Clothing [1913] AC 724.

192 Paper 154, 21 January 1999.

whether the illegality should act as a defence to the normal rights and remedies, and in doing so, it would take into account a range of relevant factors. These factors would be: (i) the seriousness of the illegality involved; (ii) the knowledge and intention of the party claiming relief; (iii) whether denying the claim would deter the illegality; (iv) whether denying the claim would further the purpose of the rule which rendered the transaction illegal; and (v) whether denying the claim would be proportionate to the illegality involved. According to the Commission, these factors reflect the policies lying behind the illegality defence and would enable the court to reach clearer and more just decisions, by more straightforward and open reasoning. New proposals were drafted in 2002, suggesting it would be helpful to distinguish between those obligations that are inherently illegal, in the sense that they cannot be performed without committing an offence, and those that are themselves lawful but should arguably be unenforceable because of some associated illegality.

Chapter 5:
Good Faith

Main Concerns

1. Is it possible to define the concept of good faith? Because it is a vague notion, it appears difficult to give it a precise, positive and unequivocal meaning. Would it therefore not be preferable to use a merely functional definition of the notion?

2. Should this notion be maintained, even though it is easier to define it negatively, by reference to its opposite: bad faith? In this perspective, are the terms 'bad faith' and 'abuse' synonymous?

3. Is it possible to speak indifferently of "good faith" and of "fairness" (*"loyauté"* in French)? An analysis of common Acquis Communautaire and Acquis International would lead to the conclusion that the two terms are interchangeable. However, the distinction is essentially maintained in comparative law, which tends to differentiate between the two terms. From this perspective, the question arises as to whether fairness is a type of good faith. Similarly, the term "appearance" only represents one facet of good faith; the two cannot be considered as being synonymous.

4. From the study of Acquis Communautaire and Acquis International, as well as comparative law, it is apparent that the expression 'good faith and fair dealing' is simply translated in French as "good faith". Is this a mere convenience of language, or is it indicative of an approach that distinguishes more clearly in English than in French, from a terminological point of view, good faith in a subjective sense and good faith in an objective sense?

5. Following from this question, should the expression 'good faith' systematically be qualified with the use of the adjectives 'objective' and 'subjective'? In order to answer, it is necessary to question the relevance of such a distinction with regard to the applicable legal regime (burden of proof, a possible control by supreme courts etc …).

6. Should the different functions of good faith not lead to the use of different terms? For example, in German and in Dutch law, different terms are used to refer to good faith as a tool to interpret and extend the content of a contract on the one hand, and as mistaken belief on the other.

General Introduction

The terminological study of the notion of good faith reveals that this notion runs through a number of concepts. Firstly, it appears that a number of systems consider that good faith applies to the law of obligations generally, and not simply to contract law.[1] In addition, beyond the sphere of contract law, good faith sometimes affects almost all private law. It is found in such areas as family law, property law, and laws governing inheritance and gifts. The fact that it touches so many areas is not confined to French, Belgian or even Quebec law. In the Netherlands, for example, good faith has been applied to inheritance laws, company law, bankruptcy law, property law and even to private international law. The conclusion was therefore reached that good faith should simply apply to all the laws affecting property rights. Certain legal systems, Germany for example, have gone even further by overcoming the public law/private law divide. The civil codes of Quebec and of Switzerland can equally be cited as examples as certain introductory articles state that each person's rights will apply according to the criteria of good faith.[2]

Moreover, the success of the notion of good faith finds a real echo in developments of contemporary European, Community, international and national law.

Whether we envisage good faith in Acquis Communautaire or Acquis International, or in comparative law, it is useful to retrace the origins of the concept **(I)** in order better to comprehend the difficulties associated with it **(II)**.

I. Good Faith: An Historical Perspective

Three historical periods are distinguished below; Roman law **(A)**, medieval law **(B)** and the XIXth century, period of the first codifications **(C)**.

A. Roman Origins

The introduction of the notion of good faith in Roman contract law[3] would undoubtedly have been impossible without inspiration from the Greeks. Among others, the Stoics PYTHAGORAS and ZENO produced works that were at the origin of notions of justice and equity. "This new concept opens the contractual system to the ethics of what is just

1 § 242 of the German Civil Code (BGB), which appears in the sections dealing with obligations in general; Article 1175 of the Italian Civil Code which also appears under a title dealing with obligations in general; Article 288 of the Greek Civil Code; Article 762 of the Portuguese Civil Code which appears in the part relating to the performance of obligations in general or article 6:2 of the Dutch Civil Code (BW) which also appears in the general section on obligations.

2 Article 6 of the Quebec Civil Code; Article 2 of the Swiss Civil Code.

3 R.-M. RAMPELBERG, *Repères romains pour le droit européen des contrats*, L.G.D.J., Systèmes, Droit, 2005, p. 43; J.-P. LEVY, A. CASTALDO, *Histoire du droit civil*, Précis, Dalloz, 1st edition, 2002, p. 690; M.J. SCHERMAIER, "*Bona fides* in Roman contract law", *in Good Faith in European Contract Law*, R. ZIMMERMANN, S. WHITTAKER eds., Cambridge University Press, 2000, p. 63.

and equitable, the latter, according to CICERO's dream, linking all men, citizens or pagans, in a universal society of *boni viri*, of good men".[4]

It is CICERO who left the most complete definition of good faith: "These words, good faith, have a very broad meaning. They express all the honest sentiments of a good conscience, without requiring a scrupulousness which would turn selflessness into sacrifice; the law banishes from contracts ruses and clever manoeuvres, dishonest dealings, fraudulent calculations, dissimulations and perfidious simulations, and malice, which under the guise of prudence and skill, takes advantage of credulity, simplicity and ignorance".[5]

One of the particularities of Roman procedure was the formulae system. The praetor (a magistrate who received citizens, listened to their pleadings, authorized or forbade a certain course of action, verified allegations and brought the case before a judge) gave his approval only to requests that could be expressed in specific, pre-determined formulae. There was a limited number of formulae, which, in turn limited the number of available rights. If originally, the praetor ensured that the ancient formula was properly observed, after 150 B.C., he became competent to create new formulae. This period corresponds with the expansion of Rome into the entire Mediterranean basin. The number of praetors grew, and the post of peregrine praetor, responsible for disputes among 'foreigners', the non-citizens, was created.[6] It appears that it was during this period that the procedure was profoundly modified. It is believed that the peregrines, as outsiders to the city, could not use the ancient formulae, and their rights would therefore not have been recognized. The peregrine praetor therefore settled disputes not by applying the law in force for citizens, but by applying a law that he himself created.[7]

It is in this context that good faith rights of action, *bona fide judicia*, were born. The lists of good faith rights of action vary depending on the historical period, and thus depending on the author. According to the CICERO[8] list, the *bona fine judicia* were filed in matters of guardianship, fiduciary duty, and in agency, rental and sales contracts. GAIUS,[9] two hundred years later, added *negotiorum gestorum*, deposits, *societas* and *actio rei uxoriae*. Finally, Justinian[10] increased the list of right of actions to include pledges, claims to divide property, claims to succeed to estates held by third parties and the *actio praecriptis uerbis* for exchanges and estimation contracts.[11]

Initially designed to solve legal relationships for which the law had never created a right of action (such as those between peregrines, to whom Roman law could not apply), these rights of action were introduced by the urban praetor into the *jus civile* (the civil law that applied only to Roman citizens) at the end of the second century B.C.[12]

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4 R.-M. RAMPELBERG, *op.cit.* p. 44.

5 *De Off*, 3, 17. quoted by R.-M. RAMPELBERG, *op.cit.* p. 44-45.

6 B. JALUZOT, La bonne foi dans les contrats, Etude comparative de droit français, allemand et japonais, Dalloz, 2001, n° 61, p. 24.

7 *Ibid* n° 62, p. 24.

8 *De Officiis*, published in 44 BC.

9 *Institutes*, 143 AD.

10 *Institutes*, 533 AD.

11 Generally, see B. JALUZOT, *op.cit.* n° 63, p. 24.

12 *Ibid.* n° 75, p. 27.

It is apparent that during this period, good faith allowed the judge to actively intervene in legal relations protected by good faith rights of action (especially in the determination of the quantum of damages, and in the creation of new obligations founded on morality).[13] It also appears that it is from these good faith rights of action that contracts based on good faith were born.

These contracts of good faith concerned consensual contracts that distinguished themselves from formal contracts by their conditions of validity and by the fact that they were all in good faith, that is to say they came largely under the judge's broad power of interpretation.

The *bona fides* forces the judge to determine what each party owes the other. It is on this basis that the *ius gentium* introduced a fundamental principle in contract law: consensualism. From then on, the consensual contract distinguished itself from the contract of pure law, the principle trait of the *ius civile*, in that it was sanctioned by a 'good faith right of action', thus providing the judge with a significant margin of appreciation, especially with regards to the amount of the damages awarded. This good faith right of action also allows the judge to determine whether one party's behaviour is in keeping with the attitude of an 'honest man'.

In this type of contract, the judge's interpretation is thus dominated by the notion of good faith, and the parties' intentions are considerably limited by three types of obligations: (1) the *essentialia*, without which an act can not exist (for example, the object sold and the price paid in a contract of sale), (2) the *naturalia*, that are included in the contract unless expressly excluded (for example, a guarantee against attacks on property rights), and (3) the *accidentalia*, which are only included in the contract by virtue of an express clause (for example, a liabilities guarantee).[14]

The practical use of the notion of good faith in Roman law is often illustrated through the classic example of a contract of sale because of the importance attached to the seller's duty to inform with regard to the hidden defects guarantee and the guaranty against attacks on property rights. Other illustrations include the theory of abuse of rights, the recognition of the *rebus sic stantibus* principle etc… It is interesting to note that these illustrations of the role of good faith in Roman law are easily transposable to contemporary law.

In the fourth and fifth century A.D., a split in the notion of *bonae fidei contractus* occurred. Contracts of good faith were either concluded in ignorance of an unfavorable element, or were concluded with neither constraints nor deceit and were thus immune from attack.[15]

If Roman law reserved the use of the notion of *bona fides* for contract law and procedure, it appears that this requirement was, on the one hand, extended to all of the *jus commune* (the law common to all Christian European countries) and, on the other hand, became closer to *aequitas*.

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13 On this last point, it would appear that these moral obligations were established by the praetor. "Starting off as moral obligations, they became legal obligations and acquired a place in the legal system". B. JALUZOT, *op.cit.* n° 84, p. 29. In this way, new contractual rules appeared such as the defence of non-performance or compensation.

14 B. JALUZOT, *op.cit.*, n° 94, p. 30.

15 *Ibid.* n° 95, p. 31.

B. Good faith in medieval law[16]

From the 12th century onwards, contracts of good faith as they had existed under Roman law became the rule rather than the exception. A contract was concluded by the mere exchange of consent. However the passage from the principle of *ex nudo pacto action non nascitur* ("no right of action is created from a bare pact") to that of *consesu obligat* ("consent alone suffices") occurred gradually, and apparently with great difficulty. It appears as if consensualism was only recognized as a general principle in the 16th century.

It is equally during the course of this period that good faith became a general principle of both national and international commerce. This time period also saw the generalization of the principle *exceptio doli*, which would later become the foundation for the theory of abuse of right.

In addition to the development of good faith, medieval law also bore witness to the rapprochement between good faith *("bona fides")* and equity *("aequitas")*. On this question the German and the French Romanists adopt opposing positions. The former first considered that the two notions were distinct before later treating them the same them after the Byzantine period (476-1453). However, the French authors considered that good faith was simply a manifestation of equity. Constantine even went so far as to proclaim this theory as being an essential principle of the entire Roman legal system. Later, Justinian made the *jus aequuum* into the supreme source of law.[17]

In practice, during the Byzantine legal period, the functions of good faith and of equity largely overlapped.

This overlap was primarily caused by the enlargement of the notion of good faith, which had been given general application, so that there was, on a practical level, a confusion with *aequitas*.

This historical confusion thus allows for a better understanding of certain contemporary problems, most notably that of the wording of articles 1134-3 and 1135 of the French Civil Code, and of similar articles in other civil codes.[18] However, above all, this confusion can be used to justify the terminological distinction that appears in Dutch law, largely inspired by German law which, in its latest Civil Code (BW) reform, chose to substitute "good faith" with the expression "reason and equity".

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16 R.-M. RAMPELBERG, Repères romains pour le droit européen des contrats, L.G.D.J., Systèmes, Droit, 2005, p. 47; J. GORDLEY, "Good Faith in Contract Law in the Medieval ius commune", in Good Faith in European Contract Law, R. ZIMMERMANN, S. WHITTAKER eds., Cambridge University Press, 2000, p. 93.

17 B. JALUZOT, *op.cit.* n° 104 to 109, p. 33-34.

18 The confusion which reigns between equity and good faith, in particular with regard to the legal basis for completive obligations has been remarked upon by a number of commentators, from various nationalities. See for example M.W. HESSELINK, "The concept of good faith", *in Towards a European Civil Code, Third Fully Revised and Expanded Edition*, Kluwer Law International, 2004, p. 472, note 9; L. ANTONIOLLI, *"Principles of European Contract Law and Italian Law. A Commentary"*, L. ANTONIOLLI, A. VENEZIANO eds, Kluwer Law International, 2005, p. 55; Ph. JACQUES, *Regards sur l'article 1135 du Code civil*, Préf. François Chabas, Dalloz, 2005, n° 156, p. 295.

If Roman and Medieval law contribute to the understanding of the meaning that can be attributed to good faith, the period of Napoleonic codification clarifies the meaning and the purpose of good faith in contemporary law.

C. Good faith in the nineteenth century

Little information exists regarding the concept of good faith during the period of Napoleonic codification. However, a few points are discernable, notably the fact that good faith emanates from the notion of 'natural law'.[19] It also appears as if it was generally recognized in commercial transactions. However, "referring to God to legitimize the existence of good faith leads to the automatic deferral to God regarding the content of the rule. Perhaps this explains the absence of discussion regarding good faith in preparation work, in addition to the absence of any definition and in depth study of good faith".[20]

If natural law served as the justification for the insertion of good faith into the French Civil Code of 1804, this authority was undermined during the nineteenth century primarily by the historical school and the Positivist doctrine. It was first the works of Emmanuel KANT, but especially those of Friedrich von SAVIGNY, that were at the origin of the historical school. This school searched for the sources of all law in history. Positivism, which finds its origins in the works of one of von SAVIGNY's contemporaries, Auguste COMTE, is "a theory according to which social sciences should be experimental sciences, and the law was thus treated as a science of social relationships in which experience had an essential role".[21] Bearing in mind the importance of these two schools of thought at the beginning of the twentieth century, it is surprising to note the establishment of good faith in the BGB in 1900. Nonetheless the notion had lost all of its meaning and new theories appeared in order to determine the content of good faith.

The School of Begriffsjurisprudenz held an opposing view from that of the School Freirechtsbewegung. The former sought the recognition of a legal order founded on precise and abstract concepts in order to avoid a judge's arbitrary discretion. The latter, begun through the works of JHERING, aimed to achieve a relaxing of the law and of its interpretation. This school of thought is particularly important, for in promoting the development of an interpretive and completive judicial power, it began the renewal of the notion of good faith.[22] However, just as the School of Begriffsjurisprudenz had done, the School of Freirechtsbewegung fell into excess by proposing to completely detach itself from the letter of the law and to grant but a secondary importance to the law. "The

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19 Indeed, until the XIXth century, God was considered to be the origin of all things including good faith, which could not be altered by man. It is in this spirit that DOMAT distinguishes between immutable laws and arbitrary laws. Within immutable laws, there is a further distinction between those which can be derogated from and those which cannot. "Thus, the laws which prescribe good faith, fidelity, sincerity and which forbid deceit, fraud and any surprise, are laws from which there cannot be any derogation" (J. DOMAT, *Traité des lois*, 1689, edited and commented by J. Remy, Paris 1835, chap. XI, *De la nature et de l'esprit des lois, et de leurs différentes espèces*, n° 1, quoted by B. JALUZOT, *op.cit.* n° 125, p. 38).

20 B. JALUZOT, *op.cit.* n° 127, p. 39.

21 B. JALUZOT, *op.cit.* n° 130, p. 39.

22 B. JALUZOT, *op.cit.*, n° 139, p. 42.

directives that were intended for the judges were totally vague and would have exposed parties to the greatest uncertainty".[23]

Good faith therefore became a written rule that has seen tremendous growth in a number of different national systems, even though it does not have a definition. Nor is there any consensus regarding the exact legal nature of good faith. This terminological and notional imprecision inevitably affects the function fulfilled by good faith in contemporary law.

II. Good Faith: Difficulties Associated with the Concept

Having reviewed the historical developments, it appears that good faith is a notion which attracts great interest in contemporary law not only because of the functions it performs, but equally, and especially, as a result of the vagueness that surrounds it. Although the notion should not be rigid, it remains that the adaptability of the concept must fit within a certain framework in order for its uses to be, to some extent, restricted. After considering the uncertainties that surround the notion of good faith (**A**), we shall examine the means employed in attempts to rationalize it (**B**).

A. Good faith: a notion with uncertain boundaries

It is possible to distinguish two meanings and two functions of good faith. In the objective sense, good faith is perceived as being the method used to moralize contractual relationships, and to temper the inequalities that could result from the dogma of the autonomy theory. In the subjective sense, good faith aims to protect the mistaken belief of one contracting party, and to give effect to appearances. Even if the objective/subjective dichotomy is found in a number of legal systems, this first rationalization effort was insufficient to dispel the multiple uncertainties surrounding the notion and the functions of good faith.[24]

The primary cause of the uncertainty remains, even today, the general absence of definition.[25] The concept of good faith seems to generate more interest based on its function than on its definition.[26]

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23 B. JALUZOT, *op.cit.*, n° 155, p. 46.

24 On the relevance of the distinction between objective and subjective understanding, see for example E. POILLOT, *Droit européen de la consommation et uniformisation du droit des contrats*, Préf. P. de Vareilles-Sommières, L.G.D.J., Tome 463, 2006, n° 627 and following. In any event, this approach rapidly runs into obstacles: "[…] generally, the distinction made between the objective and the subjective is subject to caution; […] for there is in any objectivism a share of subjectivism and vice versa" Y. LOUSSOUARN, "Rapport de synthèse", *in La bonne foi*, TAHC, 1992, p. 13.

25 Luc GRYNBAUM admits that "it is difficult to give a definition of good faith" (*Le contrat contingent, l'adaptation du contrat par le juge sur habilitation du législateur*, Préf. M. Gobert, L.G.D.J., 2004, p. 101). Along the same lines, D. COHEN is of the view that "(good faith) finally represents a necessary standard, tinged with moral considerations and with the idea of normality, just like good morals or the good paterfamilias, notions which have all been qualified at some stage as 'irritating, because they do not allow the historian or the jurist to define them

"Good faith is therefore usually said to be an open norm, a norm the content of which cannot be established in an abstract way but which depends on the circumstances of the case in which it must be applied, and which must be established through concretisation. Most lawyers from a system where good faith plays an important role, will therefore agree that these differences in theoretical conception do not matter very much (…) What really matters is the way in which good faith is applied by the courts: the character of good faith is best shown by the way in which it operates.[27]

More than a rule, good faith is also used as a standard,[28] a general principle according to some,[29] or a norm, a rule, a maxim, a duty, an obligation according to others.[30] This terminological and conceptual inconsistencies can for a large part be explained by the frequent and anarchic use of good faith in different national laws and in international law. However, this imprecision does not only result in disadvantages.

In fact, a substantive analysis reveals that good faith is an open norm the content of which cannot, nor should not, be determined in an abstract manner, so that it is able to adapt to the particular circumstances which surround it.[31]

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with any degree of precision' J.-L. GAZZANIGA, *Introduction historique au droit des obligations*, PUF, 1992, n° 84". ("La bonne foi contractuelle: éclipse et renaissance", *in Le Code civil (1804-2004) un passé, un présent, un avenir*, Dalloz, 2004, p. 518, n° 2). Certain academics have however attempted to present and clarify the various definitions of good faith (see. R. VOIRIN, *La bonne foi, notion et rôle actuels en droit privé français*, L.G.D.J., 1939, n° 23, p. 32). The "Vocabulaire juridique" of the Association Henri Capitant suggests that good faith be defined as the "fair behaviour which is required in particular for the performance of an obligation; attitude of integrity and honesty…". In any event, there is a certain consensus among academics to the effect that "to define good faith by reference to what it is not is of limited (if not no) interest: if it is envisaged in this way, good faith becomes an unnecessary detour and appears as an 'inconsistent notion', since it ends up being the same thing to say that there was no deceit or fraud, or that a particular party was in good faith". (Ph. JACQUES, *op.cit.* n° 161, p. 303-304 as well as the other references cited above).

26 Y. LOUSSOUARN point out that "the definition of good faith is linked to the role which it is meant to play" ("Rapport de synthèse", *in La bonne foi*, TAHC, 1992, p. 9). He goes on to question whether: "such observations reflect a certain impossibility: that of providing one definition of good faith which reflects its various aspects? Should one give up on the idea of defining the notion and accept its atomization or is there not a compromise solution between these two extreme positions?" (Y. LOUSSOUARN, *op. cit.* p. 11).

27 M. W. HESSELINK, "The concept of good faith", *in Towards a European Civil Code*, Kluwer Law International, Third fully Revised and Expanded edition, 2004, p. 474.

28 Ph. JACQUES, *op.cit.*, n° 160.

29 On the nature of good faith as general clause, general standard or principle, see C. JAUFFRET-SPINOSI, "Théorie et Pratique de la Clause Générale en Droit Français Et Dans les autres Systèmes Juridiques Romanistes", *in General Clauses and Standards in European Contract Law. Comparative Law, EC Law and Contract Law Codification*, S. GRUNDMANN, D. MAZEAUD eds., Kluwer Law International, 2006, p. 23.

30 For a full picture of terminological inconsistencies see M.W. HESSELINK, *op.cit.* p. 473, notes 12-20.

31 See also Ph. JACQUES, *op.cit.*, n° 160, p. 302 and J. WIGHTMAN, "Good Faith and Pluralism in the Law of Contract", *in Good faith in contract: concept and context*, R. BROWNSWORD,

Is that to say that the determination of the content of good faith depends solely on the personality of the judge settling the litigation?[32] Not necessarily. It seems possible to objectivize the notion of good faith, by providing judges with guidelines, without freezing the notion and detracting from its essential characteristic: adaptability.

B. Good Faith: a 'domesticable' notion?

Conversely to most legal systems, American, German and Dutch law[33] have attempted from a legal and/or academic point of view, rather than to define good faith from an abstract point of view, to provide certain criteria to enable judges to determine the content of good faith in different factual situations.

1. Rationalization attempts through legislation. Specificities of American and Dutch law

It is interesting to note that while American law fully adopted liberal British contractual conceptions, symbolized by the legal doctrine of *caveat emptor*, it also used the idea of good faith very early on.[34] However, rather surprisingly, despite recognition of an implicit obligation of good faith by the courts, the *American Law Institute* did not expressly recognize it as a separate doctrine in 1920 when the first edition of *Restatement of Contracts*[35] was drafted. The courts continued to use the concept of good faith energetically, and when the *Second Restatement of Contracts* was drafted in 1981, the concept was firmly anchored in American law. In this second writing, section 205 expressly provides: "Every

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N.J. HIRD, G. HOWELLS Eds., p. 47-48 who makes an express distinction between "*rule*" and "*standard*" and who declares: "*The advantage of rules is calculability, in that their application, being dependent only on factual characteristics, should be predictable. The drawback is that they are likely to be under or over-inclusive when the outcomes are measured in terms of the values of purpose underlying the law. Conversely, standards may offer less calculability, but greater normative accuracy in that the norms underlying the law are consistently translated into outcomes. […] Good faith is clearly a standard, and therefore might be expected to score well on normative accuracy but less well on calculability. However, neither rules nor standards are uniform in relation to calculability and normative accuracy, and in looking at a general standard like good faith, it is important to assess the balance between normative accuracy and calculability that is struck in different contexts*".

32 M.W. HESSELINK, *op.cit.*, p. 486.

33 These are some examples, but are by no means exhaustive.

34 The first references to the notion of good faith, in American law, can be found in case law as early as the end of the XIXth century: *Armstrong v Agricultural Ins. Co*, [1890] 29 *N.E.* 991 (N.Y.) according to which insurers are under an obligation of good faith when they demand proof of loss.

35 "A Restatement" represents an attempt by the American Law Institute, a private organisation of scholars, judges and practioners, to formulate with some precision the leading rules and principles in major fields of American law…", R.S. SUMMERS, "The Conceptualisation of good faith in American contract law: a general account", in Good Faith in European Contract Law, R. ZIMMERMANN, S. WHITTAKER eds., Cambridge University Press, 2000, p. 119.

contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement".

However, the *Second Restatement of Contracts* is of little use in the determining what is, or at least, what is covered by the notion of good faith. For this, one must consult the *Uniform Commercial Code* (U.C.C.). Indeed, attorneys at the *American Law Institute*, taking note of the frequent use of good faith in commercial transaction, set out to unify the theory in the 1950's, and did so in the U.C.C, in between the two draftings of the *Restatement of Contracts*.[36]

In the 1960's the U.C.C. was adopted by a large number of American States, with the exception of Louisiana. In its first version, section 1-203 stated as follows: "Every contract or duty within this Act imposes an obligation of good faith in its performance and enforcement". However, the provision was only applicable to areas covered by the U.C.C., that is to say, contracts of sale, documentary letters of credit, and securities. It did not apply to all contracts as a general rule. Since then, the U.C.C. has been adopted by almost all States and governs the greater part of commercial transactions in the United States. Its influence is such that occasionally, judges refer to it in order to resolve a case that does not fall within its scope of application.

The U.C.C. is of interest in the determination of what is, or what is covered by, good faith, on the basis of various articles. Firstly, article 1-201 (20) defines good faith as: "honesty in fact and the observance of reasonable commercial standards of fair dealing". This definition applies to the whole of the U.C.C., with the exception of Section 5 regarding letters of credit, which in its article 5-107(7), defines good faith as: "honesty in fact in the conduct or transaction concerned".

In addition to these two indications as to the meaning of good faith in contractual relations, it is interesting to note that article 1-302 (b) states that: "The obligations of good faith, diligence, reasonableness, and care prescribed by [the Uniform Commercial Code] may not be disclaimed by agreement. The parties, by agreement, may determine the standards by which the performance of those obligations is to be measured if those standards are not manifestly unreasonable".

Similarly, Dutch law does not define good faith. However, article 3:12 BW of the Civil Code states that: "In determining what reasonableness and equity require, reference must be made to generally accepted principles of law, to current juridical views in the Netherlands, and to the particular societal and private interests involved".[37]

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36 The initiative was encouraged by the fact the main drafter of the U.C.C., Karl LLEWELLYN, studied in part in Germany and was therefore extremely familiar with the concept of *Treu und Glauben*, stated at article § 242 of the BGB.

37 New Netherlands Civil Code – Patrimonial Law (trilingual edition English – French – Dutch), translated by P.P.C. Haanappel and Ejan Mackaay, Deventer, Pays-Bas and Boston, MA, Kluwer, 1990. However, the weight to be accorded to these elements should be put into perspective as pointed out by Martijn Hesselink: "These factors cannot really be considered as providing some sort of direction. The 'Principles of law' (…) either don't exist, or cannot be determined or are generally conflicting (e.g. the principles of autonomy and solidarity). 'The ways law is generally perceived in the Netherlands' are numerous: there is a relatively wide spectrum of political parties and we live in a society which is strongly individualistic and multicultural. As for the 'social and personal interests in question' (i.e. especially the interests of the parties),

2. Rationalization attempts by legal theory[38]

While certain legal systems expressly provide for elements intended to rationalize the interpretation of the duty of good faith, the majority of systems remain silent. It is therefore academic thinking that proposes rationalization elements, either through a methodology specific to German law or through legal theory.

German law[39] does not contain legislative provisions identical to those of the U.C.C. or of the BW. The rationalization attempt or objectivization of the notion of good faith stems from the methodology adopted by German authors, and followed by Dutch authors, often called *Fallgruppen*.[40] This involves determining the functions of good faith and organizing the different judgments concerning the notion – *Treu und Glauben* – into various groups. An inner system of good faith developed in this manner, and it aims to determine the content of good faith.

"The result is a system of sometimes quite specific duties, prohibitions, (sub) rules and doctrines which are all part of the content of good faith. It is said to have made decisions on the basis of § 242 BGB agreeably predictable (legal certainty) and rational".[41]

Aside from the development of a particular methodology, the attempts to rationalize good faith can be found in the development of legal theories. Without purporting to list the theories exhaustively, mention should be made of the excluder theory,[42] according to

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they are generally totally opposing (which is why the parties have brought a claim before the courts)". M.W. HESSELINK, *op.cit.* p. 497 note 153.

38 The primary function of good faith is to be a "soft" concept (B. FAUVARQUE-COSSON, "La réforme du droit français des contrats: perspective comparative", RDC 2006/1, p. 147) which can be adapted by the judge. If the notion is too rigidly defined, then there is a risk of "fossilization" (M.W. HESSELINK, *op.cit.*, p. 475), which would be in contradiction with its function.

39 § 242 as other paragraphs of the BGB are seen as general clauses. However, history has shown that these clauses could provide justification for certain nazi policies. Whence the necessity felt by the Germans to rationalize general clauses, generally and the general clause on good faith in particular. On the abuses that general clauses could cause, in particular during the nazi period, see B.S. MARKESINIS, H. UNBERATH, A. JOHNSTON, *op.cit.*, p. 121; B. JALUZOT, *op.cit.*, n° 137, p. 41 This is a perfect illustration of the views of C. JAMIN ("Une brève histoire politique des interprétations de l'article 1134 du code civil", *D.* 2002, Chron. p. 901: "this history [that of article 1134 para. 1] teaches us a lot, not just that this formula [1134 al. 1] is perhaps no more than what its interpretors (professors and judges) make it out to be, but also and especially, on the political character of these interpretations. (…) the interpretors, in this instance, civil law specialists, even when they allegedly merely apply a dogmatic method which is allegedly objective and which is supposed to rationalize positive law by establishing principles and building legal theory (the professor) or then they simply wish to apply the law to a particular dispute (the judge), are largely influenced by the time they live in and the prevailing ideologies".

40 This comes in addition to the theories developed by certain schools of thought. See *supra*, General Introduction.

41 M.W. HESSELINK, *op.cit.*, p. 475.

42 R.S. SUMMERS, "Good faith in general contract law and the sales provisions of the Uniform Commercial Code", [1969] 54 *Va. L. Rev.* 195; "The general duty of good faith – Its recognition

which the effect of the concept of good faith would be to exclude types of improper conduct likely to characterize a performance in bad faith. Professor SUMMERS, creator of the theory, therefore compiled a list of behaviours which are excluded by the requirement of good faith: "evasion of the spirit of the deal, lack of diligence and slacking off, willful rendering of only substantial performance, abuse of power to determine compliance, and interference with or failure to cooperate in the other party's performance". This analysis received broad approval not only by the courts, but also in academic commentaries published in *the Second Restatement of Contracts*, regarding the duty of performance in good faith.

In direct opposition to the excluder theory stands the 'foregone opportunities' theory developed by Professor BURTON.[43] This theory also received a certain amount of support from the judges.[44] Embodying the economic approach to contractual good faith, it is founded on the theory that during the contractual formation period, parties forego the opportunity of entering into other contracts.

Bad faith conduct would thus occur if one party were to attempt to reappropriate his/her foregone opportunities during contractual formation.

In spite of these academic debates, it appears from American case law that American courts have implicitly used the two theories together, so that they have become more complementary than opposing.[45]

Finally, the theory of M.W. HESSELINK, according to which good faith is nothing but a cover, a pretext, appears to be the most provocative:[46] The use of the concept of

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and conceptualization", [1981-1982] 67 *Cornell L. Rev.* 810; "The Conceptualisation of good faith in American contract law: a general account", *in Good Faith in European Contract Law*, R. ZIMMERMANN, S. WHITTAKER eds., Cambridge University Press, 2000, p. 118.

43 S.J. BURTON, "Breach of contract and the common law duty to perform in good faith", [1980-1981] 94 *Harv. L. Rev.* 369; "Good faith performance of a contract within article 2 of the Uniform Commercial Code", [1981-1982] 67 *Iowa L. Rev.* 1; "More on Good Faith Performance of a Contract: A Reply to Professor Summers", [1983-1984] *Iowa L. Rev.* 497.

44 Professor Burton et Professor Summers's theories are regularly endorsed by caslaw. For a non-exhaustive list, see E.M.S. HOUH, "The Doctrine of Good Faith in Contract Law: A (Nearly) Empty Vessel?", [2005] 1 *Utah Law Review* 1, esp. p. 5 note 20.

45 E.M.S. HOUH, "Critical Interventions: Toward an Expansive Equality Approach to the Doctrine of Good Faith in Contract Law", [2002-2003] 88 *Cornell L. Rev.* 1025; "The Doctrine of Good Faith in Contract Law: A Nearly Empty Vessel", [2005] 1 *Utah Law Review* 1: *"The excluder-analysis certainly has the potential to effect justice in a broader, non-economic sense, but in its original iteration it was, and is, quite susceptible to almost exclusively economically driven applications by the courts. In this regard, Summer's argument – that the pursuit of justice provides a better rationale for the good faith obligation than does economic efficiency – is significantly weakened"*. An almost identical view can be found at: E.A. FARNSWORTH, "Good Faith Performance and Commercial Reasonableness under the Uniform Commercial Code", [1962-163] 30 *U. Chi. L. Rev.* 666; "The Concept of Good Faith in American Law", Centro di studi e ricerche di diritto comparato e straniero (Rome 1993), No. 10, disponible sur Internet à l'adresse suivante: http://s oi.cnr.it/~crdcs/crdcs/farnswrt.htm; "Good Faith in Contract Performance", *in Good Faith and Fault in Contract Law*, J. BEATSON, D. FRIEDMANN eds, Oxford, Clarendon Press, 1995, p. 153.

46 *"Good Faith is a cover"*, M.W. HESSELINK, *op.cit.*, p. 497.

good faith is nothing but a pretext designed to reassure judges when they fulfill their role of creating law. The role of good faith is in fact neither more nor less than the role fulfilled by the judge in his normal course of action. As such, good faith appears as a norm so broad that it is empty. *A fortiori*, the use of good faith becomes pointless. In any event, should this approach be broadly accepted, there would be no limit to its scope of application".[47]

Ultimately, such approach is not all that far from that put forward by recent academic works.[48]

Indeed it appears from such works that, although there is no legal concept or mechanism which is sufficiently defined to be of any use, the notion of good faith has allowed judges to adopt certain solutions. The use of the notion appears as a means, and not as an end. Good faith could in fact be perceived as being merely a revealing agent.

A judge traditionally uses this notion as an instrument of contractual justice, in particular to judge the results which arise out of the exercise of a claim. This does not take away its moral dimension, even though, as observed by Mr. LE TOURNEAU: "it involves a watered-down morality, mixed with a particular interest: good faith is, in law, most often employed for utilitarian purposes (…)".[49]

Acquis Communautaire and Acquis International

Traditionally, three different meanings of the term "good faith"[50] have been put forward. Firstly, good faith is "a criteria of interpretation. To interpret a legal text be it a contract

47 M.W. HESSELINK, *op.cit.*, p. 486-498. This theory does appear to be confirmed by professors Zimmermann and Whittaker, who, after mentioning the mere transitory use of article § 242 du BGB state that: *"All in all, therefore, § 242 BGB is neither 'queen of rules' nor 'blaneful plague' but an invitation, or a reminder, for courts to do what they do anyway and have always done: to specify, supplement and modify the law, i.e. to develop it in accordance with the perceived needs of their time"*. (R. ZIMMERMANN, S. WHITTAKER, "Good faith in European contract law: surveying the legal landscape", *in Good Faith in European Contract Law*, R. ZIMMERMANN, S. WHITTAKER eds., Cambridge University Press, 2000, p. 32.).

48 We shall cite, without pretending to any exhaustivity, the following works: S. DARMAISIN, *Le contrat moral*, Pref. Bernard Teyssié, L.G.D.J., 2000; L. FIN-LANGER, *L'équilibre contractuel*, Pref. Catherine Thibierge, L.G.D.J., 2002; L. GRYNBAUM, *Le contrat contingent, l'adaptation du contrat par le juge sur habilitation du législateur*, Préf. Michelle Gobert, L.G.D.J., 2004; A.-S. LAVEFVE-LABORDERIE, *La pérennité contractuelle*, Préf. Catherine Thibierge, L.G.D.J., 2005; A. DANIS-FATOME, *Apparence et contrat*, L.G.D.J., 2004; D. HOUTCIEFF, *Le principe de cohérence en matière contractuelle*, Pref. Horatia Muir Watt, PUAM, 2001, who notes that although a principle of coherence could be lifted from the notion of good faith, meaning that one couldn't contradict oneself to the detriment of others –, a legal analysis inevitably leads to the conclusion that the concept is autonomous (see n° 1202).

49 Y.-M. LAITHIER, *Etude comparative des sanctions de l'inexécution du contrat*, Pref. H. Muir-Watt, L.G.D.J., 2004, n° 351, p. 446 citing P. LE TOURNEAU, *Rep. civ.*, V° Bonne foi, n° 10.

50 E. ZOLLER V° "Bonne foi", in Dictionnaire de la culture juridique.

or a treaty or a statute in accordance with good faith is to interpret it according to its real spirit and not to interpret it strictly".[51] Such a view contrasts with pure formalism and is based upon the traditional distinction in Roman law between actions of strict law and actions *bonae fidei* (actions based on good faith). Secondly, good faith is a moral quality: "to be in good faith is to behave loyally, sincerely, honestly; to keep one's word; to keep one's promise. Good faith is thus the reverse of undue influence, of fraud; it rules out any malicious intent".[52] Finally, good faith is the mistaken belief in the existence of a certain legal situation. This good faith "is always presumed […] Understood in this way, good faith is the other side of mistake, to which it is bound".[53]

Good faith is a flexible term which refuses to be imprisoned in any one particular definition. The study of the Acquis Communautaire and Acquis International reveals that the triple polysemy proposed is not irrelevant. On the contrary it reveals that good faith, being a flexible concept, takes different forms according to the functions assigned to it. These functions are themselves largely dependent upon the spheres or types of obligations to which good faith applies: "Good faith is an 'open' concept".[54]

As a preliminary, it must be pointed out that the concept "good faith" does not appear in all international or European texts. It is also absent from certain international conventions.[55] Moreover, many Community texts do not even mention good faith.[56] However, it does appear in a large number of texts and its scope is increasing ever more in the light of the recent codification proposals. In these proposals, good faith appears sometimes as a **(I)** norm of interpretation, sometimes as a **(II)** source of obligations and sometimes as a **(III)** mistaken and forgivable belief, a ground for validity in certain legal situations.

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51 E. ZOLLER V° "Bonne foi", in Dictionnaire de la culture juridique.

52 E. ZOLLER V° "Bonne foi", in Dictionnaire de la culture juridique.

53 Ibid.

54 P. MAYER, "Le principe de bonne foi devant les arbitres du commerce international", in *Etudes de droit international en l'honneur de Pierre Lalive*, ed. Helbing et Lichtenhahn, 1993, p. 543, esp. p. 556.

55 It does not appear in the Hague conventions (15th June 1955 on the law applicable to international sales of goods; 14th March 1978 on the law applicable to agency; 22nd December 1986 on the law applicable to contracts of international sales of goods). It does not even figure in the 1988 United Nations Convention on International Bills of Exchange and International Promissory Notes.

56 Without being exhaustive the following are examples where good faith is missing: Directive 1999/93/EC of the European Parliament and of Council of the 13th December 1999, on a Community framework for electronic signatures (*JOCE* L 13 19th January 2000, p. 12), Directive 85/577/EEC of 20th December 1985 concerning the protection of the consumers in respect of contracts negotiated away from business premises (*JOCE* n° L 372 31st December 1985, p. 31), Directive 94/47/EC of 26th October 1994 concerning the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis (*JOCE* n° L 280 29th October 1994, p. 83), Directive 1999/44/CE of 25th May 1999 on certain aspects of the sale of consumer goods and associated guarantees (*JOCE* n° L 171 7th July 1999, p. 12).

I. Good Faith, an Instrument of Interpretation

The expression "good faith" often appears in the context the interpretation of legislation. In this case, it is not given any specific definition. It seems to be understood as conflicting with a narrow and strict interpretation of texts. It ensures a certain flexibility of interpretation and prevents any paralysis which could otherwise result from a text being silent on an issue or giving rise to some doubt. This principle of interpretation applies primarily, to all international treaties (**A**). It sometimes takes on a particular value when it is applied to international texts which seek especially to promote good faith (understood as a standard of behaviour) (**B**). These texts must indeed be interpreted with the aim of promoting a certain ideal of justice and fairness in contractual relations. Good faith thus becomes a principle of interpretation, no longer merely of the international texts but also generally of the contracts which are affected by such texts (**C**).

A. A principle for the interpretation of international treaties

In public international law, good faith is a fundamental principle.[57] Article 26 of the Vienna Convention on the Law of Treaties, signed on 23rd May 1969 provides as follows: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith"; article 31 clarifies: "A treaty shall be interpreted *in good faith* in accordance with the ordinary meaning to be given to the terms of the Treaty in their context and in light of its object and purpose".

This principle has in a way been repeated and consolidated by old article 5 of the EEC Treaty, now article 10 of the European Union Treaty: "Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks. They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty." The term "good faith" does not appear as such in the text. However, it is generally admitted that this text can be read as the transposition into the Community legal order of the directive laid down by the Vienna Convention. From this point of view, the text serves the purpose of "strengthening a pre-existing obligation"[58] and is a "method of systematic interpretation" of Community legislation. Here again its role goes beyond a mere norm of interpretation.[59]

B. A directive for the interpretation of rules relating to contracts

Beyond this application to treaties in general, good faith plays a greater role as a regulator where the said international treaties set out, more or less explicitly, to give good faith its full importance in interpersonal relations.

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57 E. ZOLLER, La bonne foi en droit international public, Paris, Pedone, 1977.

58 D. SIMON, Le système juridique communautaire, 3rd ed., PUF, 2001.

59 See infra.

The Vienna Convention of 11th April 1980 on international sale of goods illustrates this situation perfectly. Article 7(1) sets out that, in interpreting the Convention, particular attention must be paid to the "observance of good faith in international trade". Good faith is thus defined as a guideline for the interpretation of the whole Convention: the interpreter "must ensure compliance with good faith in international trade".[60] This disposition undoubtedly introduces a certain flexibility in conventional rules.[61] Good faith thus appears with a moral connotation, as a term used to regulate business life. If the freedom of the contracting parties is essential to a market economy, the freedom of some must coexist with the freedom of others: good faith presents itself as one of the regulating principles able to achieve this coexistence.

In the same manner, article 5 of the UNCITRAL Convention on independent guarantees and stand-by letters of credit of 1995 sets out: "in the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in the international practice of independent guarantees and stand-by letters of credit".

A similar expression appears in the UNCITRAL Convention on the assignment of receivables in international trade (see article 7 "principles of interpretation") and in the UNIDROIT Conventions of 28th May 1988, concerning international factoring and international financial leasing, respectively article 4 and 6.

The texts of "virtual" law share a similar preoccupation. Article 1.6 of the UNIDROIT Principles, even if it does not expressly set out good faith as a principle of interpretation, refers to it implicitly in the second paragraph: "issues within the scope of these principles but not expressly settled by them are as far as possible to be settled in accordance with their underlying general principles". And the explanatory note for the article points out that in order to successfully "fill the gaps in the principles", one should, on one hand, resort to analogy, and on the other, take into account some fundamental principles set out by the Principles amongst which good faith, as stated by the note on article 1.7.

As for PECL, they explicitly refer to good faith as a guide to the interpretation of the whole *corpus*, as stated in article 1:106: "These Principles should be interpreted and developed in accordance with their purposes. In particular, regard should be had to the *need to promote good faith and fair dealing*, certainty in contractual relationships and uniformity of application". The expression is unequivocal: as every international text, PECL will have to be interpreted in good faith, but they have in addition a political aim, that of promoting good faith among the parties to the different contracts. It is in the light of this aim, that each disposition must be read.

Thus a certain number of international texts aim to promote good faith in contractual relations. They raise it to the status of a principle of interpretation of the dispositions they contain.

These observations lead, in a logical analysis, to a further observation: good faith acts as a regulating principle, not only in the reading of international texts relating to contracts but also in the interpretation of the contracts themselves.

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60 V HEUZE, La vente internationale de marchandises, LGDJ 2000, n° 91.

61 Ibid.

C. A principle of contractual interpretation

The idea that a contract must be interpreted according to the principle of good faith permeates all the law relating to commercial contracts. It has developed notably in the frame of the *lex mercatoria* to such an extent that it has become one of its fundamental principles.[62] In fact, the requirement of good faith emerges directly from a number of international arbitration awards, which establish a true "general principle according to which agreements must be applied in good faith".[63]

In international arbitration, the interpretation in accordance to good faith is seen as "another way of favouring the interpretation according to the parties' real intention over a literal interpretation".[64] To support this view, the award given long ago by President CASSIN is often quoted[65] as well as the ICC award rendered in 1975 in the following terms: "one should interpret the [contentious] clause … without forgetting to replace [the terms of the contract] in their context and to consider the contract as a whole, in order to bring out the real common intention of the parties. And when a term arouses controversy, one should interpret it in accordance to the *good faith principle*".[66] Here "the bad faith of a party, who claims the benefit of the rigour of the law and contract for himself, is invoked against such party. It is in fact a disguised way of introducing equity".[67]

The doctrinal projects of codification whether international or European, also make use of good faith to this end. As stated by Ole LANDO: "the principles of European contract law and the UNIDROIT Principles attach a great importance to the principle of good faith under the influence of several laws mainly German, Dutch and American.

In each of these legal instruments, good faith is promoted to the rank of general principle which covers all stages of a contract".[68]

This high status changes the function of good faith from an interpretative role to that of extending the content of a contract.

The phrase "good faith" is thus used in the UNIDROIT Principles "to define a regulating concept in reference to which a contract must be interpreted".

Article 4.8 of the UNIDROIT Principles states that where the parties to a contract have not agreed with respect to a term which is important for a determination of their rights and duties, a term which is appropriate in the circumstances shall be supplied, and paragraph 2 of the same article adds: "in determining what is an appropriate term, regard shall be had, among other factors to (a) the intention of the parties; (b) the nature and purpose of the contract; (c) *good faith and fair dealing*; (d) reasonableness".

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62 See B. GOLDMAN, "La lex mercatoria dans les contrats internationaux: réalités et perspectives", JDI, 1979, 475.

63 Ph FOUCHARD, E GAILLARD and B. GOLDMAN, Traité de l'arbitrage commercial international, Litec 1996 n° 1470.

64 Ibid.

65 Award of 10 June 1955, Rev.crit., 1956.279, note H. BATIFFOL, Rev arb. 1956.15.

66 Award ICC case 1434, 1975, JDI, 1976.979; note Y. DERAINS.

67 P. MAYER, "Le principe de bonne foi devant les arbitres du commerce international" *op.cit.* p. 654.

68 O. LANDO, "L'avant-projet de réforme du droit des obligations et les Principes du droit européen du contrat: analyse de certaines différences", RDC, jan. 2006, p. 167 and following § 11.

The same reasoning is found in article 5:102 of the Principles of European contract law: "in interpreting the contract, regard shall be had in particular to […] g) *good faith and fair dealing*. Placed at the limit between "interpretation" and "content" of the contract, article 6:102 asserts that in addition to the express terms, a contract may contain implied terms which stem from (a) the intention of the parties, (b) the nature and purpose of the contract and (c) *good faith and fair dealing*. The term is close to equity at least partly, and is reminiscent of article 1135 of the French Civil Code according to which: "agreements are binding not only as to what is expressed therein, but also as to all the consequences which *equity*, usage or statute give to the obligation according to its nature". Thus the Principles follow the French tradition: they do not distinguish between consensual agreements and formal agreements (formal agreements with regard to which the principles of equity and good faith were unknown in the old law).[69]

Nowadays, even in respect of a formal and written contract, good faith remains a relevant principle of interpretation.

The PAVIA Principles are faithful to this view and use the term "good faith" in the same way. Article 39, which sets out the rules regarding the interpretation of a contract, ends with a final paragraph which is unambiguous: "In any event, the interpretation of a contract must not reach a conclusion that is contrary to good faith or to common sense". Moreover, it contains a clause regarding implied contractual terms which is along the same lines (art 32, paragraph 1) besides the express clauses, the contents of a contract are made up of clauses (a) that are imposed by the present Code or by the European and national clauses, even replacing different clauses introduced by the parties (b) *that derive from the duty of good faith*. A parallel can be drawn with article 44 of the Principles: "The consequences of a contract result not only from the agreement between the parties but also from the articles of this Code as well as from the national and European principles, usage, *good faith and equity*".

From this, we see that good faith is not only a guide to the interpretation of the parties' intention but also a tool which influences the content of the contract. Judges are ready to go beyond a simple clarification of the parties' intention; they seem prepared, encouraged by a number of academics and by numerous international texts, to use good faith as a real norm of interpretation even as a source of obligation.

II. Good Faith, a Standard of Behaviour

The expression "good faith", far from being univocal and unambiguous, is often regarded as a "standard of behaviour", which can occasionally even materialize as a specific obligation. This explains the use of expressions such as "duty of good faith" or "obligation of good faith".

As pointed out by Professor JACQUET, "the principle of good faith, sometimes seen as a basic principle of the *lex mercatoria*, can therefore be directly applicable to interna-

69 See in this respect the writings of DOMAT such as quoted by E. COLAS "La notion d'équité dans l'interprétation des contrats" (1980-81) 83 R. du n.391 page 394: "there is no type of contract where it is not understood that one party acts in good faith as regards the other, with all the effects required by equity, whether in the way the contract is expressed, as in the performance of what is agreed including all consequences".

tional contracts (…). Thus, the principle of good faith can impose obligations of behaviour directly upon the parties in the conclusion as well as in the implementation of the contract".[70]

Positive law imparts a varying degree of importance to the notion of good faith (**A**). However, in documents drafted by academics, the expression takes on a particular importance, especially through its objective dimension (**B**).

A. Positive law

Reference to good faith as a standard of behaviour can be found in international as well as in Community law.

1. The United Nations convention on contracts for the international sales of goods: an implied obligation of good faith

Amongst the different international sources applicable to a contract, the notion of "good faith" appears mainly in the United Nation Convention on Contracts for the International Sale of Goods, 11 April 1980, in which the expression is abundantly used. However, it has an ambivalent status: the Convention does not contain any provision imposing a duty of good faith concerning the implementation of a contract. And whilst article 7(1) states that in the interpretation of the Convention good faith should prevail, it does not impose an actual duty of good faith upon the parties.

This article would appear to be the result of a compromise between the delegates of the civil law countries, favourable to the establishment of a duty of good faith, and those of the common law countries, strongly opposed to this solution.[71]

Indeed, "a suggestion put forward by Spain in favour of a specific provision, in spite the support of most civil law countries, was met with a firm refusal emanating, for example, from England".[72] Consequently, interpretations of this convention vary. Some argue that because it does not expressly impose a duty of good faith upon the parties, it simply means that such a duty does not exist. For others, on the contrary, this principle does not need to appear in the text to be accepted: a general principle of good faith can be implied. A half-way view is to consider that such a duty implicitly underlies an important number of specific provisions in the Convention so that this duty of good faith can be seen as one of the fundamental principles on which the Convention is based.

This last interpretation is appealing. The fact is that without being explicitly mentioned, the notion of good faith finds its way into an important number of articles in the

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70 *Le contrat international*, Dalloz 2nd ed. 1999, p. 101 and 102.

71 See *Conférence des Nations-Unies sur les contrats de vente internationale de marchandises*, Vienne, 10 March – 11 April 1980, *Documents officiels des Nations Unies*, p. 79 and p. 272; see also G. EORSI, "Problems of Unifying Law on the Formation of Contracts for the International Sale of Goods", *Am. J. Int.Law*, 1979, vol. 27, p. 311, esp. p. 313.

72 P. LALIVE, "Sur la bonne foi dans l'exécution des contrats d'État", *in Mélanges offerts à Raymond Vander Elst*, ed. Némésis, 1981, p. 434.

Convention. For example, article 29(2) states: "A contract in writing which contains a provision requiring any modification or termination by agreement to be in writing may not be otherwise modified or terminated by agreement. *However, a party may be precluded by his conduct from asserting such a provision to the extent that the other party has relied on that conduct*". Also, in article 35(3): "The seller is not liable under subparagraphs (a) to (d) of the preceding paragraph for any lack of conformity of the goods if at the time of the conclusion of the contract the buyer knew or could have not been unaware of such lack of conformity". A parallel can be established between this article and provisions from articles 38, 40 and 44.

Article 77 relating to the obligation to mitigate the loss can also appear as another expression of the general principle of good faith between the parties. "A party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach. If he fails to take such measures, the party in breach may claim a reduction in the damages in the amount by which the loss should have been mitigated". Finally, article 80 of the Convention states that: "a party may not rely on a failure of the other party to perform, to the extent that such failure was caused by the first party's act or omission". In this last article, the good faith of the debtor is required; indeed the debtor cannot rely on the slightest mistake of the creditor to avoid performing his obligations under the contract.

2. The United Nations convention on independent guarantees and stand-by letters of credit

Article 14 of the Convention entitled "Standard of conduct and liability of guarantor/issuer", provides in its first paragraph that "the guarantor/issuer shall act in good faith and exercise reasonable care having due regard to generally accepted standards of international practice".[73] The second paragraph states that the guarantor/issuer may not be exempted from liability "for its failure to act in good faith or for any grossly negligent conduct". Article 19 clarifies this general standard of behaviour by listing situations in which the guarantor/issuer can rely on a right to withhold payment.

3. Community law

Good faith seems to be at the very heart of European institutions. Article 10 of the aforementioned Treaty on European Union (ex-article 5 of TEC) imposes upon Member States a negative obligation *to abstain from any measure which could jeopardise the attainment of the objectives set out in the Treaty-* as well as a two-fold positive obligation- *to take all appropriate measures to ensure fulfilment of their obligations under the Treaty and facilitate the achievement of the Community's tasks*. Although the term "good faith" does not explicitly appear in the text, the article has sometimes been interpreted as laying out a principle of "good faith in Community law", a principle of "loyal cooperation". Initially article 10 was analysed as a mere norm of interpretation the sole purpose of which was to introduce the specific obligations inherent to the Treaty.

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73 See article 6 of the UNIDROIT Convention of 28 May 1988 on international finance leasing.

Subsequently, the text was gradually construed by the ECJ as an autonomous source of obligations: today, any violation of art. 10 is considered as being a breach of Treaty obligations capable of leading to infringement proceedings under article 226 TEU.

This is also the case whenever the duty to inform the Commission, imposed on Member States by article 10 EC[74], is breached: the Court considers it a breach of the *obligation of cooperation, imposed by article 5 of the Treaty*, for a Member State to refuse or neglect to provide the Commission with requested information[75] or to fail voluntarily to provide the Commission with the information which is necessary to control the compliance of a Member State with Community law.[76] Although the term "good faith" is not used expressly and although the principle is applied in this instance to the relationship between Member States and Community institutions, this provision gives the principle of "good faith" a solid foundation in the Acquis Communautaire. It enables a better understanding of the precise meaning given to this general obligation: a requirement of loyal cooperation between Member States and willingness to honour their commitments[77] under the Treaty. Some academics have assimilated it to the German concept of "*Bundestreue*" ("federal loyalty" or loyalty to the federal State). According to this analysis, good faith would be an "illustration of the federal model and more precisely of Germany […] where the concept must be understood as entailing not only a unilateral obligation on the part of the Länder towards the central authorities but also as an allegiance to the federal principle by both the Member States and the central government itself".[78] The necessity of cooperation thus applies not only to States but also to relations between the institutions within the European Union.

If the term "good faith" is not always used explicitly, that of fairness – no doubt because of its more objective connotation- is fundamental in Community law. It represents the "emergence of moral values"[79] in the Community system: "if freedom of economic operators is the sine qua non condition of a market economy, it cannot however be unlimited. […] the ECJ points out that the freedom of action on the part of economic operators can be measured by the awareness of their responsibility in the working of market forces: the duty of loyalty must govern the behaviour of undertakings and ultimately benefit the consumers".[80] The judge will only refrain from punishing the impair-

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74 ECJ, 22 September 1988, *Commission v. Greece*, 272/86: Rec. 1988, p. 4875. – 13 December 1991, *Commission v. Italy*, C-33/90: Rec. 1991, I, p. 5987; *Europe*, February 1992, comm. n° 38. – 14 October 1992, *Commission v. République hellénique*, C-65/91: Rec. 1992, I, p. 5245; *Europe*, December 1992, comm. n° 439.

75 *ECJ, 22 March 1994, Commission v. Spain, C-375/92:* Rec. 1994, I, p. 923; *Europe, May 1994, comm. D. Simon n° 184.*

76 *ECJ, 24 March 1994, Commission v.Great Britain, C-40/92:* Rec. 1994, I, p. 989; *Europe, May 1994, comm.* D. SIMON n° 184.

77 See V. CONSTANTINESCO, "L'article 5 CEE, de la bonne foi à la loyauté communautaire", *Mélanges Pescatore*, p. 97. More generally, see M. BLANQUET, *L'article 5 du traité CEE, Recherche sur les obligations de fidélité des États membres de la CEE*, Paris, LGDJ, 1994.

78 L. DUBOUIS et Cl. BLUMANN, *Droit matériel de l'Union européenne*, Montchrestien, 3rd ed., n° 114.

79 See P. HETSCH, "L'émergence des valeurs morales dans la jurisprudence de la CJCE", *RTDE*, 1982, esp. p. 547.

80 P. HETSCH, *op.cit.* p. 548.

ment to the free movement of goods if the measures taken are justified by "the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions, and the defence of the consumer".[81] Fairness also appears as a principle regulating free competition: "any obstacle to the freedom to undertake, which belongs to all undertakings, created by one of them, creates an imbalance for its own profit and constitutes unfair conduct as it is detrimental to the entire community.[82] The notions of *unfair* competition and *abuse* of dominant position, considerably developed throughout Community case law, are part of this trend.

Aside from the Treaty provisions, Community secondary legislation copiously refers to good faith and to fairness, with the two concepts often interlinked.[83] These legal texts use the terms "abuse", "abusive behaviour" to denote a behaviour tainted with bad faith. The concept of "good faith" is no longer defined by reference to its positive aspect but by reference to its negative aspect: abuse of rights.

This trend is clearly illustrated by Council Directive 93/13/EEC of 5th April 1993 on unfair terms in consumer contracts[84] which provides in article 3, § 1: "a contractual term […] shall be regarded as unfair, if contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract to the detriment of the consumer". The very concept of "good faith" as it is understood under the above Directive is clarified by the 17th recital of the preamble: "Whereas the assessment, according to the general criteria chosen, of the unfair character of terms, in particular in sale or supply of activities of a public nature providing collective services which take account of solidarity among users, must be supplemented by *a means of making an overall evaluation of the different interests involved*; whereas this constitutes the requirement of good faith; whereas, in making an assessment of good faith, *particular regard shall be had to the strength of the bargaining positions of the parties, whether the consumer had an inducement to agree to the term and whether the goods or services were sold or supplied to the special order of the consumer*; whereas the *requirement of good faith* may be satisfied by the seller or supplier where he deals *fairly* and *equitably* with the other party whose legitimate interests he has to take into account". As pointed out by J. CALAIS-AULOY, it seems that taken literally, the expression "good faith" is used here in its subjective dimension, as a criterion which should be taken into account in addition to the objective requirement of a significant imbalance.[85] However, it should be noted that when these texts were implemented by the Member States, the national legislators were concerned that this subjective approach would lead to a weakening of the measures taken against unfair

81 ECJ., 28 February 1979, *Rewe Zentral A.G.*, Rec. 1979, p. 469, paragraph n° 8, p. 662.

82 P. HETSCH, *op.cit.* p. 550.

83 "[…] la notion de bonne foi, synonyme reconnu de celle de loyauté […]", E. POILLOT, *Droit européen de la consommation et uniformisation du droit des contrats*, Pref. P. de VAREILLES-SOMMIERES, L.G.D.J., Tome 463, n° 614, p. 270.

84 *OJ* n° L 95 of 21 April 1993, p. 29.

85 J. CALAIS-AULOY, "Le devoir de se comporter de bonne foi dans les contrats de consommation", *in General clauses Standards in European Contract Law Comparative Law, EC Law and Contract Law Codification*, éd. S. GRUNDMANN et D. MAZEAUD, Kluwer Law International, 2005, p. 192-193. See also, ECJ, C-240 à 244/98, 27 June 2000, *Oceano Grupo*, esp. consid. 21.

contract terms; in order to avoid this risk they removed any reference to the concept of good faith altogether. This was the case for article L 132-1 of the French Consumer Code.

Even when the term "good faith" is not explicitly used, the word "fairness" occasionally appears in secondary legislation (…) Directive 97/7/EC of 20th May 1997 on the protection of consumers in respect of distance contracts[86] sets out in its article 4.2 the requirement that the consumer should be provided with information prior to the conclusion of the contract. It is specified, in this respect that the information, "the commercial purpose of which must be made clear, shall be provided in a clear and comprehensible manner, in any way appropriate to the means of distance communication used, *with due regard, in particular, to the principles of good faith in commercial transactions* and the principles governing the protection of those who are unable, pursuant to the legislation of Member States, to give their consent, such as minors".

Using similar wording, Directive 86/653/EEC of 18th December 1986 on the coordination of the laws of Member States relating to self-employed[87] agents sets out in its article 3: "the commercial agent must look after his principal's interest and act dutifully and in good faith". This reference to good faith and dutiful behaviour ("loyalty" in the French version) also appears in article 4 relating to the principal's behaviour.

Likewise, Directive 2002/65/EC of 23rd September 2002, concerning the distance marketing of consumer financial services,[88] provides in article 3.2: "The information referred to in paragraph 1, the commercial purpose of which must be made clear, shall be provided in a clear and comprehensible manner in any way appropriate to the means of distance communication used, *with due regard, in particular, to the principle of good faith in commercial transactions* and the principles governing the protection of those who are unable, pursuant to the legislation of the Member States to give their consent, such as minors".

Finally, more recently, Directive 2005/29/EC of 11th May 2005 concerning unfair business-to-consumer commercial practices in the internal market,[89] specifies in its article 2, that "professional diligence" under the Directive means the "standard of special skill and care which a trader may reasonably be expected to exercise towards consumers, *commensurate with honest market practice and/or the general principle of good faith* in the trader's field of activity". Those who commented on the Directive raised the issue of the definition to be given to these two concepts (good faith and loyalty) in this context, in the following terms: "if the concept of loyalty ("fairness") is familiar to civil law systems, which include French law, it is not in keeping with the free play of market forces encouraged by the EU… And although English law may have inspired the economic approach adopted by directive 2005/29, the concept of "good faith" employed is unfamiliar to British jurists.[90]

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86 *OJ* n° L 144 4th June1997.

87 *OJ* n° L 382 31st December 1986.

88 *OJ* n° L 271 9th October 2002.

89 *OJ* n° L 149 11th June 2005.

90 M. LUBY, "La directive 2005/29 sur les pratiques commerciales déloyales (une illustration de la nouvelle approche prônée par la Commission européenne)", *Europe* n° 11, Nov. 2005, Étude 11. It has however been proved that English law could accommodate itself of this new implementation of the concept of good faith. See C. TWIGG-FLESNER, D. PARRY, G. HOWELLS,

It appears from the analysis of the Acquis, including Acquis Communautaire, that the concept of good faith, interpreted as a standard of behaviour, is frequently used. It is noteworthy that recent writings by academics working on a European contract law suggest that the concept of good faith should be given an essential role in contract law.

B. Good faith in international and European codification proposals

These international and European texts use "good faith" in the objective sense and turn it into a fundamental notion, a general principle (1). Without giving a clear definition – but is the term not inherently incapable of being defined? – these texts offer a series of examples which allow the concept to be understood more concretely (2).

1. A general principle

Whilst the Vienna Convention does not establish "good faith" explicitly as a basic principle of contract law, both the Principles of European Contract Law (PECL) and the UNIDROIT principles go so far as to do this. Article 1.201 of the PECL sets out a duty to act in good faith: "Each party must act in accordance with good faith and fair dealing. The parties may not exclude or limit this duty". The first line of article 1.201 imposes a duty of good faith on each party to the contract and defines it in such wide terms that it establishes a truly general obligation.

It can be considered from the wording used in the text that good faith is required both during the implementation of the contract and at the stage of its formation.[91] It should also be noted that in their second version, PECL have opted for a wider definition than the one first retained. The initial text imposed on each party the duty to act in good faith "while exercising their rights and performing their duties.

It is noteworthy that the French version of PECL only refers to a compliance with the requirement of good faith, whilst the English version mentions "good faith and fair dealing". As mentioned in the commentary, "good faith" (in the English version) probably refers to the *intention* to act honestly and fairly. It is a subjective concept: "a person

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A. NORDHAUSEN, *An Analysis of the Application And Scope of the Unfair Commercial Practices Directive, A Report for the DTI*, 2005, esp. p. 9, which is to be found at the following adress: http://www.dti.gov.uk/files/file32095.pdf; In the same spirit, on the reception of the directive by the new Member States and the existence of a general principle of good faith and/or fairness/loyalty see C. VAN DAM, E. BUDAITE (coord.), *Unfair Commercial Practices. An analysis of the existing laws on unfair commercial practices between business and consumers in the new Member States. General Report*, BIICL, 2005, available at the following address: http://ec.europa.eu/consumers/cons_int/safe_shop/fair_bus_pract/ucp_general_report_en.pdf; *adde* C. VAN DAM, E. BUDAITE (coord.), *Unfair Commercial Practices. An analysis of the existing laws on unfair commercial practices between business and consumers in the new Member States. National Reports*, BIICL, 2005, available on: http://ec.europa.eu/consumers/cons_int/safe_shop/fair_bus_pract/ucp_national_report_en.pdf.

91 J. MESTRE, "Article 1:201 – Bonne foi", *in Regards croisés sur les principes du droit européen du contrat and followingr le droit français*, C. PRIETO (directed by), PUAM 2003, p. 116.

cannot use means from which he would not profit, with the sole aim of harming the other party". However, the term "fair dealing" draws on an objective criterion, it is *fact* of acting with fairness. The term good faith used in French law must therefore be understood in its wider meaning, as including the objective dimension.

The same remark is true about the UNIDROIT principles, which explicitly set out the principle of "good faith". Article 7.1 paragraph 1 provides: "Each party must act *in accordance with good faith and fair dealing in international trade*". The commentary makes it clear that: "while pointing out that each party must act in accordance with good faith, the first paragraph of the said article, states clearly that *even in the absence of any particular dispositions in the Principles, the parties, must during the entire duration of the contract, including at the negotiation phase, act in good faith*." The notion should again be understood in its wider meaning, as referring to the fairness of the parties. It should be added that article 7.1 paragraph 2, makes good faith mandatory: "The parties may not exclude or limit this duty". The commentary makes it clear that on the contrary, "nothing prevents the contracting parties from stipulating an even stricter standard of behaviour in their contract".

However, the UNIDROIT principles, unlike PECL and in accordance with their scope use the expression "good faith and fair dealing *in international trade*" and the commentary for article 7(1) adds, that even when the Principles or commentaries only refer to "*good faith*" or "*good faith and fair dealing*", they should be understood as referring to the full expression "*good faith and fair dealing in international trade*". The commentary specifies that the French notion of "good faith" should be understood, in the commentaries, as including the more explicit term in English and that "good faith should be analysed in the light of the special conditions applying to international trade." The text thus aims to prevent any differences in interpretation arising out of different national laws and to achieve this it gives the concept of good faith a certain autonomy in the context of the Principles: "the concept must not be applied in accordance with the usual criteria adopted in the different legal systems", even though comparative law is, of course, the basis upon which the principle of good faith as now used in international trade was developed.

2. The concrete meaning of good faith

Because the term "good faith" is a vague notion, it is difficult to define precisely. Neither the UNIDROIT principles (**a**) nor PECL (**b**) nor the Pavia Project (**c**) attempt to do this. However, these texts contain numerous examples in which the principle of good faith applies, which enables us to understand how it comes into play.

a) UNIDROIT principles

The UNIDROIT Principles provide a variety of examples where the principle of good faith applies.[92]

[92] Articles 1.9 (2), 2.1.4(2)(b), 2.1.15, 2.1.16, 1.2.18, 2.1.20, 2.2.4(2), 2.2.5(2), 2.2.7., 2.2.10, 3.5, 3.8, 3.10, 4.1(2), 4.2(2°, 4.6, 4.8, 5.1.2., 5.1.3., 5.2.5., 6.1.3., 6.1.5., 6.1.16(2), 6.1.17(1), 6.2.3(3)(4), 7.1.2, 7.1.6, 7.1.7, 7.2.2(b)(c), 7.4.8, 7.4.13, 9.1.3, 9.1.4 et 9.1.10(1). Article 1.8,

Sometimes, the term "bad faith" is preferred to that of "good faith". It enables the text to give a clearer idea of the prohibited behaviour. Good faith is in this case, defined negatively, by its opposite.

In the Principles, a number of specific applications of the general prohibition to exclude or limit the principle of good faith between the parties can be found. Article 3.19 thus declares the provisions in the Principles regarding fraud, threat and gross disparity to be of mandatory character. The commentary states that "it would be contrary to good faith for the parties to exclude or modify these provisions when concluding their contract". Article 7.1.6 sets out a prohibition as to certain exemption clauses: "A clause which limits or excludes one party's liability for non-performance or which permits one party to render performance *substantially different from what the other party reasonably expected may not be invoked if it would be grossly unfair to do so, having regard to the purpose of the contract*".

The will to define good faith, by its antonym appears vividly in article 2.1.15 of the UNIDROIT Principles, named "Negotiations in bad faith": 1) A party is free to negotiate and is not liable for failure to reach an agreement. 2) However, a party who negotiates or breaks-off negotiations in bad faith is liable for the losses caused to the other party. 3) *It is bad faith*, in particular *for a party to enter in or continue negotiations when intending not to reach an agreement with the other party*".

Moreover, article 3.5, regarding avoidance of the contract for mistake sets out: "(1) A party may only avoid the contract for mistake if, when the contract was concluded, the mistake was of such importance that a reasonable person in the same situation as the party in error would only have concluded the contract on materially different terms or would not have concluded it at all if the true state of affairs had been known, and: a) the other party made the same mistake or caused the mistake or knew or ought to have known of the mistake and *it was contrary to reasonable commercial standards of fair dealing to leave the mistaken party in error* […]".

Sometimes, good faith appears as a standard of behaviour that the judge must try to restore, as set out in article 3.8 relative to fraud: "A party may avoid the contract when it has been led to conclude the contract by the other party's fraudulent representation, including language or practices, or fraudulent non-disclosure of circumstances which, *according to reasonable commercial standards of fair dealing*, the latter party should have disclosed." Or as set out in article 3.10 regarding gross disparity: "2) A court may, upon the request of the party entitled to avoidance, adapt the contract or term in order to make it accord with reasonable commercial *standards of fair dealing*".

Good faith also refers to a standard of behaviour close to that of fairness. Thus, article 3.10 of the Principles asserts that there is abuse of economic dependence when "the other party has *taken unfair advantage* of the first party's dependence, economic distress or urgent needs, or of its improvidence, ignorance, inexperience or lack of bargaining skill. In this example, again the power conferred to the court, is to be exercised in accordance with good faith: "The court may, upon the request of the party entitled to avoidance, adapt the contract or term in order to make it accord with reasonable *commercial standards of fair dealing*".

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relating to the prohibition on inconsistent behaviour is one of the most obvious examples: "A party cannot act inconsistently with an understanding it has caused the other party to have and upon which that other party reasonably has acted in reliance to its detriment".

b) PECL

The same intention, that of describing behaviour in good faith or in bad faith reoccurs in a number of places in PECL.

First, it should be pointed out that the notion of good faith is presented as a principle which restricts the freedom of contract, following a reasoning also found in the Acquis CommunautaireCommunity. Indeed, article 1:102 (1) states that: "Parties are free to enter into a contract and to determine its contents, *subject to the requirements of good faith and fair dealing, and the mandatory rules established by these Principles*." Good faith thus seems to make up "the third segment in the contractual triangle also comprising freedom of contract and legal certainty".[93] The notion of good faith is also frequently coupled with reasonableness defined in article 1:302: "Under these Principles reasonableness is to be judged *by what persons acting in good faith and in the same situation as the parties would consider to be reasonable*".

The requirement of good faith is found in many provisions of PECL.[94] Article 4:107 (1) thus states "A party may avoid a contract when it has been led to conclude it by the other party's fraudulent representation, whether by words or conduct, or fraudulent non-disclosure of any information *which in accordance with good faith and fair dealing it should have disclosed*." When a contract grants one of the parties excessive benefit or unfair advantage, it is provided in article 4:109 (2) that: "Upon the request of the party entitled to avoidance, a court may if it is appropriate adapt the contract in order to bring it into accordance with what might have been agreed had the *requirements of good faith and fair dealing* been followed". Also, in accordance with article 4:110 (1): "A party may avoid a term which has not been individually negotiated if, contrary to the *requirements of good faith and fair dealing*, it causes a significant imbalance in the parties' rights and obligations arising under the contract to the detriment of that party (…)" Concerning the change of circumstances, article 6:111 of the Principles clearly states *in fine* that the court may award damages for the loss suffered through a party refusing to negotiate or breaking off negotiations contrary to good faith and fair dealing, when the parties entered negotiations with a view to adapting the contract or terminating it. Articles 16:101 and 16:104 should also be cited. The role of good faith during the pre-contractual period was established by the Principles of European Contract Law, as well as by the UNDROIT Principles, as shown in article 2:301 entitled "Negotiations Contrary to Good Faith": (1) a party is free to negotiate and is not liable for failure to reach an agreement. (2) However, a party who has negotiated or broken off negotiations *contrary to good faith and fair dealing* is liable for the losses caused to the other party. (3) It is *contrary to good faith and fair dealing*, in particular, for a party to enter into or continue negotiations with no real intention of reaching an agreement with the other party". However, the Principles do not deal with the issue of a possible pre-contractual obligation of information imposed upon the parties. Article 4.106 and article 4.107 punish the giving of incorrect information during the formation of the contract as well as a fraudulous non-disclosure of information. "But the statement of a general and autonomous obligation of information goes beyond sanctions imposed for a fraudulent non-disclosure or the provision of incorrect

93 D. MAZEAUD, "Le nouvel ordre contractuel", *RDC*, déc. 2003, p. 295, § 29.

94 I. DE LAMBERTERIE, G. ROUHETTE et D. TALLON, *Les principes du droit européen du contrat*, Paris, La documentation française, 1997, p. 19.

information. Any relevant fact, any risk, even if it is exceptional, should be divulged in order for the parties to enter into the contract fully informed.

c) The Pavia Project

The notion of good faith is also very much omnipresent in the Pavia Project, in which numerous illustrations can be found. Despite the fact that the notion is not set forth as a general principle as it is in the UNIDROIT principles as well as in PECL, it still appears in article 1: "Definition: 1. A contract is the agreement of two or more parties to establish, regulate, alter or extinguish a legal relationship between said parties. It can also produce obligations or other effects on only one of the parties. 2. Except as provided for in the following provisions, a contract can also be created by conclusive behaviours, *following a previous statement of intent or according to usage or good faith*".

The Pavia Project uses the notion of good faith several times. These different illustrations can provide elements which are useful for defining good faith in general, by induction at least. The project also includes provisions regarding the necessity to act in good faith even during the pre-contractual negotiations.[95] Good faith is defined negatively, in terms which are reminiscent of the notion of abuse of right and the necessity not to harm others. Article 51 concerning the "pendent condition" states that: "During the pendency of a suspensive condition the contracting party who is under an obligation or has created or transferred a real right, shall act according to good faith *in order to safeguard the interests of the other party*, who can, if such is the case, judicially request one of the remedies provided for in Art. 172, without prejudice to the right to damages".

There is a clear duty to perform the contract in good faith. Article 75.1 states that "Each of the parties is bound to perform exactly and completely all the obligations laid on him by the contract, without request from the entitled party being necessary. In rendering due performance the debtor must conform to what has been agreed by the parties, to good faith and the diligence required in each specific case, on the basis of agreements, circumstances and usage". Article 108 should also be mentioned: "1. In contracts providing for mutual counter-performance, if one of the parties fails to perform or offer to perform his obligation, regardless of the gravity of the non-performance, the creditor can suspend his own performance which is due at the same time or subsequently, *unless such refusal to perform is contrary to good faith*. 2. The refusal is deemed, in particular, contrary to good faith when: a) it creates excessively onerous consequences for the other party; b) the non-

[95] Article 6, entitled *Obligation of good faith* "1. Each of the parties is free to undertake negotiations with a view to concluding a contract without being held at all responsible if said contract is not drawn up, unless his behaviour is contrary to good faith. 2. To enter into or continue negotiations with no real intention of concluding a contract is contrary to good faith. 3. If in the course of negotiations the parties have already considered the essentials of the contract whose conclusion is predictable, either party who breaks off negotiations without justifiable grounds, having created reasonable confidence in the other, is acting contrary to good faith. 4. If the situations considered in the above paragraphs occur, the party who acted contrary to good faith shall be liable for the harm he has caused to the other party to the extent of the costs the latter had to incur while the contract was being negotiated. Loss of opportunities caused by the negotiations underway shall also be made good".

performance is not substantial and the creditor's refusal causes the extinguishing of his obligation; c) the refusal infriges a fundamental right to the person".

III. Good faith, a Basis for the Protection of Mistaken Belief

The notion of good faith is sometimes used in a much more precise manner. It can either refer to the situation in which a person acts in the belief that they are acting in accordance with the applicable law (**A**) or the situation in which a third party requires protection (**B**).

A. The belief in the lawfulness of a situation

The notion of good faith, in the case law of the European Court of Justice (ECJ), refers to the legitimate belief on the part of the parties regarding the existence of certain applicable rules of law: good faith is in this case used to avoid, on a highly exceptional basis, the principle according to which ECJ case law has a retrospective effect.

Indeed, the ECJ has consistently held that national courts may and must apply rules of Community law as interpreted by the ECJ, also, in principle, to legal relationships arising and established before the judgement ruling on the request for interpretation:[96] This is an application of the classical principle of retrospective effect of case law. However, the ECJ case law exceptionally allows a limitation on the temporal effects of a ruling when they are likely to undermine considerations of legal certainty arising out of public and private interests affected. The ECJ only adopts this solution in very precise circumstances when, on the one hand, there is a risk of serious economic repercussion due in particular to "the large number of legal relationships entered into in *good faith on the basis of the rules considered to be validly in force*" and, on the other hand, "where it appears that individuals and national authorities had been led to adopt practices which did not comply with Community legislation by reason of objective, significant uncertainty regarding the implications of Community provisions to which the conduct of other Member States or the Commission of the European Communities may even have contributed".[97] Good faith is presented as the corollary of the concept of abuse of right – even though the expression abuse of right is not used. The ECJ thus restricts the freedom to bring a claim by precluding the reference to a text which a party had, in good faith, interpreted differently.

The expression "good faith" is sometimes also used as a means to set aside the application of a text which would in principle render the litigious agreement void.

In French international private law, it was decided in the *Lizardi* case that a French person entering into a contract in France with a foreigner, "should not be required to know the laws of the different nations and their provisions concerning minority, legal majority and the extent of contractual obligations which can be undertaken by foreigners with regards to their legal capacity; the contract will be valid as long as the French party

96 Judgments of 27 March 1980, Salumi e.a. (joint cases 66/79, 127/79 and 128/79, Rec. p. 1237, point 9) and Denkavit Italiana (61/79, Rec. p. 1205, point 16).

97 ECJ, 27 April 2006, *Richards*, C-423/04, points 40 to 42.

acted without rashness, without carelessness and *in good faith*".[98] The mistaken and excusable belief is then "considered as a source of validity of certain legal situations which is an exception to the usual application of the rules of conflict of law".[99] Good faith is thus used to simplify legal relations: without this solution, "tradesmen would have to inquire about the nationality of all their clients and when their clients happen to be foreigners, they would have to investigate the content of the relevant national law".[100] For others, this solution is an application of the notion of appearance.[101]

Article 11 of the EC Convention on the Law Applicable to Contractual Obligations "adopts this solution by giving it a bilateral effect".[102] The article provides: "In a contract concluded between persons who are in the same country, a natural person who would have capacity under the law of that country may invoke his incapacity resulting from another law only if the other party to the contract was aware of this incapacity at the time of the conclusion of the contract or was not aware thereof as a result of negligence".

Therefore, the validation of an agreement, by derogating from the application of the national law which would cancel the agreement on the grounds of incapacity, benefits not only the French but also the foreign contracting party, no matter the country in which the contract was concluded, so long as both parties were in that country. The onus is on the contracting party wishing to rely on his incapacity to prove that, at the time of the conclusion of the contract, the other party knew of this incapacity or did not know of it only because of negligence on his part. However, it should be noted that the reference to "good faith" in this hypothesis is purely academic: it does not appear in the convention itself.

B. The protection of a third party acting "in good faith"

The expression "good faith" can also be used in a situation in which a third party legitimately believes in an apparent situation. Good faith is then used functionally, as an instrument to protect the third party.

This is particularly the case in the Hague Convention on the Law Applicable to Trusts and their Recognition concluded on 1st July 1985. Article 15 states: "The Convention does not prevent the application of provisions of the law designated by the conflicts rules of the Forum, insofar as those provisions cannot be derogated from by voluntary act, relating in particular to the following matters: a) the protection of minors and incapable parties; b) […], f) *the protection, in other respects, of third parties acting in good faith*".

Academic Projects such as PECL or the Pavia works use good faith in such a way. Article 3:201 of PECL dealing with direct representation, provides that: "a person is to be treated as having granted authority to an apparent agent if the person's statements or

98 Ch. Req., 16 January 1861, *D.*, 1861, 1, 93, *S.*, 1861, 1, 306, note MASSÉ, *Grands arrêts du droit international privé*, n° 5.

99 D. ALEXANDRE, "Rapport français. Droit international privé", in *La bonne foi*, Journées louisianaises, *Travaux de l'Association Henri Capitant*, tome XLIII, Litec, 1992, p. 548.

100 P. MAYER et V. HEUZÉ, *Droit international privé*, Montchrestien, 8ème éd. 2004, n° 524.

101 M.-N. JOBARD-BACHELLIER, L'apparence en droit international privé – essai sur le rôle des représentations individuelles en droit international privé, LGDJ 1983.

102 P. MAYER et V. HEUZÉ, *Droit international privé*, *op.cit.* n° 525.

conduct *induce the third party reasonably and in good faith* to believe that the apparent agent has been granted authority for the act performed by it". The Common Frame of Reference proposes in its last version to establish this rule. Indeed, the present article 6:103 of PECL concerning simulation ("When the parties have concluded an apparent contract which was not intended to reflect their true agreement, as between the parties the true agreement prevails") would be moved to article 9:201 and completed with a second subsection: "However, the apparent effect prevails in a question with a person, not being a party to the contract […], who has reasonably and in good faith relied on the contract's apparent effect".

Moreover, this understanding of good faith is abundantly used in the Pavia works. For examples, article 46 states, in its paragraph 2: "1. Unless explicitly agreed to the contrary, a contract, concluded to transfer ownership of a movable thing or to create or transfer a real right with respect to that thing, has real effects on the contracting parties and on third parties from the moment of delivery to the entitled person or to one charged by that person to receive it or to the carrier who, according to an agreement, must provide for delivery. 2. In the situation provided for in the preceding paragraph, if the party who transfers by contract a movable thing or a real right with respect to that thing is not the owner of the thing or entitled to the right thereof, the other party to the contract becomes the owner or entitled to the right in accordance with said contract at the moment of delivery, *provided he is in good faith*". Article 23 can also be read from the same angle: "A promise made to the public can be revoked before the expiration of the times mentioned in the preceding paragraph in the same form as the promise. In such case the person revoking the promise must pay fair compensation to *those who, in good faith, were induced by said promise to incur expenditure*, unless he can prove that the expected outcome would not have been obtained". Article 64 concerning the "agent without authority" can also be invoked this way, since it repeats the theory of the apparent agency: "One who has contracted as a representative without having the power to do so, or in excess of the authority conferred on him, is liable for any damage suffered by the third contracting party, as a result of his having believed in good faith that he was concluding a valid contract with the presumed principal, unless said third party avails himself of the power to treat the contract as made with the unauthorised representative". Article 65 (concerning *ratification*) should also be mentioned along with article 67 (*subjective conditions)*, article 155 (*simulation and mental reserve)* and especially article 117 concerning the *"rights of third party in good faith"*: "The exercise of the above rights by the creditor does not affect the rights acquired by third parties in good faith over the property of the creditor or over what is due to him, before said creditor, justifiably fearing nonperformance, has warned the third parties in writing or, in the case of immovable or registered movable property, before the transcription of his judicial applications in public records, according to the laws of the State where the records are provided. This applies except for the provisions of Art. 161".

Comparative law

One of the characteristic features of good faith, as we have seen, is the uncertainty that surrounds this concept despite its omnipresence. Whether it be its legal nature, its content or the terminology used to define it, good faith, in contrast to the normal rigor of legal concepts, is characterised by its surprising inconsistency.[103]

No matter how one defines the legal nature of good faith, it is clear that it is a fluid notion with a content that is able to be adapted to fit a particular context or legal dispute. The notion is therefore characterised by its great flexibility, which means the criticism generally levelled against good faith is that it undermines legal predictability and security. Even if the concept of good faith can be seen as a tool to promote a certain idea of contractual justice, whether that be "contractual solidarity" *(solidarisme contractuel)* or "the new contractual morality",[104] it remains a concept with multiple uses which has posed[105] and continues to pose a problem of methodology. As we have seen, many different proposals have been put forward in order to define the notion of good faith.[106]

The definition of good faith has been of a particular importance in Germany where the concept of '*Treu und Glauben*',[107] found at article § 242 BGB,[108] has seen a resounding success.[109] In order to gain a clear understanding of the concept, the German approach

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103 G. WICKER 'Force obligatoire et contenu du contrat' in *Les concepts contractuels français à l'heure des principes du droit européen des contrats*, dir. P. REMY-CORLAY, D. FENOUILLET, Dalloz, 2003, p. 151 and following, esp. n° 2 p. 154.

104 J.-L. BAUDOUIN et P.-G. JOBIN, *Les obligations*, with the collaboration of N. VEZINA, ed. Y. Blais, 6th ed.; 2005, p. 13.

105 Y. LOUSSOUARN, 'Rapport de synthèse', *in La bonne foi (journées louisianaises)*, Travaux de l'association Henri Capitant, Tome XLIII, Paris, Litec, 1992, p. 11; P. SCHLESTRIEM, 'Good Faith in German Law and in International Uniform Laws', Centro di studi e ricerche di diritto comparato e straniero, Rome, 1997, p. 1-21, available at the following address: http://soi.cnr.it/~crdes/crdes/frames24.htm.

106 P. JOURDAIN, 'Rapport français', *in La bonne foi (journées louisianaises)*, TAHC, Tome XLIII, Paris, Litec, 1992, p. 121 and following Ph. JACQUES, *op.cit.* n° 160.

107 On the difficulty of German jurists regarding the systemic treatment of good faith, GERNHUBER, "§ 242 BGB – Funktionen und Tatbestände", *JuS* 1983, p. 765. *"Even experienced German academics admit that any attempt to present this seamless web systematically, following every twist and turn, must fail"*. B.S. MARKESINIS, H. UNBERATH, A. JOHNSTON, *op.cit.* p. 122.

108 'The debtor must execute his obligations in accordance with the principle of good faith and the common practice between the parties' *German Codes. Civil code and Commercial code, translated into French.* W. GARCIN (under the direction of) Editions Jupiter, 1967.

109 Peter SCHLECHTRIEM *(op.cit.)* notes that German judicial literature (jurisprudence, doctrine) is prolific regarding the question. He states that the most 'frightening' example is the 11th edition of *Staudinger commentary*, written by Dr Weber and which contains more than 2000 pages dedicated especially to § 242 BGB. A shorter version has also been published containing 'only' 500 pages on § 242 BGB (B.S. MARKESINIS, H. UNBERATH, A. JOHNSTON, *The German Law of Contract. A Comparative Treaty* Second Edition, Hart Publishing, 2006, p. 120.

has been to distinguish[110] between its different functions. This approach is one that is common to other judicial systems (it is followed, for example, in Italy and in the Netherlands) and therefore will be adopted in this study document in order to understand the most commonly used expressions of good faith in comparative law.

The concept of good faith will firstly be viewed as an instrument of interpretation (**I**), before being considered as a standard of behaviour (**II**) and finally as the basis for the protection offered in cases of mistaken belief (**III**). However, this structure is only relevant regarding the countries which recognise the existence of the notion itself. Under English law the concept has always been problematic, with the functions classically associated with good faith in civil law countries being fulfilled through other mechanisms in the anglo-saxon world. We will take, as a source of inspiration, the English approach in order to envisage in a final section (**IV**) the alternatives to the use of the concept of good faith.

I. Good Faith, an Instrument of Interpretation

In countries with a civil law tradition contracts are traditionally interpreted by reference to the parties' intentions; the spirit of an agreement carrying more weight than the strict wording.[111]

More generally it appears that all legal systems recognize the pre-eminence of a "subjective" interpretation by searching for the parties' intentions.[112] After that, the "objective" interpretation comes into play, which interpretation is used in the application of the notion of good faith.[113] In other words, the contract must be interpreted as having the meaning which would be understood by reasonable persons placed in the same circumstances.

It should be noted that that the new Dutch civil code[114] has chosen to remove all references to interpretation as it was considered that those in the 1838 Code were not only superfluous but were so general that they were perceived as being erroneous.[115]

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110 A position inspired by the work of F. WIEACKER, *Zur rechtstheoretischen Präzisierung des § 242, Tübingen*, 1956, S. 20 and following.

111 As is the case in Belgium law, French law, Quebec law, Italian law and in Dutch law.

112 Art. 1156 of the French, Belgium and Luxembourg civil codes; § 133 BGB; § 914 ABGB; art. 1281 of the Spanish Civil Code; art. 173 and 200 of the Greek Civil Code; art. 1362 of the Italian Civil Code. The principle is also recognised by the jurisprudence *Haviltex*, HR 13 March 1982, NJ 1981. 635.

113 The French, Belgian and Luxemburg civil codes do not use the term good faith contrary to the Italian (art. 1366) and Spanish (art. 1258) civil codes. The jurisprudence *Haviltex* in Dutch law does not expressly mention the term good faith within the context of an objective interpretation. However, one must not forget that the court founded its interpretation of article 6.248 BW on 'reason and equity'.

114 In the same vein the rules of interpretation of contracts found in Scandinavian countries are determined by the courts and by academic doctrine.

115 M.H. WISSINK, *The Principles of European Contract Law, A Commentary*, D. BUSCH, E. HONDIUS, H. VAN KOOTEN, H. SCHELHAAS, W. SCHRAMA eds., Kluwer Law International, 2002, p. 242.

However, this approach remains exceptional and most legal systems contain either detailed legislation[116] or legal rules[117] to facilitate judicial interpretation and to improve legal certainty.

There are many legal systems which include the creation of additional obligations within the interpretive function of good faith.

This phenomenon is sometimes referred to as the *"forçage du contrat"* (a tool used by the judges who find the existence of additional obligations in a contract whether or not these were intended by the parties).[118] However the creation of new obligations under the guise of an interpretation based on good faith combines its interpretive and suppletive functions. Hence certain authors have referred to the process as suppletive interpretation.[119] The creation of new obligations forms a part of the general trend to raise moral standards in contractual relations. Consequently, good faith can be understood as a true behavioural standard.[120]

II. Good Faith, a Standard of Behaviour

The moralizing function that many legal systems attribute to good faith can be divided up in a fairly traditional way by distinguishing its completive (**A**), adaptive (**B**) and restrictive (**C**) functions. Together these functions create a genuine behavioural standard, a code of contractual ethics.[121]

A. The completive function of good faith

Whilst national initiatives try to respond to the pressing need to clarify the use of terminology and concepts, many uncertainties remain, notably regarding the relationship between loyalty and good faith. This particular problem has been considered by a Quebec author who notes that often 'the obligations of good faith and loyalty are mentioned as if the two notions formed an indissociable unit'.[122] The author considers that the duty of loyalty constitutes a particular version of "the obligation of good faith", a "sub

116 Art. 1156 to 1164 of the Belgium, French and Luxembourg civil codes; art. 1258, 1281 to 1289 of the Spanish Civil Code; art. 1362 to 1371 of the Italian Civil Code.

117 § 133 and 157 BGB; § 914 and 915 ABGB; art. 173 and 200 of the Greek Civil Code.

118 L. LEVENEUR, 'Le forçage du contrat', *Droit et Patrimoine* 1998, p. 69.

119 "Most authors agree that in practice it is not always possible to draw a clear line between interpreting and supplementing a contract, while a minority argue that there is no difference at all between the two" (M.H. WISSINK, *op.cit.*, p. 242-243).

120 "[…] the interpretation considers the wishes of the parties, which distinguishes it from the type of 'interpretation' which supplements […]", P. STOFFEL-MUNCK, *L'abus dans le contrat. Essai d'une théorie*, Pref. R. Bout. L.G.D.J., 2000. no 61 p. 65.

121 For an idea on the behavioural standards imposed upon the contracting parties, see L. AYNES, *Vers une déontologie du contrat?*; conference given on the 11th May 2006 at the French Cour de cassation, found at the following address: http://www.courdecassation.fr/formation_br_4/2006_55/intervention_m._aynes_9141.html.

122 G. LECLERC, "Rapports canadiens. Le contrat en general.", *in La bonne foi, op.cit.* p. 268.

category" which is found in certain types of contract where a particularly strong relationship of trust exists between the parties (i.e. employment contracts, mandates, commercial agency…). Thus, loyalty appears to be the civil law equivalent of the fiduciary duties which are found in certain contractual relations specific to common law countries, such as, for example, "agency" or "trust".

French law appears to embrace this distinction between good faith and loyalty. Whilst article 1134 para. 3 of the French Civil Code states that "[Agreements] must be performed in good faith", it should be noted, for example, that "The relationship between the commercial agent the and principal shall be governed by an obligation of loyalty and a reciprocal duty of information" (article L 134-4 al.2 of the Commercial Code), In the same spirit, article L 120-4 of the Employment code provides that "Contracts of employment shall be executed in good faith" whilst article L 121-9 al.3 of the same code states that "the employee has a duty of loyalty towards his or her employer".

However, if the distinction appears transposable, it has not been unanimously accepted with certain authors preferring to use loyalty to qualify good faith viewed objectively as opposed to the protection offered in case of mistaken belief.[123]

In a way it is a question of the transposition in France of the distinction which operates in Germany or the Netherlands, for example. Moreover, legal textbooks traditionally teach that the obligation of good faith is subdivided into a "duty of loyalty" on one hand and a "duty of cooperation" on the other.[124] In outline, it appears that the "duty of loyalty" consists of the abstention from all unfair behaviour whilst the "duty of cooperation" imposes a positive obligation to act.

No matter how one classifies the distinction between good faith and loyalty, it would seem appropriate to unify the terminology used by choosing between the two expressions, the distinction between them being more dogmatic than practical.[125] However, it is conceivable that a difference in terminology be maintained, as is the case in Germany and the Netherlands, in order clearly to distinguish on the one hand good faith which is the basis for protection in cases of mistaken belief, and on the other, good faith which sets a behavioural standard.

If it appears from most of the legislation that the obligation of good faith, objectively viewed, applies usually during the performance of a contract, this does not exclude its application throughout the contractual process. Consequently certain aspects of good faith will be examined firstly during the formation of the contract **(1)** and secondly during its performance **(2)**.

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123 Y. PICOD, *Le devoir de loyauté dans l'exécution du contrat*, Pref. Gérard Couturier, L.G.D.J., 1989, no 6, p. 11.

124 F. TERRÉ, P. SIMLER, Y. LEQUETTE, *Droit civil, Les obligations*, 9e edition, Dalloz, Précis, 2005, no 439 p. 442; J. FLOUR, J.-L. AUBERT, E. SAVAUX, *Droit civil, Les obligations, T.1., L'acte juridique*, 11e edition, Armand Colin, 2004, no 378, p. 294; P. MALAURIE, L. AYNES, P. STOFFEL-MUNCK, *Les obligations*, Defrénois, 2e edition, 2005, no 764, p. 371; J. CARBONNIER, *Droit civil, Les biens, Les obligations*, Quadrige, Manuel, PUF, 2004, 22e edition, January 2000, no 1029, p. 2115.

125 It has in fact been shown that in the context of secondary Community legislation "good faith" and "loyalty/fairness" were considered to be synonymous. Cf. our analysis on Community and international acquis, II, A, 3 and specifically note 88.

1. At the moment of formation of the contract

The emphasis here will be placed on the requirement of good faith during the pre-contractual negotiations. However, one must not lose sight of the fact that the notion of good faith finds an expression in a less obvious way, through other mechanisms (loss due to an imbalance in the parties' obligations, fraud, error).

The origin of the requirement of good faith during the period of pre-contractual negotiations can be traced to an article by Rudolph von JHERING, published in 1861,[126] and in which the author considers that if a party causes the other to believe that the contract will be concluded, then such party is at fault. In other words, it is a matter of *culpa in contrahendo*.[127]

In 1942 the Italian Civil Code became the first to codify the requirement of good faith during pre-contractual negotiations.[128] The French, Belgium and Luxembourg civil codes have not established a such a requirement,[129] although in Belgium[130] and France the courts recognise the existence of a general principle of good faith governing the pre-contractual phase.[131]

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126 R. VON JHERING, "Culpa in contrahendo oder Schadensersatz bei nichtigen oder nicht zur Perfection gelangten Verträgen, Jahrbücher für die Dogmatik des heutigen römischen und deutschen Privatrechts", 1861. IV. 1. However, this article, although fundamental, falls short of covering all aspects of the notion. This took place in the article by a Napolitan judge G. FAGELLA, "Dei periodi precontrattuali e dell loro vera ed esatta costruzione scientificaé", *in Studi Giurdici in onore di Carlo Fadda*, vol. III, p. 271. This article is crucial and was the subject of a study carried out by R. SALEILLES, "De la responsabilité précontractuelle. A propos d'une étude nouvelle sur la matière", *RTD Civ.* 1907. 697.

127 H. ROLAND, *Lexique juridique. Expressions latines*, 3ème édition, Litec, 2004, p. 53 V° *culpa in contrahendo*: "Fault in the conclusion of the contract. Fault leading to the cancellation of the contract following the breach by one of the parties of its duty of sincerity and good faith during the negotiations".

128 Article 1337: "Le parti, nello svolgimento delle trattative e nella formazione del contratto, devono comportarsi secondo buona fede (1366, 1375, 2208)." It appears to be generally admitted that this necessity of good faith during the precontractual period implies "duties of information, clarity and secrecy […]".

129 A caveat should be noted regarding French law. Indeed, the French Reform Proposals have seen the suggestion of a new article 1104: "Negotiations can be freely initiated, carried out and broken off, so long as the parties act in good faith. The break down of negotiations can only give rise to liability if it is due to the bad faith or the fault of one of the parties". Furthermore, the French Reform Proposals provide expressly, in articles 1110 and 1110-1 for a precontractual obligation of information. Such a provision appeared to be necessary to "give a general framework to this notion in order to overcome the diversity of its sources (case law or legislation) and the different legal treatments which it receives". Y. LEQUETTE, G. LOISEAU, Y.-M. SERINET, "Exposé des motifs. Validité du contrat – Consentement (art. 1108 à 1115-1)", *in Avant-projet de réforme du droit des obligations (Articles 1101 à 1386 du Code civil) et du droit de la prescription (Articles 2234 à 2281 du Code civil)*, p. 20.

130 For example, CA de Liège, 20 October 1989, Revue de droit commercial belge, 1990, 521, note X. DIEUX.

Conversely, the Civil Code of Quebec states in article 1375 that: "Good faith shall govern the behaviour of the parties, whether it be at the moment the obligation comes into existence, during its performance or the moment it is extinguished. 1991, c. 64, a. 1375".

This article must be read in parallel with article 6 which states that: "Article 6. Each person shall exercise his/her civil rights according to the requirements of good faith. 1991, c. 64, a. 6".

These articles are reminiscent of article 2 of the Suisse Civil code, which has been interpreted so as to impose a duty of good faith during the pre-contractual period. According to this article: "Art. 2 (1) Each person shall exercise his/her rights and execute his/her obligations according to the rules of good faith. (2) No manifest abuse of a right shall be protected by law".

It is submitted that this article imposes respect for the principle of good faith during the pre-contractual period.

The Portuguese[132] and Greek[133] civil codes also recognise the requirement of good faith during the pre-contractual phase.

German law is a little more specific and does not use the terminology of good faith. However, it recognises the existence of a special type of relationship, similar to contractual relations, which gives rise to certain rights and obligations.[134] There does however exist a divergence of opinion among academics over their legal basis. Hence it would be presumptuous to limit such basis to good faith. Nevertheless, in practice, the various obligations which arise out of good faith during the precontractual period are very similar from one legal system to another. The legal basis for liability is not always identical (in Germany, the liability is contractual; in France and Belgium it is based on principles of tort) but what appears in all systems is the intention to sanction unfairness (disloyal behaviour).

Under English law there is no "duty to negotiate in good faith." Indeed in *Walford v Miles*[135] the court held that: "A duty to negotiate in good faith is as unworkable in practice as it is inherently inconsistent with the position of a negotiating party. It is here that the uncertainty lies. In my judgment, while negotiations are in existence either party is entitled to withdraw from those negotiations, at any time and for any reason. There can be thus no obligation to negotiate until there is a 'proper reason' to withdraw. Accordingly a bare agreement to negotiate has no legal content".

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131 For example, Cass. com., 22 April 1997, D. 1998, jur., 45, note P. CHAUVEL; Cass. com. 20 March 1972, Bull. civ. IV, n° 93, p. 90, JCP 1973, II, 17543, note J. SCHMIDT; RTD Civ. 1972, 779, obs. G. DURRY.

132 Article 227 of the Portuguese Civil Code.

133 Article 197 of the Greek Civil Code.

134 Article § 311 of the BGB provides that: "An obligation relationship with duties under § 241 paragraph 2 also arises from: 1. the opening of contractual negotiations (…)". Article § 241 paragraph 2 provides that: "The obligation relationship can, according to its content, oblige each party to have regard to the rights, legal entitlements and interests of the other party". Translation from the annex of B.S. MARKESINIS, H. UNBERATH, A. JOHNSTON, The German Law of Contract. A comparative Treatise, *op.cit*. p. 896.

135 [1992] 2 AC 128.

The solution seems to be the same under Scottish[136] and American law.[137] However, there is in existence a "duty to negotiate with care",[138] which duty has a place in the wider renewal of general contract law theory in England.

Therefore, although there is no "duty to negotiate in good faith", English law does recognise a certain number of obligations which protect the interests of the person with whom negotiations have been entered into. Thus, in practice, the requirements imposed upon the parties in these different countries are largely identical. A breach of these obligations ("obligation not to make any misrepresentation", "obligation of information", "obligation of good faith in *uberrimae fidei* contracts", "obligation of confidentiality") is sanctioned in accordance with the principles of misrepresentation, undue influence, collateral contracts, equitable estoppel and implied contracts.

It appears that there is a general duty to negotiate in good faith in civil law countries. In addition it seems that a consensus exists regarding the precise content of the obligation.[139] Thus the pre-contractual duty of good faith leads to the prohibition of negotia-

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136 However, types of behaviour such as "misrepresentation", "fraud", "force and fear" or "undue influence" are, in any event, prohibited.

137 Although American law does not recognise the existence of a general requirement of good faith during the negotiation phase of a contract, it does however provide various cases of liability, based essentially upon three theories: "restitution" (based on the unjust enrichment of one party in relation to the other during the negotiation phase), "misrepresentation" (based on the provision of false information, during the negotiations, in relation to the true intention of entering into the contract), "promissory estoppel" (based on a promise made by one party to induce the other party to enter into negotiations). Another problematic area is that of agreements to agree. Indeed, American courts have held that preliminary agreements are binding as soon as the parties have reached an agreement on all the points requiring negotiation, or in the event that express reciprocal undertakings have been given on the main points of the contract, even if some points are still undetermined. In this last case, the courts can impose a respect for the principle of good faith on the parties to carry the negotiations through to a successful conclusion. The courts focus on the intention of the parties. For an example, compare R.G. Group, Inc. v. the Horn & Hardard Co., 751 F. 2d 69 (2d Cir. 1984) and Texaco, Inc. v. Pennzoil, Co., 729 S.W.2nd 768 (Tex. Ct. App. 1987). On the whole, the "duty of good faith" during negotiations has been of great interest to American academics who have defended varying points of view.

It should furthermore be mentioned here that certain special provisions of American law impose a "duty to negotiate in good faith." For example, in its part relating to labour law, the *United States Code*, §§ 158 (a)(5), 158 (d)(2000). This article deals with unfair practices in labour law and imposes an obligation on the employer to negotiate collectively with the employee representatives. In this context, "to negotiate collectively" means "the performance of mutual obligations on the part of the employer and the employee representatives to discuss in good faith subjects such as remuneration, working hours, as well as all the other terms and conditions relating to the carrying out of their work by the employees". See generally: E.M.S. HOUH, *op.cit.* p. 54-55, esp. notes 369 and 370.

138 H. COLLINS, *op.cit.* p. 178.

139 The comment is valid for civil law countries as well as common law countries, which have seen the development of a duty to negotiate with care. H. COLLINS, *The Law of Contract*, LexisNexis, 4th edition, 2003, p. 179.

tions without the intention to conclude the contract, of behaviour that is likely to cause physical harm to the other party, of the possibility of entering into parallel negotiations and obliges the parties to respect an obligation of confidentiality.[140]

2. During the performance of the contract

Good faith is also the basis for many obligations which complete those expressly contained in the contract: obligations of information, of confidentiality, to act fairly, of cooperation and security.[141]

In addition to these "traditional" obligations, good faith has also provided the basis on which to develop more modern ancillary obligations, such as, for example, the obligation to mitigate one's loss.[142] Although this principle is not legally recognised under French law, it is in other legal systems.[143] However, whether it is recognised by statute or by the courts, good faith is generally presented as being the legal basis of the obligation. In France, the duty to mitigate was referred to, for example, in a judgment given on the 16th July 1998 in which the first civil chamber of the Cour de cassation stated that: "in letting the debt owed by Mr and Mrs Bergue as a result of the non-payment of their rent increase without taking action in due course against them or against Mr Chambon, Mr Lepelletier had deprived the latter of the possibility of paying the debt himself and then bringing an action for the cancellation of the lease, through the mechanism of subroga-

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140 On these questions, see H. BEALE, A. HARTKAMP, H. KÖTZ, D. TALLON eds., *Cases, Materials and Text on Contract Law*, Hart Publishing, 2002, p. 243 and following. Regarding the duty of confidentiality specifically, two cases should be distinguished: in the first, the parties have agreed beforehand on the confidential character of certain or all of the documents exchanged during the negotiations, in which case any divulgation or personal use of the informations will be treated as a breach of a contractual obligation, in the second, nothing has been provided in the contract by the parties, in which case the rule is that there is no confidentiality obligation. However, in this last hypothesis, the courts have sometimes found a duty of confidentiality included in the general duty to negotiate in good faith. This solution is accepted in most legal systems including under English law, but on the basis of equity (Seager v. Copydex Ltd. [1967] 2 All ER 415).

141 These can be found in the case law of Germany, the Netherlands, Italy, France, Belgium, Quebec (For numerous examples, see M.W. HESSELINK, *op.cit.* p. 480 and following, Ph. JACQUES, o*p. cit.* note 6, p. 318-319; également B. JALUZOT, o*p. cit.*, n° 1767 and following). Certain equivalent obligations (notably the duty of collaboration) can be found in anglo-saxon mechanisms, such as implied terms.

142 For a comprehensive bibliography on this topic and on the justification of its legal basis, see Y.-M. LAITHIER, *Etude comparative des sanctions de l'inexécution du contrat*, Preface Horatia Muir-Watt, L.G.D.J., 2004, n° 351, p. 445, esp. note 121.

143 § 254 (2) BGB; § 1304 ABGB; article 1227 (2) of the Italian Civil Code; article 300 of the Greek Civil Code; article 6:101 BW. Belgian and Spanish laws, from their case law, appear to consider that the obligation to mitigate one's loss is a sub-category of a fault on the part of the obligee. The only self-standing legal obligation under Belgian law can be found in article 20 on the Law on Insurance contracts dated 25 June 1992.

tion, so as to allow him either to recover the amount paid, or at least to avoid the payment of future rent and hence to limit the level of debt guaranteed".[144]

A completive function is not the only function attributed to good faith. The notion also has an adaptive function.

B. The adaptive function of good faith

The adaptive function of good faith comes into play following an important change in the economic context which renders the execution of the contract either much more onerous or at least less profitable for one of the parties. In this respect, it appears that there is a divergence of positions with some States allowing the modification of contractual terms whilst others refuse to take into account economic fluctuations.

On one hand, France,[145] Belgium, Quebec[146] and England refuse to allow the adaptation of contractual terms following such changes.

On the other hand, Argentinean,[147] Polish,[148] Portuguese[149] and Dutch[150] law accept the theory of revision for want of foresight.

German law was among the first to allow for the possibility to either end or modify a contract when its continuation in its original form would produce an intolerable result. According to a court decision,[151] such contracts many only be ended if it is impossible to adapt their terms to the new economic situation. This solution is justified by reference to article § 242.

German law and the theory of *Voraussetzung* have heavily influenced Italian law, and notably the notion of *presupposizione*. According to this theory, if the parties, at the

144 Cass. 1re civ. 16 July 1998, *Chambon c. Lepelletier*, *JCP* 1998, II, 10000, note B. Fages. For other examples, see B. JALUZOT, *op.cit.* n° 1795 to1799, 521 to 523.

145 The statement should be toned down for various reasons, at least with regard to France. Firstly, with the emergence of an obligation to renegotiate based on the duty of good faith. The decisions in *Huard* (Cass.Com. 3 November 1992, *Bull. civ.*, n° 338, p. 241), and *Chevassus Marche* (Cass. com. 24 November 1998, *Bull. civ.* n° 277, p. 232) should be remembered. Furthermore, the French Reform Proposals provide two new articles dealing with the remedies of the parties in the absence of contractual provisions allowing a renegotiation of the contract in the event of a change of circumstances. Article 1135-2 provides that: "In the absence of such a clause, the party who no longer has any interest in the contract can apply to the President of the grande instance tribunal to order a new negotiation". Article 1135-3 provides that" Should the case arise, these negotiations would be treated as provided in Chapter 1 of the present section. A breakdown of such negotiations in the absence of bad faith would allow either party to rescind the contract without any liability for cost or damages".

146 Under Quebec law, certain legal provisions (consumer law, landlord and tenant law) allow a direct intervention in the contract on the part of the judge.

147 Article I 198 of the Argentinean Code.

148 Article 351.1 of the Polish Civil Code.

149 Article 437 of the Portuguese Civil Code.

150 Article 6:258 of the BW. However, we should mention that Dutch case law had already reached the same solution under the old code by relying on the principle of good faith.

151 RG 3 February 1922, RGZ 103. 328.

moment of formation of the contract, consider an element of the contract to be essential and this element is substantially altered during the execution of the contract, the contract can be cancelled on the basis that one of its essential elements *(presupposto)* is now missing. The Italian Supreme Court of Appeal, in a decision dated 24th March 1998,[152] put an end to a contract providing for the supply of petrol on the basis that following new local regulations the petrol station had to be built in a way which differed substantially from what had initially been agreed between the parties. The contract would only be held to be invalid if the essential element was altered due to circumstances totally unconnected to the parties (i.e. which the parties could not foresee at the time they entered into the contract[153]). The principle of *presupposizione* was entirely created by the courts. In order to justify their decision, the courts have referred alternatively to articles 1366 (contracts must be interpreted in the light of the principle of good faith), 1463 *(force majeure)* and 1467 (the occurrence of excessive costs). However, academics are in agreement to teach that the solution stems from the principle of good faith.[154]

In this respect, the debate is more academic than judicial, since contracts often contain hardship clauses[155] or force majeure clauses. Hence litigation is avoided at source.

C. The restrictive function of good faith

The very fact that a restrictive function should be attributed to the notion of good faith shows the difficult relationship which exists between the notions of abuse of right and good faith. This difficulty is mirrored both in the legislation and in case law. Far from aspiring to achieve an exhaustive study, it appears appropriate to present a broad outline of the relationship between good faith and abuse of right (1) before considering in more detail the specific case of unfair contract terms which bears witness to the permanent character of the problem (2).

1. General points on the relationship between good faith and the notion of abuse

Often presented as the corollary of good faith, the concept of the abuse of rights, although controversial, seems to be common to a number of legal systems.[156]

In practice, few systems sanction the abuse of rights in a legal and general way. However, we should cite, for example, the Swiss Civil Code[157] and the Civil Code of Quebec[158] and to a certain extent the BGB.[159]

What is instantly apparent is the intensity of the connection between good faith and the notion of abuse, to the extent that sometimes the concept of abuse is eclipsed totally

152 Cass. 24 March 1998, n° 3083, *in Giust. civ.*, 1998, I, 3161, note CALDERONI.

153 Cass. 9 February 1985, n° 1064, *in Foro it.*, 1986, I, 1981, note ESPOSITO.

154 L. ANTONIOLLI, *op.cit.*, n° 5, p. 54.

155 D. TALLON, "Hardship" in Towards a European Civil Code, Third Fully Revised and Expanded Edition, Kluwer Law International, 2004, p. 499.

156 Notably under Italian, French and Belgian law. See for example, F. RANIERI, "Bonne foi et exercice du droit dans la tradition du civil law", *RIDC* 1998, p. 1055-1092; P. STOFFEL-MUNCK, *L'abus dans le contrat. Essai d'une théorie*, Preface R. Bout, L.G.D.J., 2000, Tome 337.

by the principle of good faith, as found in the Greek (article 281 of the Civil Code), Portuguese (article 334 of the Civil Code),[160] Lebanese, Polish and Brazilian legal systems.[161]

Under Belgian law, where the legal system is almost identical to that found in France, the question of the interaction between good faith and abuse of rights was not raised until the end of the 1960s. At first the relationship between the two notions was condemned by the author André de BERSAQUES, who was of the opinion that "the duties of solidarity and cooperation stem from the obligation to respect the principle of good faith. Good faith implies, necessarily, that the behaviour of the parties is sincere, loyal and honest. It is a standard that applies just as much outside of the contractual sphere as within it, regarding which article 1134 para. 3 imposes its application […]. The link between good faith and abuse of rights is therefore evident".[162]

On 19 September 1983 the Belgian Cour de cassation confirmed this view by stating that "the principle that agreements shall be performed in good faith, established by article 1134 of the Civil Code, prevents one party to the contract from abusing the rights conferred by the contract upon such party".[163] Hence, under Belgian law, the notion of abuse of contractual rights is based upon article 1134 para. 3.

In France, article 1134 para. 3 was not automatically considered as the basis for the principle of abuse of rights in contract.[164] Nevertheless case law has found good faith to

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157 Article 2. "(1) Each party must exercise his/her rights and perform his/her obligations in accordance with the principles of good faith. (2) The manifest abuse of a right is not protected by law".

158 Article 7. "A right cannot be exercised with a view to harming another person or in an excessive and unreasonable fashion, in breach of the requirements of good faith. 1991, c. 64, a. 7."

159 Article § 226 "The exercise of a right is illegal if its sole aim is to cause loss or injury to another person". However, it would appear that § 242 (objective good faith) is a more relevant basis for the theory of abuse of rights. M. MARKOVITCH, *La théorie de l'abus des droits en droit comparé*, Thèse Lyon, 1936, p. 206 quoted by P. STOFFEL-MUNCK, *op.cit.* n° 57, p. 62. Furthermore, from a strictly terminological point of view, German law is surprisingly inconsistent. Indeed, case law refers indistinctly to illegal exercise of a right *(unzulässige Rechtsausübung)*, to the abusive exercise of a right *(missbräuchliche Rechtsausübung)*, to a defence based on illegal exercise *(Einwand der unzulässigen Rechtsausübung)* or to abuse of rights *(Rechtsmissbrauch)* or to illicit abuse of rights *(unzulässiger Rechtsmissbrauch)*. See B. JALUZOT, *op.cit.* n° 1409.

160 Article 334: "The exercise of a right is illegitimate when its holder manifestly exceeds the limits imposed by the requirement of good faith, by standards of good behaviour, or by the social and economic purpose of the right".

161 See on these points, P. STOFFEL-MUNCK, *op.cit.* n° 57, p. 61; C. MASSE, "La bonne foi dans les relations entre particuliers", *in La bonne foi*, *op.cit.* p. 217 and the various national reports quoted.

162 A. de BERSAQUES, note under CA Liège 14 February 1964, *RCJB* 1969, 497, n° 11, quoted by P. STOFFEL-MUNCK, *op.cit.* n° 61, p. 65.

163 Cass. 3ème ch., 19 September 1983, RCJB 1986, 282, n. J. L. Fagnart, quoted by P. STOFFEL-MUNCK, *op.cit.* n° 61, p. 66.

164 See in this respect, P. STOFFEL-MUNCK, *op.cit.* n° 62 and following, also P. LOKIEC, *Contrat et Pouvoir. Essai sur la transformation du droit privé des rapports contractuels*, preface A. Lyon-Caen, L.G.D.J., 2004, n° 246 p. 179; B. JALUZOT, *op.cit.* n° 1408.

be a source of liability,[165] mainly in the context of a breach of contractual relations. It is often stated that "for contracts of repeated performance for which no duration has been stipulated, the unilateral termination of the contract by one party, except in the case of abuse sanctioned by article 1134 para. 3 of the Civil Code, is permitted".[166]

The law relating to cancellation clauses also highlights just how inextricably the notions of good faith and abuse are linked.[167] The ties between the two are also acknowledged with regard to clauses allowing a party to determine the price unilaterally. In 1994 the First Civil Chamber of the Cour de cassation stated that "an appeal court which annuls […] a contract […] when […] it has not been alleged that the supplier has abused his contractual right of exclusivity, has misjudged the rules regarding the determination of the price and the execution of contracts in good faith".[168] The following year the Cour de Cassation in its full formation *(Assemblée Plénière)* held that the question should be considered from the point of view of "the abuse of rights in the fixing of the price", with a reference to article 1134 of the Civil Code in general, but in particular to its paragraph 3, according to the conclusions of the advocate general".[169]

The recognition of the link between good faith and abuse of right *(abuso del diritto)* also seems to present problems in Italian law. The concept of abuse of right in the Italian legal system is not a codified principle and its existence arises out of legal doctrine and case law based on article 833 of the Civil Code, regarding the abuse of right in property law. The abuse of right in contractual matters should be understood as the prohibition of a claim, which although legal per se, is brought purely to cause loss or damage to the other party. Italian judges and legal academics remain divided over the scope of application and the relationship between the theory of abuse of right and the notion of good faith.

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165 In France the issue of sanctioning bad faith in the contractual area is controversial (see in this regard the thesis of Ph. STOFFEL-MUNCK cited above). However, the Commercial Chamber of the *Cour de* cassation has just delivered a very important decision on this question (Cass. com. 10 July 2007, n° 06-14768, (unreported). In effect, the decision holds, with regard to subsections 1 and 3 of article 1134 that: "Although the rule according to which contracts must be executed in good faith, allows a court to punish an abusive use of a contractual prerogative, it does not authorise the court to undermine the very substance of the rights and obligations legally contracted by the parties"). In this case, the judges held that the decision given by the *Cour d'appel*, should be quashed for violation of law, in this case charaterised by a a 'false application' of article 1134 ss3 and by a 'refusal to apply' subsection 1 of the same article. However, if it is to be understood from this decision that bad faith does not prevent the creditor from remaining a creditor, it is not clear to this author, in any sense, what the nature of the sanction for 'abusive use of a contractual perogative 'might be.

166 See for example Cass. 1ère civ., 5 February 1985, *Bull. civ.* I, n° 54, p. 52; *RTDC* 1986, 105, obs. J. MESTRE; Cass. com., 8 April 1986, *Bull. civ.* IV, n° 58; Cass. com., 20 January 1998, *Bull. civ.* IV, n° 40; *D.*, 1998, 413, note. Ch. JAMIN; 1999, som. 114, obs. D. MAZEAUD. For other references, see P. STOFFEL-MUNCK, *op.cit.* n° 76 note 380.

167 "Although the judges are bound by a resolutory clause, the application thereof remains subject to the requirements of good faith in application of article 1134 of the Civil Code". Cass. 1ère civ, 14 March 1956, *D.* 1956, jur., 449, note J.V.

168 Cass. 1ère civ., 29 November 1994, *Contrats conc. consom.* 1995, comm. 24 obs. L. LEVENEUR; *JCP* 1995, II, 22371, note J. GHESTIN; *D.* 1995, jur., 122, note. L. AYNES.

169 P. STOFFEL-MUNCK, *op.cit.*, n° 78, p. 78 with references at note 390.

However, it appears to be generally accepted that in order for an abuse of right to be characterized, the relationship between the benefits acquired through the exercise of a right and the loss or damage caused to the other party must be disproportionate.[170]

From an analysis of Dutch and German law, certain authors have been able to define different categories of 'abuse of right':[171] "Improper behaviour (exceptio doli specialis praeteriti), unclean hands (tu quoque), inconstant behaviour (venire contra factum propium) and Verwirkung".[172]

The principle of Verwirkung (the principle which forbids a party to contradict himself to the detriment of the other party, or coherence in contractual matters) is not expressly provided for in the law, but has emerged from the analysis of case law and of certain provisions in the legislation.[173] A recent example of its application occurred in a judgment from the Cour de cassation on the 8th March 2005.[174] This principle is accepted in a number of different legal systems, including Swiss,[175] German, [176] Belgian[177] and Dutch law as well as in common law systems.[178]

In any event, it is good faith which would appear to be the genuine basis for the sanction of incoherent behaviour. Indeed, although German law no longer recognises good faith as the basis for such an action and Dutch law has expressly codified the principle of Verwirkung, it would however appear that it is good faith which has directed the sanction of such behaviour.

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170 L. ANTONIOLLI, *op.cit.* p. 5.

171 Made possible thanks to the technique of *Fallgruppen*. See C. MAK, *op.cit.*, p. 49-50. Equally S. WHITTAKER, R. ZIMMERMANN, "Good faith in European contract law: surveying the legal landscape", *op.cit.* p. 24-25.

172 *Ibid.* concerning this last category.

173 See generally the analysis of D. HOUTCIEFF, *Le principe de cohérence en matière contractuelle*, Préf. H. Muir-Watt, PUAM, 2001 as well as the acts of the Colloque organized by the Centre de Droit des affaires de l'Université Paris V, on 13 January 2000, *L'interdiction de se contredire au détriment d'autrui*, M. BEHAR-TOUCHAIS (under the direction of), Economica, 2001.

174 *Bull. civ.* n° 44, p. 48, D. HOUTCIEFF, "Quelle sanction pour la contradiction?", *RLDC* 2005, n° 18, p. 5-9.

175 Through the bias of the principle of confidence. D. HOUTCIEFF, *Le principe de cohérence en matière contractuelle*, *op.cit.*n° 938, p. 719.

176 See the adage *Non venire contra factum proprium* from which the case law has deduced a form of forfeiture *(Verwirkung)*, D. HOUTCIEFF, *op.cit.* n° 943, p. 722. German case law provides numerous illustrations, for example: a lawyer cannot claim more in payment that what was previously announced (BGHZ 18, 340), a person cannot invoke an arbitration clause during proceedings before a State jurisdiction after having opposed arbitration on the grounds of competence. (BGHZ 50, 191). For more examples see B.S. MARKESINIS, H. UNBERATH, A. JOHNSTON, *op.cit.*,p. 123.

177 Through the application of *Rechtsverwerking* which, contrary to other examples of the prohibition of contradictory statements, sanctions those who oppose one attitude and a right rather than two attitudes. D. HOUTCIEFF. *Op.cit.* no 947, p. 724.

178 Through the application of *estoppel*, D. HOUTCIEFF, *op.cit.* n° 953, p. 727; B. FAUVARQUE-COSSON, "L'estoppel du droit anglais", *in L'interdiction de se contredire au détriment d'autrui*, M. BEHAR-TOUCHAIS (under the direction of), Economica, 2001, p. 3; D. MAZEAUD, "La confiance légitime et l'estoppel", *RIDC* 2006-2, p. 363.

Moreover, it should be noted that from a terminological point of view the Netherlands stand out again by using the concept of abuse of power rather than that of abuse of right,[179] although in practice this variation only concerns the property law. With regard to the law relating to obligations, the reference texts are the second paragraphs of both article 6:2 and article 6:248 which refer to "reason and equity".

2. The relationship between good faith and abuse in the legislation against unfair contract terms

In dealing with the relationship between good faith and abuse, it appears necessary to consider the issue of unfair contract terms, mainly in relation to the European directive 93/13/EEC regarding unfair terms in consumer contracts.[180] The directive refers to the notion of good faith at article 3.1 as one of the criteria used to determine whether a clause is unfair. The transpositions of the directive illustrate the different approaches to the application of good faith as a criterion for unfairness.[181] Although several jurisdictions refer to the criteria of good faith, as set out by the Directive 93/13/EEC to control unfair contract terms, others have strongly opposed the introduction of the notion. In France and Belgium, as in Switzerland,[182] the legislators have chosen not to refer to the notion of good faith in this context. Instead the criteria of 'a significant imbalance' is considered sufficient.[183] Consequently article L 132-1 of the French Consumer Code states that: […] are unfair, clauses which have for object or for effect to create, to the detriment of the non-professional or the consumer, a significant imbalance between the rights and obligations of the parties to the contract".

On the other hand, other legal systems use the notion of good faith to control unfair clauses. Article 1437 of the Quebec Civil code states, for example, that "An abusive

179 Article 3:13: "1. The holder of a right cannot rely on a right which belongs to him to the extent that the exercise of such right constitutes an abuse. 2. An abuse of right occurs, inter alia, when such right is only exercised in order to cause loss or damage to another or with an intention which is different from that with which such right was granted, or when, if the holder of such right had considered the discrepancy existing between the interest favoured by its exercise and the interest which suffers as a result, he could not possibly have reached the decision to exercise it. 3. A right may be such, that its very nature makes it likely to be abused." Voir D. DANKERS-HAGENAARS, *op.cit.*, p. 315.

180 See *supra*, p. 31.

181 On the various stages of transposition of the directive in Member States see the report from the Commission on the Implementation of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts. COM (2000) 248 final.

182 The approach of Swiss law is didactic, in the same way as article 2 of the Civil Code which distinguishes clearly between the obligation of good faith and the abuse of rights. In Swiss law the limitative function that one attributes to good faith is assured by the concept of abuse of rights. There is a division of competence between the two notions.

183 G. PAISANT, "Les clauses abusives et la présentation des contrats dans la loi n° 95-96 du 1er février 1995", *D.* 1995, chr., p. 99; *Adde* D. MAZEAUD, "La loi du 1er février 1995 relative aux clauses abusives: véritable réforme ou réformette?", *Dr. et patrimoine*, juin 1995, p. 42, n° 17; *Adde* P. STOFFEL-MUNCK, *op.cit.* n° 382; *Adde* B. JALUZOT, *op.cit.* n° 868 and following.

clause in a consumer contract or contract of adhesion is null, or the obligation arising from it may be reduced. An abusive clause is a clause which is excessively and unreasonably detrimental to the consumer or the adhering party and is therefore not in good faith; in particular, a clause which so departs from the fundamental obligations arising from the rules normally governing the contract that it changes the nature of the contract is an abusive clause". German law can equally be cited as an example of where good faith is one of the criteria used to qualify a clause as unfair. Before the reform of the German law of obligations, the question of unfair clauses was resolved by § 9 of the AGBG, an article introduced by the law of the 9th September 1976 concerning the 'regulation of standard business terms'.[184] According to § 9:

"(1) Any clause contained in standard business terms which, contrary to the requirements of good faith, unreasonably disadvantages the other party, shall be annulled.

(2) Where there is doubt, an unreasonable disadvantage shall be found where the clause

1. is incompatible with the fundamental ideas of the legislation from which the clause derogates, or

2. limits the essential rights and obligations resulting from the nature of the contract to the extent that the realisation of the contractual objective is threatened".[185]

This important German law has since been integrated into the BGB and is found at articles § 305-§ 310, and in particular at article § 307. For a long time the majority of German authors have considered it necessary to rely on the principle of good faith:

"The need to turn to the notion of good faith in order to control unfair clauses in German law can only be explained by the particular structure of good faith in German law: good faith is the underlying support for the elements cited. Citing these elements without the accompanying notion of good faith would deprive them of what holds them together".[186]

Finally, English law has also introduced the notion of good faith as a criterion used to determine whether a clause is unfair even though it is not familiar with the principle.[187]

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184 On the history of this law et and the previous application of article § 242 BGB to control unfair clauses, see B. JALUZOT, *op.cit.* n° 845; B.S. MARKESINIS, H. UNBERATH, A. JOHNSTON, *op.cit.* p. 164 and following.

185 Translated into English from the French translation by A. RIEG, "Rapport de droit allemand" *in Les clauses abusives et les consommateur*, *RIDC* 1982, p. 926.

186 B. JALUZOT, *op.cit.* n° 865. For an overview of the application in case law see B.S. MARKESINIS, H. UNBERATH, A. JOHNSTON, *op.cit.* p. 175 and following.

187 Regarding the relationship between English law and good faith see *infra*. It is nonetheless interesting to note that the English and Scottish Law Commissions have produced a report which proposes a common system treating unfair clauses in contracts. Among its propositions for reform the report suggests the avoidance of all reference to good faith, arguing that the tests of *reasonableness* and *fairness* suffice to meet the objectives fixed by the EC Directive. See *Unfair Terms in contracts. Report on a reference under section 3(1)(e) of the Law Commission Act 1965* found at http://www.lawcom.gov.uk/docs/lc292(1).pdf The government has recently accepted the diverse recommendations in the report and will implement them after an impact evaluation. See http://www.dti.gov.uk/files/file34128.PDF Generally see, the Law Commission's website: http://www.lawcom.gov.uk/unfair_terms.htm.

III. Good Faith, a Basis for the Protection of Mistaken Belief

This section deals with the psychological aspect of good faith: good faith as a subjective notion. This approach can be found in both the codes of civil law countries (**A**) and in certain common law provisions (**B**).

A. Civil law countries

Subjective good faith is found in various areas, including family law,[188] the law relating to assets (where generally it is a question of the rights of persons of good faith who are in possession of assets) [189] and the law regarding restitution (in order to avoid or limit restitution) following the cancellation or rescission of a contract or a payment which was not owed.[190]

Similarly the Dutch Civil Code contains several provisions regarding subjective good faith. Although the principle reference is found at article 3:11, the application of subjective good faith can also been seen at articles 3:86 para. 1, 5:73 and at articles 3:35, 3:36 and 3:44 para. 5.

It is interesting to note that a number of legal systems have intended to establish a distinction between objective good faith and subjective good faith by adopting different wording.

Indeed, German law distinguishes between '*Treu und Glauben*' (objective good faith) and '*Guter Glaube*' (subjective good faith). A similar distinction is made in other countries, such as Dutch law. C. MAK, in his commentary,[191] explains that the expression "reason and equity" is used to describe objective good faith so as to avoid confusion with the use of the concept in its subjective sense, as found for example at article 3:11 BW.[192] The new Dutch Civil Code has combined two concepts: that of '*goede trouw*' (article

188 See the following non-exhaustive examples: Swiss Civil Code: articles 92 (engagements), articles 304 et 327 (parental authority), articles 528, 547, 579, 600 (Successions); Belgian Civil Code: articles 201, 202 (Putative marriage), 316, 334ter (on the effect of marriage with regard to third parties of good faith), 373, 376, (parental authority); Quebec Civil Code: articles 382 à 388 (Putative marriage), article 447 (on the effects of marriage); articles 603, 624, 793 et 835 (Successions); French Civil Code: articles 201, 202 (Putative marriage); articles 222, 372-2 (effects of marriage with regard to third parties of good faith), article 515-5 (PACS).

189 Non exhaustive examples: Swiss Civil Code: articles 661, 673, 674, 714, 728, 738, 866, 867, 874…, Quebec Civil Code: articles 931, 932, 959, 961, 963, 992, 1093, 1137…; French Civil Code: articles 549, 550, 555 ou encore 1141 et 2269…; Belgian Civil Code: 1141.

190 Generally see: French Civil Code: articles 1844-16, 1935, Belgian Civil Code: 1380; 1691.

191 D. BUSCH, E. HONDIUS, H. VAN KOOTEN, H. SCHELHAAS, W. SCHRAMA (W.) eds., *The Principles of European Contract Law, A Commentary*, Kluwer Law International, 2002, p. 47.

192 Article 3:11 BW: "In the event that the good faith of a person is required in order for a legal consequence to take effect, good faith will be found to be lacking not only if the person knew of the facts or law to which that person's good faith relates, but also if in the circumstances that person should have known of them. The impossibility of verifying a particular fact or law does not prevent the person who had good reasons to doubt to be treated in the same way as a person who should have known that fact or law".

1374 section 3 of the old BW) and '*billijkheid*' (article 1375 of the old BW) [193] in order to create the concept of '*redelijkheid en billijkheid*' which is now found at articles 6:2[194] and 6:248[195] of the new BW, setting out the elements constituting objective good faith.

B. Common law countries

Countries with common law traditions are rather reluctant to introduce a concept that is quite as malleable as that of good faith. However, an examination of the legislation of these countries reveals a certain use of good faith, albeit a use which is different from what is traditionally found in relation to unfair contract terms and which is arises out of a European influence.

Rather surprisingly, it is the subjective good faith which is found in various pieces of legislation from common law countries. For example the *Sale of Goods Act 1979* makes use of the notion of good faith exclusively in its subjective sense. (i.e. article 23: *"When the seller of goods has a voidable title to them, but his title has not been avoided at the time of the sale, the buyer acquires a good title to the goods, provided he buys them in* **good faith** *and without notice of the seller's defect of title"*; article 24: *"Where a person having sold goods continues or is in possession of the goods, or of the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge, or other disposition thereof, to* any person receiving the same in good faith *and without notice of the previous sale, has the same effect as if the person making the delivery or transfer were expressly authorised by the owner of the goods to make the same;"* article 25 *"(1) Where a person having bought or agreed to buy goods obtains, with the consent of the seller, possession of the goods or the documents of title to the goods or documents of title, under any sale, pledge, or other disposition thereof,* to any person receiving the same in good faith *and without notice of any lien or other right of the original seller in respect of the goods, has the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner*").[196]

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193 Articles 1374 section 3 and 1375 of the old BW are the exact translation in Dutch of articles 1134 al 3 and 1135 of the French Civil code. The Dutch legislator in 1838 more or less reproduced the precepts of Domat. For an analysis of the question see D. DANKERS-HAGEN-AARS, "Rapport Néerlandais", *in La bonne foi*, *op.cit.*, p. 311; equally M.E. STORME, "Rapport Néerlandais", *in La bonne foi*, *op.cit.* p. 163.

194 Article 6:2: "1. The obligor and the obligee are required to behave towards one another in accordance with reason and equity. 2. The rule to which their relationship is subject by virtue of the law, custom or a legal transaction does not apply if, in the circumstances, this would be unacceptable following criteria of reason and equity".

195 Article 6:248: "1. The contract does not only produce legal effects which are as agreed by the parties, but also those which, depending on the nature of the contract, arise out of the law, custom or requirements of reason and equity. 2. The rule to which their relationship is subject in accordance with the contract does not apply to the extent that, in the circumstances, it would be unacceptable following criteria of reason and equity".

196 See also articles 14(2) and 61(3) of the *Sale of Goods Act* 1979. Article 61(3) is particularly important as it defines one element of the wider concept of good faith: 'A thing is deemed to be

The subjective approach to good faith can also been found in several articles of the U.C.C. For example, article § 2-403 (1) states that '… *A person with voidable title has power to transfer a good title to a good faith purchaser for value …*', whilst according to article § 2-506 (2): '*The right to reimbursement of a financing agency which has in good faith honored or purchased the draft under commitment to or authority from the buyer is not impaired by subsequent discovery of defects with reference to any relevant document which was apparently regular*'.

The analysis of different legal systems shows that the distinction between objective and subjective good faith is a problem which is found to either a greater or lesser extent in every system. However, good faith in its subjective form appears never to have been a source of difficulties. It is the objective version of good faith which has caused and remains a source of apprehension and the object of debate, especially in certain common law countries.

IV. Alternatives to Good Faith: The Specific Contribution of English Law[197]

The recognition of the principle of good faith (in its objective sense) is often presented as one of the points of divergence between the civil law and the common law. However, it would be wrong to believe that common law systems, and in particular English law, remain isolated from recent European developments concerning the idea of 'contractual justice'[198] (**A**). Therefore, despite the fact that, strictly speaking, there is no obligation of "good faith", both case law and academics have used other mechanisms in order to promote 'fairness' in contractual relations[199] (**B**).

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done in good faith within the meaning of this Act when it is in fact done honestly, whether it is done negligently or not'.

197 Can equally be consulted: J.F. O'CONNOR, Good Faith in English Law, Aldershot, Dartmouth Publishing Company, 1991, Spec. Chap. 3; The Hon Johan STEYN, "The Role of Good Faith and Fair Dealing in Contract Law: a hair-shirt philosophy?" [1991] Denning LJ 131; R. GOODE, "The concept of 'good faith' in English Law", Centro di Studi e Richerche di Diritto Comparato e Straniero, Saggi, Conferenze e Siminari 2, Rome 1992. Also of interest are the talks given during a conference entitled "Good Faith and Fairness in Commercial Contract Law", London, September 1993 in the Journal of Contract Law [1994] 7 et [1995] 8; H. COLLINS, The Law of Contract, 4th edition, London, Butterworths, 1993, esp. Chap. 13; J. BEATSON, D. FRIEDMANN eds, Good Faith and Fault in Contract Law, Oxford, Clarendon Press, 1995; J.N. ADAMS, R. BROWNSWORD, Key Issues in Contract, London, Butterworths, 1995, esp. Chap. 7; R. BROWNSWORD, Good Faith in Contracts "Revisited" [1996] 49 Current Legal Problems 111.

198 E. HONDIUS, "The Protection of the Weak Party in a Harmonised European Contract Law: A Synthesis", *Journal of Consumer Policy* 2004, n° 27, p. 245; T. HARTLIEF, "Freedom and Protection in Contemporary Contract Law", *Journal of Consumer Policy* 2004, n° 27, p. 253; D. STAUDENMAYER, "The Place of Consumer Contract Law Within the Process on European Contract Law", *Journal of Consumer Policy* 2004, n° 27, p. 269.

199 H. COLLINS, *The Law of Contract*, Fourth edition, LexisNexis, 2003, p. 20, p. 270.

A. Ideological considerations

As in French law and a certain number of other civil law systems,[200] English contract law has evolved from its initial liberal approach (**1**) to one which promotes a principle of 'fairness' (**2**).

1. The traditional reasons for the reticence in england to the importation of the concept of good faith

"The malleability of the good faith doctrine can undermine the goals of certainty and predictability in ordering one's affaires. This tension between the desire to infuse some measure of morality or community norms into contractual relations and the need to construct predictable outcomes has been central to the debate over the meaning of good faith in recent years".[201]

Generally speaking, the central idea which tends to emerge from anglo-saxon legal commentaries is the fear that the introduction of the general principle of good faith will create legal uncertainty. The notion of good faith in itself could be accepted, but in a measured way, and not as a basic principle running through all contractual relations. In addition, the integration of such principle is perceived as a threat to the principle of contractual autonomy of the parties, each party being limited in the pursuit of his own personal interest.[202]

Moreover, "the fear is that good faith, at least on some formulations, gives the courts a wide and therefore unpredictable exercised discretion to do justice as they see fit".[203] Finally it is generally considered that English law already holds various tools which serve the same function as that ascribed to good faith. Why therefore introduce a new concept which merely duplicates the functions already assured by these other mechanisms?

On the other hand, certain authors are of the opinion that recognising a proper doctrine of good faith would avoid resorting to contortions and subterfuges.[204] In the

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200 It appears as though French law prefers a less individualistic approach to contract, thus applying the teachings of R. DEMOGUE who considered that contracts were not the result of opposing interests, but 'a little society where everyone must work towards a common objective which is the sum of all the individual aims pursued by the contractors'. (R. DEMOGUE, *Traité des obligations en général*, t. 6, 1931, n° 3). Regarding contractual solidarity, see generally, L. GRYNBAUM, M. NICOD (directed by), *Le solidarisme contractuel*, Economica, 2004; C. JAMIN, D. MAZEAUD (directed by), *La nouvelle crise du contrat*, Dalloz, 2003; D. MAZEAUD, "Loyauté, solidarité, fraternité: la nouvelle devise contractuelle?", *in L'avenir du droit, Mélanges en hommage à François Terré*, Dalloz, 1999, p. 603; C. THIBIERGE-GUELFUCCI, "Libre propos sur la transformation du droit des contrats", *RTD civ.* 1997, p. 357.

201 J. NEFF, *op.cit.* p. 121-122.

202 'To act in Good Faith is to take into account the legitimate interests or expectations of the other party'. R. BROWNSWORD, 'Positive, Negative, Neutral: The Reception of Good Faith in English Contract Law', in Good Faith in Contract: Concept and Context, R. BROWNSWORD, N.J. HIRD, G. HOWELLS Eds., Ashgate, 1999, p. 15.

203 J. WIGHTMAN, *op.cit.*, p. 47.

204 R. POWELL, "Good faith in contracts", [1956] 9 *Current Legal Problems* 16.

same vein Robert SUMMERS has proposed that "without a principle of good faith a judge might, in a particular case, be unable to do justice at all, or he might be able to do it only at the cost of fictionalising existing legal concepts and rules, thereby snarling up the law for future cases. In begetting snarl, fiction may introduce inequity, unclarity or unpredictability. In addition, fiction can divert analytical focus or even cast aspersions on an innocent party'.[205] This school of thought receives some support today in England.

2. The recent evolution of English law

The anglo-saxon approach in general, and the English one in particular, is reputed to perceive contract law through notions such as economic efficiency and to accept as a necessary corollary an exaggerated application of the theory of autonomy. However, it would appear that a change has taken place and that new ideas based on the notion of fairness are being defended by both the courts and the legislator. The concept of fairness appears to be composed of three main notions: "injustifiable domination, the equivalence of the exchange and the need to ensure co-operation".[206]

An analysis of the decision in *Schroeder Music Publishing Co Lts v Macaulay*[207] provides an illustration. In this case a young composer had agreed to give all his songs to his editor for a renewable period of five year in exchange for the remuneration gained through the publication of his works. However, no promise was made concerning the obligation of the editor to publish the works. The House of Lords annuled the contract by relying on restraint of trade, on the basis that the weaker position of the composer caused him to agree to an inequitable agreement according to which the obligations of the editor were minimal whilst those of the composer were maximal. According to the traditional economic analysis of English law the contract was valid and therefore should have been enforced. However, such an analysis would not have permitted the court to take into account the realities of the legal situation, including the respective positions of the parties, loyalty and co-operation. Due to the fact that the career of the composer was entirely dependent on the discretionary power of the editor during a period of up to 10 years, the degree of subordination with regard to the editor was considered to be a form of unjustifiable domination. The absence of an obligation to publish the works rendered the contract too unequal to be fair.

In addition, since the composer could not terminate the contract during a predetermined period, he had no leverage by which to ensure that the editor would at least take reasonable measures so as to ensure the composer received some benefit from the con-

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205 R.S. SUMMERS, 'Good Faith in General Contract Law and the sales provisions of the Uniform Commercial Code', [1968] 54 *Virginia Law Review* 195, esp. 198-199. By the same author, 'The General Duty of Good Faith – It's recognition and Conceptualisation', [1982] 67 *Cornell Law Review* 810.

'The normative version of good faith does not see it as derived from the tacit understandings of the parties in their contractual community, but essentially as a canon of contractual justice which is imposed on the parties. […] This was the basis of the decision in *Dalton v Educational Testing Services […]* (see J. WIGHTMAN, *op.cit. p. 45*).

206 H. COLLINS, *op.cit.* p. 28-29.

207 [1974] 3 All ER 616, [1974] 1 WLR 1308, HL.

tract, through publishing and carrying out the promotion of his work. This case is proof of a renewal in the philosophy of contract law in England, but without attacking the traditional autonomist and economic theories put forward in the past. The House of Lords has simply taken account in a more modern way of new values such as equity, the equivalence of the exchange and the duty of co-operation between contracting parties – values which are generally guaranteed by the duty of good faith in civil law systems.

It is an evolution which has been underlined and strengthened by statutory references to good faith – even if these result more often from an obligation due to the primacy of European law and the obligation to transpose European Directives than from intentional actions.[208]

One of the traditional examples, which comes under the category of *uberrimae fidei* contracts, is found at section 17 of the Marine Insurance Act 1906:

'A contract of marine insurance is a contract based upon the utmost good faith and, if the utmost good faith be not observed by either party, the contract may be avoided by the other party'.[209]

Moreover the Regulations adopted in order to transpose European directives also refer expressly to the concept of good faith.

Hence Regulation 4 of the Commercial Agents Regulations 1993 provides that the "principal in dealing with his agent is obliged to act dutifully and in good faith". Regulation 5 states that the parties cannot derogate from the obligation of good faith.

In the same vein, *The Unfair Terms in Consumer Contracts Regulations 1999*, which transposes the Directive 93/13, defines in article 5, an unfair clause as:

"(1) A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer".

Case law supports this provision, as appears in *Director General of Fair Trading v First National Bank plc*[210] in which the court noted that:

"good faith was not an artificial or technical concept but connoted fair and open dealing, which required terms to be expressed fully and clearly, without hidden pitfalls and with appropriate prominence being given to matters which might operate disadvantageously to the customer, and required the supplier not to take advantage, deliberately or unconsciously, of factors indicative of the consumer's weaker bargaining position".

Finally the Consumer Protection (Distance Selling) Regulations 2002 state at article 7(2) that the obligation of information towards consumers must be carried out '*with regard… to the principles of good faith in commercial transactions*'.[211]

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208 See the developments relative to EC and international law acquis. II. A. 3.

209 More generally insurance law recognises the principle of good faith through the imposition of an obligation of information. *Carter v Boehm* (1966) 3 *Burr.* 1905, 1910; *Court of Appeal, Bank Keyser Ullman SA v Skandia (UK) Insurance Co Ltd* (1999) I QB 665, 700. More recently the principle has been toned down by the House of Lords in *Banque financière de la cité SA v Westgate Insurance Co Ltd* (1990) 3 WLR 364.

210 [2002] 1 AC 481, [2001] 1 All ER 97 (HL).

211 Generally, regarding this question, see W. TETLEY, "Good Faith in Contract, Particularly in the Contracts of Arbitration and Chartering", [2004] 35 *JMLC* 561; H. COLLINS, "Good Faith in European Contract Law", [1994] 14 *Oxford J. Legal Stud.* 229; G. TEUBNER, "Legal Irritants:

B. Technical alternatives to the rejection of a general principle of good faith

Sir Thomas Bingham in *Interfoto Picture Library Ltd v Stiletto Visual Programs Ltd*,[212] after having noted that legal systems which have recourse to the concept of good faith do so in order to import a sense of equity to business affairs, finds that English law arrives at a near identical solution through the development of 'piecemeal solutions in response to demonstrated problems of unfairness'.[213] Thus English law[214] simply employs different mechanisms in order to achieve a sense of equity in commercial relations. The following mechanisms can be cited: *"consideration"*, *"incorporation of terms"*, *"undue influence and unconscionability"*, *"interpretation and implied terms"*, *"mistake and representation"; "duress and undue influence"; "waiver and estoppel"*, *"fiduciary obligations"; "unjust enrichment and restitution"*.[215]

Consequently, although lawyers across the Channel remain largely reticent when it comes to undermining the principle of autonomy, English law is not inequitable. Contractual fairness is protected by a reliance on notions which are different from, and to a certain extent, more precise than, the notion of good faith.

Good Faith in British Law or How Unifying Law Ends Up in New Divergences", [1998] 61 *Mod. L. Rev.* 11.

212 [1988] 1 All ER 348 at 353 (CA).

213 "English law has, characteristically, committed itself to no such overriding principle but has developed piecemeal solutions in response to demonstrated problems of unfairness. Many examples could be given. Thus equity has intervened to strike down unconscionable bargains. Parliament has stepped in to regulate the imposition of exemption clauses and the form of certain hire purchase agreements. The common law also has made its contribution by holding that certain classes of contract require the utmost good faith, by treating as irrecoverable what purport to be agreed estimates of damage but are in truth a disguised penalty for breach, and in many other ways".

214 It appears from a study carried out by William TETLEY *(op.cit.)* that other common law countries are less reticent to accept a general principle of good faith (i.e. Australia, Canada and the USA).

215 For a more detailed analysis see W. TETLEY, *op.cit.*, p. 13 as well as H. COLLINS, *op.cit.*, 270 and E. POILLOT, *op.cit.*, no 645 and no 964.

Chapter 6:
Fault, Failure

Main Concerns

A wide consensus arises with regard to the use of a neutral term. The word "fault" (*"faute"* in French) is rarely used and the term non-performance (*"inexécution"*)[1] seems more appropriate to describe the default, the failure to perform a contractual obligation.

Two questions derive from this observation. First of all, should the term non-performance be preferred to the term fault? Would it thereafter be more appropriate to maintain the use of the term non-performance and avoid using the terms "default" or "failure"? A positive answer would imply that the use of the term "fault" be totally excluded in contractual matters.

Should there be, from a terminological point of view, a distinction made between a non-performance *imputable to* one of the parties and a non-performance due to an external cause?

In some cases, could reference be made to the "wrongful non-performance" *("inexécution fautive")* of the obligor, since the analysis of both Acquis International and Acquis Communautaire, as well as comparative law, shows that a fault in the moral sense still affects the legal regime of liability? A further question arises as to whether it is appropriate to refer specifically to an "aggravated breach/fault". If such were the case, an additional question would arise: should the aggravated breach/fault be understood as a serious fault only, assessed subjectively, or should it be completed with the more objective terms of "non-performance of a material obligation"?[2]

Can the same act, carried out by one party, amount to a contractual breach/fault as regards the other party and to a tort as regards a third party? Is the third party who wishes to invoke a wrongful non-performance within a contract required to show evidence of a specific fault of a delictual or quasi-delictual nature, distinct from the contractual non-performance or is it sufficient for such third party to prove the existence of a contractual "fault" in order for the defaulting obligor to be held liable under principles of delictual responsability?

With regard to the acts of the obligee, would it be desirable to create a terminology which is different from that applying to wrongful non-performance? The answer to that question depends on the basis which is adopted regarding mitigation of damage. Most legal systems consider that the obligee is under an obligation to mitigate its damage.

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1 An author has recently turned his attention to the notion of non-performance, F. ROUVIERE, *Le contenu du contrat: essai sur la notion d'inexécution*, Préf. Ch. Atias, PUAM, 2005. Regarding the terminological difficulties revolving around the notion, see n° 2, 7 and the following paragraphs.

2 See for instance article 1382-2 of the French Reform Proposals which provide: "A contracting party cannot exclude or limit the right for the aggrieved party to seek damages in case of a fraud, a gross violation, or a lack of performance of a substantial obligation".

Some legal systems, such English law, consider the mitigation to be a requirement, which is different from a duty due to the obligor. If it is an obligation, could it be possible to use the term "wrongful non-performance" as it is used in relation to the obligor? If it is, on the contrary, a mere requirement, would it be more appropriate to use the phrase "act of the obligee"?

Acquis Communautaire and Acquis International

In Acquis Communautaire and Acquis International, the term "fault" is rarely used. International and EU texts more usually refer to "failure", "default" or to "non-performance" rather than "fault".

The notion of fault is difficult to understand within this framework for various reasons. First, "fault" is not defined within the Acquis. Further, its presence is sometimes indirect or underlying, such as when, for instance, texts refer to good faith requirements; finally, the notion of fault is not univocal. Indeed, it seems that "fault" can bear two meanings. In its first meaning, fault is understood as a failure, the non-performance of a contractual obligation and in this case, the terminology should preferably remain neutral, with the use of the terms "default", "failure" or "guarantee"; in its second meaning, fault is used to describe a morally harmful behaviour on the part of one party and the term "fault" can then be used, or the idea could simply be conveyed by using the term "fraud".

The scarce use of the word "fault" in international and EU texts reflects this polysemy. From a terminological point of view, a distinction can indeed be observed between *default* and contractual *liability*: the former would sanction the failure of one party to perform his obligations, not taking into consideration any moral assessment of his behaviour, whereas the latter would be based on the breach committed by one of the contracting parties, that is the voluntary, intentional behaviour consisting in not performing an obligation arising out of the contract. The analysis of both Acquis Communautaire and Acquis International shows that, contractual default seems to be the prevailing approach (**I**).

However, as pointed out by P. STOFFEL-MUNCK,[3] the various texts lack consistency: the fault, in the sense of a morally harmful behaviour, is not taken into consideration in the contractual default approach, whereas it sometimes resurfaces when it comes to remedies. As a result, the notion of fault is not entirely excluded from Acquis Communautaire and Acquis International. It partly conveys the idea that runs through international and EU texts: the obligee is entitled to damages when he does not receive what he could rightfully expect from the performance of the contract. "Fault" is used, sometimes in an underlying way, in the definition of the elements characterizing contractual default. It is present in the distinction between the duty to achieve a specific result and the duty of best efforts, in the issues regarding the validity and the scope of exclusion and limitation clauses or in the modulation of the types and extent of remedies. The concept of

3 Comments on article 8.101 of the European principles in *Regards croisés sur les principes du droit européen du contrat and followingr le droit français*, sous la dir. De C. PRIETO, *PUAM* 2003, pp. 416 and the following pages.

fault, in the moral sense, is therefore not inconsistent with a broader and objectivized vision of non-performance (**II**).

I. The Replacement of Moral Fault by the Broader Concept of "Contractual Default"

In most international and EU texts relating to contractual matters, contractual default is the generally adopted phrase expressing the failure of one party to perform. Non-performance and failure constitute the most neutral interchangeable terms defining this default, without investigating the cause for the defaulting party's behaviour (**A**). Some texts refer to the guarantee due by one of the parties to the other: it is not the notion of fault that prevails, but rather the idea of allocation of risk between the parties, sometimes based on their respective status (**B**).

A. The moral neutrality of the terms "non-performance" or "failure"

In the Vienna Convention for the International Sales of Goods dated 11 April 1980 (CISG), the term "fault" is not used. The CISG defines the buyer and seller's respective obligations; it also mentions the guarantees and the seller's liability with regard to the sold goods (articles 35 and 36). In case of a failure, the CISG refers to a "breach of contract" (articles 45 and following regarding cases of breach by the seller of his obligations and articles 61 and following for breaches by the buyer of his obligations). Article 25 of the CISG defines "fundamental breach": the breach is fundamental when the obligee is deprived of what he was entitled to expect under the contract and when the damage was foreseeable by the defaulting party. The severity of the breach is objectively assessed with reference to the rightful expectations of the obligee under the contract.

The OTTAWA Conventions of 28 May 1988, respectively on International Financial Leasing and on International Factoring, mention cases of "default" or "non-performance" on the part of one of the parties (see for instance articles 13.1 and 13.2 of the OTTAWA Convention on International Financial Leasing, however also see the influence of the obligee's fault on limitation clauses below).

In the UNIDROIT Principles of International Commercial Contracts (2004 version, hereafter UNIDROIT principles), the term "fault" does not appear at all. Article 7.1.1 mentions non-performance, which is defined as the failure by one party to perform any of its obligations and covers any types of non-performance: late performance, partial performance or total non-performance. The comment explains that the notion of non-performance under this provision includes the non-performance whether it is imputable to the defaulting obligor or not (due to a party's conduct or to force majeure). Article 7.3.1. deals with each party's right to avoid the contract. This right is granted when non-performance is fundamental. Article 7.3.1. also indicates the different factors to be taken into account to determine whether the failure amounts to a fundamental non-performance. In particular, account should be taken of whether the failure is intentional (article 7.3.1.c). The fact that a non-performance is fundamental, in the sense mentioned above, therefore impacts upon the types of remedies that the obligee may claim (see below).

In PECL, non-performance is likewise the most used term. Article 1.301 covers all types of non-compliance with the contract, whatever the cause and even when the non-performance is not imputable to the defaulting obligor. As P. STOFFEL-MUNCK points out, the obligee is entitled to the remedies listed in chapter 9 of the Principles as soon as the obligor fails to perform one of his obligations.[4] Article 8.101 thus specifies that there is non-performance each time one party fails to perform an obligation arising out of the contract. This provision mentions neither the term fault, nor the word liability: P. STOFFEL-MUNCK highlights that "the award of damages seems independent from any moral assessment of the obligor's behaviour".[5] In this sense, non-performance covers both defective performance and late performance. Article 8.103 deals with fundamental non-performance. One of the cases considered is the situation in which "non-performance is intentional and gives the obligee reasons to believe that he cannot, in the future, obtain performance from the contracting party". Again, the fact that the non-performance is substantial has an impact upon the remedies.

In the European Contract Code drafted by the Academy of European Private lawyers in Pavia ("Pavia Project"), the notion of non-performance is used and defined under article 89: "a contractual obligation is considered breached when the behaviour of one of the contracting parties or associates or servants differs from what is provided under the contract, or if the factual or legal result observed is different from what was promised". As a result, the non-performance is the difference between what each party expects from the performance of an operation under the contract and what is actually performed. Article 100 gives more details on this notion of non-performance: "There is non-performance of a contractual obligation when a specific event, or a factual or legal situation one contracting party has promised or guaranteed would occur, does not occur, even when there is no consideration. If by a statement, which is neither part of the contract nor promised or guaranteed otherwise, it is stated that an event occurred or did not occur, will occur or will not occur, as long as the statement does not reflect reality, the party emitting it can be liable, towards the aggrieved party, on an Aquilian level".

Few European Directives relating to contracts refer to the notion of fault. It can no doubt partly be explained by the fact that the aim of the texts adopted by EU institutions is to harmonize Member States' laws regarding the rights granted to the consumer in the pre-contractual period and when the contract is signed: these texts focus on the harmonization of preventive means to protect the consumer and on the improvement of the consumer's rights.

Only one Directive expressly deals with the professional's fault: the Directive on "package travel and holiday tours"[6] provides in its 18th recital that organizers should be liable for the proper performance of the contract and should be liable for the damages resulting from failure to perform or improper performance, unless the defaults in the performance of the contract are attributable neither to any fault of theirs nor to that of another supplier of services (a similar provision appears in article 5 of the Directive).

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4 Comments on article 8.101 of the European principles, in *Regards croisés sur les Principes du droit européen du contrat and followingr le droit français, op.cit.*, pp. 415 and following pages.

5 *Op.cit.* p. 416.

6 Directive 90/314/EEC of 13 June 1990 on package travel and holiday tours, *OJ* n° L 158 of 23 June 1990, p. 59.

When the professional is mentioned, most Directives do not use the word "fault" to define contractual non-performance. For instance, under the Directive on distance contracts",[7] article 7 deals with non-performance by the supplier within a maximum of 30 days from the day following that on which the consumer sent his order. The non-performance here does not necessarily result from the supplier's breach.

B. The more pronounced neutrality of the term "guarantee"

Several international and EU texts regarding sale contracts impose guarantees on the seller: the seller is liable notwithstanding any moral connotation attached to the non-performance. The liability is resolutely detached from any idea of fault, in its moral meaning, of the seller.

In accordance with the CISG provisions, a guarantee of conformity and of legal availability of the sold goods is imposed on the seller. The seller, under article 35, must deliver goods that are of the quantity, quality and description required by the contract and fit for any ordinary or particular purposes made known to the seller. It does not matter that the defect originates in the seller's conduct: the qualities of the goods alone are taken into consideration. Article 42 provides that the seller must deliver the goods free of any right or claim of a third party. Despite the fact that the seller has acquired the goods in good faith, he must nonetheless protect the buyer against any eviction. However, the knowledge of the seller, either of the lack of conformity, or of the right or claim by the third party on the sold goods, will have an impact on the damages thus granted to the buyer.[8]

The Directive on certain Aspects of the Sale of Consumer Goods and Associated Guarantees deals with the seller's liability for lack of conformity.[9] The seller is responsible for the conformity of the goods: the legislator's focus is placed on the guarantee rather than on the seller's liability based on his fault. Article 3 provides that the seller is liable to the consumer for any lack of conformity that exists at the time the goods are delivered. Likewise, article 5 of the same text regarding time limits refers to the seller's liability. Article 6 deals with the contractual guarantees defined in article 1.e as "any undertaking given without extra charge by a seller or producer to the consumer to reimburse the price paid or to replace, repair, or handle consumer goods in any way if they do not meet the specifications set out in the guarantee statement or in the relevant advertisement".

The texts analysed above seem to ignore the "fault" of one of the parties: the issue is not about sanctioning morally reprehensible conduct, but instead about providing that a

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7 Directive 97/7/EC dated 20 May 1997 on the protection of consumers in distance contracts, *OJ* L 144 of 4 June 1997. Likewise, and outside of the strictly contractual domain, see articles 4, 7, 8, and 12 of the Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, *OJ* L 219 of 7 August 1985, p. 29. In relation to this text, see also the European Court of Justice's decisions dated 25 April 2002 and 14 March 2006 on the failure of France to bring into force this Directive.

8 See *infra*.

9 Directive 99/44/EC dated 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, *OJ* L 71 dated 7 July 1999, p. 12.

party who is not able to obtain what he is reasonably entitled to expect under a contract must be able to seek damages. In some situations however, the harmful, intentional conduct of one of the parties could nonetheless have consequences.

II. The Limited Role of Moral Breach in Contractual Default Rules

The term "fault" is not a totally absent from international or EU texts. Without explicitly using the term, the moral assessment of the defaulting party's behaviour or the obligee's conduct may influence the regime governing contractual failure. In these different cases, it can be observed, however, that the word "fault" is seldom used. Any reference to the wrongful behaviour, in the moral sense, of one party, is often underlying and non limitative, since other types of behaviour, which do not constitute faults in the moral sense, could equally result in the same consequences.

Various international texts illustrate the limited role played by moral fault. First, the upholding, in several texts, of the distinction between the duty to achieve a specific result and the duty of best efforts forces to consider the obligor's behaviour **(A).** Further, exclusion and limitation clauses partly depend on the assessment of the parties' conduct **(B).** Finally, the extent, terms and conditions of the remedies can depend on the obligee's or the obligor's conduct **(C).**

A. Distinction between the duty to achieve a specific result and the duty of best efforts

The distinction between the duty to achieve a specific result and the duty of best efforts is mostly used in civil law systems, in particular under French law (see the chapter relating to comparative law). Nevertheless, an echo of this distinction can be found in some international and EU texts.

In international carriage, certain texts indirectly define the carrier's obligations with reference to this distinction. Thus, under the Warsaw Convention dated 12 October 1929 for the Unification of Certain Rules Relating to International Carriage by Air, it is provided that the carrier is not liable if he proves that he took all necessary measures to avoid the damage (bodily or material) or that it was impossible for him to take such measures (article 20.1). For international carriage of goods and luggage, the carrier is not liable if he proves that the damage results from negligent piloting or negligent navigation and that he has taken all necessary measures to avoid the damage. The Montreal Convention dated 28 May 1999, intended to replace the Warsaw Convention, strengthens the carrier's obligations. The carrier is liable for damage sustained in case of death or bodily injury of a passenger or for damage caused to the checked-in luggage on the condition that the accident took place on board the aircraft (article 17); he is liable for damage sustained in the event of damage to cargo unless he proves that the damage results from an inherent defect, quality or vice of that cargo, from defective packing of that cargo performed by a third party, from an act of war, or an act of public authority carried out in connection with the entry, exit or transit of the cargo (article 18). Article 21 provides that for bodily injury or death, the carrier cannot exclude or limit his liability for damage that does not exceed 100,000 SDR for each passenger; for damages exceeding

that amount, the carrier is not liable if he proves that the damage is not due to the negligence or other wrongful act or omission, or that the damage is solely due to the negligence or other wrongful act or omission of a third party. The Council Regulation n° 2027/97 of 9 October 1997 on carrier liability in the event of accidents adjusts several provisions to match those of the Montreal Convention.[10] In a similar way, it strengthens the carrier's obligations: article 3 provides that the carrier cannot limit his liability by proving that he took all necessary measures for damages up to the sum of the equivalent in ecus of 100.000 SDR.

In PECL, the reference to the distinction between the duty to achieve a specific result and the duty of best efforts is only indirect. Article 6:102 specifies that the contract may include, in addition to explicit obligations, implied obligations. They may result from the parties' intent, the nature and the object of the contract and from good faith. In the comment, it is mentioned that this provision must help to determine the nature of the obligations undertaken: a duty to achieve a specific result or a duty of best efforts. To establish a failure of the former, it is only necessary to bring evidence that the promised result was not achieved. To establish the failure of a duty of best efforts, it will be necessary to prove the obligor's fault.

Article 5.1.4 of the UNIDROIT Principles is more explicit. It distinguishes between the duty to achieve a specific result and the duty of best efforts. The text does not use the term fault. However, it indicates that the failure to perform an obligation that involves a duty to achieve a specific result is established by proving that the promised result was not achieved. Regarding a duty of best efforts, it will be necessary to show that the obligor did not make the efforts expected from a reasonable person in the same circumstances. This reflects the concept which underpins French law: the objective finding that the result is not achieved suffices to establish a failure in the case of a duty to achieve a specific result, whereas evidence of the obligor's fault must be shown in the case of a duty of best efforts. Nevertheless, if the reference to the concept of "fault" can be detected in this provision, it must be observed that the defaulting obligor's conduct is assessed in relation to an objective standard. As a result, it might not be the obligor's morally reprehensible conduct that is in question, but rather what the obligee could rightfully expect from the obligor, in comparison with a reasonable person under the same circumstances.

The distinction between a duty of best efforts and a duty to achieve a specific result, which leads, as regards the duty of best efforts, to consider the defaulting obligor's conduct in the case of a failure, does not appear in any other international or EU text.

Some supporters of the *lex mercatoria* point out the relevance of the distinction between a duty to achieve a specific result and a duty of best efforts.[11] For some types of contracts, essential obligations would necessarily be duties to achieve a specific result: thus, in a turnkey contract, the contractor undertakes a duty to achieve a specific result, as does the operator in a raw materials contract. These contracts could nonetheless include best efforts clauses: hardship clauses or renegotiation clauses, for instance.

References to fault can be found in the regime governing exclusion or limitation clauses.

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10 This text applies to domestic transports in each Member State and to international transports from or to the Community.

11 U. DRAETTA and R. LAKE, *Contrats internationaux – pathologie et remèdes*, *Bruyland* 1996, see in particular pages 53 to 63.

B. The regime governing exemption and limitation clauses

Limitations may originate, not from contractual clauses, but from legislation itself. Even in this case, references to the defaulting obligor's fault can be found with regard to assessing the extent of these limitations. Thus, in international carriage, articles 22 of the Warsaw Convention, and 22 of the Montreal Convention fix a maximum liability; articles 23 of the Warsaw Convention and 26 of the Montreal Convention state that clauses fixing a lower limit than this maximum are null and void. Article 25 of the Warsaw Convention specifies that the carrier will not be entitled to avail himself of the limits fixed in the text if the damage is caused by his wilful misconduct or by such default equivalent to wilful misconduct. Article 22.5 of the Montreal Convention is more severe in this regard for the carrier: the limits to liability cannot be claimed if it is proved that the damage "resulted from an act or omission of the carrier, its servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result".

Moreover, limitations on liability can result from contractual provisions. Texts recognizing the validity of such clauses while restricting their scope when non-performance is due to a fault (as in due to the defaulting obligor's intentional misconduct) should be mentioned here. Obviously some texts, especially EU texts, prohibit such clauses for the purpose of protecting one party, supposedly weaker, such as the consumer. In those cases, limitation or exclusion clauses are prohibited notwithstanding the defaulting party's default.

The CISG does not cover the validity of a contract of sale or of its clauses. The validity of limitation or exclusion clauses must therefore be considered under the law applicable to the contract (see below the chapter on comparative law). However, some authors suggest that the national law designated under the conflicts of law provisions should be adjusted in accordance with the objectives of the CISG. It has therefore been argued that if French law applies to a sale contract, such clauses should be deprived of their effect only in the case of a gross or intentional fault on the part of the seller.[12] Other authors consider that national law must apply to the subject matter, as it does in strictly internal situations; if French law were to be designated by the conflicts provisions, it would mean that the validity of the clause would depend on the type of damage or on the default claimed by the buyer.[13]

The above-mentioned OTTAWA Convention on International Financial Leasing states that the lessor warrants that the lessee's quiet possession will not be disturbed (article 8). No exemption or limitation clause may be invoked when the right or claim arises from an act or an intentional omission of the lessor or from his gross fault. This text shows the traditional limit, which exists also under French law, imposed on the extent of exclusion or limitation clauses.

Article 8:109 of PECL deals with clauses excluding or restricting remedies. As a general rule, these clauses are valid. They may be excluded if is contrary to good faith and fair dealing to invoke them. Again, it should be observed that there is no reference to

12 C. WITZ, "L'adaptation du droit français interne aux règles de la convention de Vienne sur la vente internationale de marchandises", *in Mél. Mouly*, vol. 2, p. 205, esp. p. 218.

13 V. HEUZE, *La vente internationale de marchandises, droit uniforme LGDJ* 2000, n° 286, pp. 248 to 251.

the term "fault" to limit the effects of such provisions. According to the comment on this text, because of the criterion of good faith, these clauses do not constitute incentives not to perform. Non-performance of his obligations by one party cannot therefore allow such party to invoke that clause. The comment indicates that the obligor would not be able to invoke an exclusion or limitation clause where non-performance is intentional and designed to harm the other party or is at least carried out knowingly. Fraud, which article 3:101 of the PECL equates to an inexcusable act, would then be considered as an intentional non-performance. Again, the idea is that the obligor's morally reprehensible conduct deprives him of the right to invoke clauses that would exclude or limit his liability. Article 8:109 however uses a pragmatic analysis based on the parties' expectations: surely intentional non-performance deprives exclusion and limitation clauses of their effect, but there are cases where such non-performance will not have any consequences since it will have been considered by the parties. The comment on that provision illustrates this practical approach with the example of a charter-party that would include a clause limiting the amount of demurrage due by the charterer. In this situation, it would not be inconsistent with the good faith principle to invoke such a clause if both parties knew that the disembarkation port is subject to recurrent congestion.

Article 106 of the Pavia Project explicitly refers to fault in order to restrict the effect of exclusion or limitation clauses. It is indeed provided under this text that "any convention excluding or limiting beforehand the obligor's liability in case of a fraud or gross fault is null".

Article 7.1.6 of the UNIDROIT Principles is similar to article 8:109 of PECL provisions. Exclusion or limitation clauses are valid; they can nonetheless be deprived of their effect if it is grossly unfair to invoke them with regard to the purpose of the contract. This provision does not, as such, point to the wrongful conduct of the defaulting obligor. However, through examples quoted in the comment of this article, the obligor's wrongful conduct will be taken into consideration. Indeed, some authors consider that the cross-border practice of international contracts is close to the rules set out in the UNIDROIT Principles: "the validity of limitation clauses depends on concepts relating to morality, good faith and to the civil law notion of abuse of right".[14]

C. Extent and conditions of remedies

Some types of behaviour on the part of the obligee have an impact on the types of remedies to which he is entitled and on the extent of the remedies that will be granted. Among these types of behaviour, the fault of the obligee, in the moral sense, will, in various cases, prevent him from claiming certain types of remedies or limit the extent of the relief he could normally expect.

Under the CISG, the morally reprehensible conduct of one of the parties can have an impact on the regime governing the remedies.

Thus, the seller will not be able to claim that the buyer did comply with the time limits provided in order to rely on the guarantee of conformity if the defects relate to facts of which he knew or could not have been unaware of and which he did not disclose to the buyer (article 40). Similarly, the seller is not entitled to rely on the fact that the buyer did

14 U. DRAETTA and R. LAKE, *op.cit.*, in particular p. 114.

not give notice of a right or claim of a third party, or did not give that notice within a reasonable time if he knew of the right or claim of the third party, and the nature of it (article 43.2). Some types of remedies partly depend on the existence of a fundamental non-performance. Thus, article 49 allows the buyer to declare the contract avoided if the non-performance by the seller of one of his obligations constitutes a "fundamental breach" (the seller could, likewise, request, in accordance with article 64, the avoidance of the sale if the buyer commits a fundamental breach of his obligations). Regarding the buyer's rights, the CISG provides, however, that the buyer loses the right to declare the contract void if he is unable to return the delivered goods and if that inability results from his "fault". Among the means available to the obligee is the right to request damages. The obligee must, however, mitigate his own damage. This obligation is the mere application of the causation theory: only the damage that is the consequence of the obligor's failure can be compensated and that resulting from the obligee's fault are thus excluded. Finally, article 80 of the CISG states that "a party may not rely on a failure of the other party to perform, to the extent that such failure was caused by the first party's act or omission". The obligee is thus deprived from his right to invoke the non-performance in order to seek any of the remedies provided in the Convention. Article 80 is drafted in a broad manner: the act of the obligee under the article does not necessarily have to be a fault and no distinction is drawn with regard to the nature of the non-performed obligation. The act covers a third party acting on behalf of the obligee. V. HEUZE points out that in case of conflict, the implementation of this provision requires an assessment from the judge or the arbitrator on a case-by-case basis.[15] Indeed, situations where the alleged breach finds its origin both in the act and the obligee and in the obligor's negligence must be considered. Depending on the circumstances, if the obligor could not, due to his fault, overcome the difficulties of performance resulting from the obligee's act, the extent of the exoneration should be limited. V. HEUZE offers the following practical illustration: a buyer gives the seller contradictory specifications regarding the quality or the quantity of the goods to deliver – the seller will commit a fault if he does not request explanations with regard to this information – if the delivery does not conform to the buyer's expectations, the breach will be imputable to both parties.

In the field of international carriage, both the Warsaw Convention and the Montreal Convention provide that the carrier cannot be wholly or partly exonerated by bringing evidence of the injured person's fault (article 21 of the Warsaw Convention) or more broadly his/her negligence or wrongful act or omission (article 20 of the Montreal Convention).

In PECL, article 8:101.3 provides that neither party may resort to any of the remedies set out in Chapter 9 to the extent that its own act caused the other party's non-performance. The obligee who induces the failure is therefore deprived of his right to any remedies, whatever the form. The act or omission of an obligee deprives him, as a result, of any right to seek compensation. Again, it should be underlined that this act does not necessarily have to bear the characteristics of a fault, in the moral sense.

In the UNIDROIT Principles, article 7.3.6 forbids the obligee from claiming restitution of whatever it has supplied in case of avoidance, if this restitution is not possible or contrary to the principle of good faith. Under this hypothesis, the UNIDROIT Principles evoke cases where restitution would expose the defaulting party to unreasonable efforts or

15 *Op.cit.* n° 478, p. 433.

costs. Articles 7.1.2 and 7.4.7 of the Principles deal with the obligee's wrongful conduct in terms very similar to those used in PECL. Under the former, it is provided that a party may not rely on the non-performance of the other party to the extent that such non-performance was caused by the first party's act or omission or by another event for which the first party bears the risk. Again, among the circumstances covered by this article appears "fault" in the moral sense. Article 7.4.7 is the mere application of article 7.1.2: where there is an act of the obligee (act, omission or any other event for which the obligee bears the risk), the damages allocated to the obligee will be reduced to the extent that these factors have contributed to the harm. It can be added that article 7.4.8, as in PECL, compels the obligee to mitigate the damages resulting from the obligor's failure.

Comparative law

"Fault" traditionally fulfils three distinct functions: it provides a *ground* for liability, but it also allows it to be *measured* or *excluded*. The role of fault, however, and the use of this term in the context of contractual liability reveals certain rifts among the various legal systems.

Whereas common law-based systems are seen as ignoring the notion of fault[16] and even trying to oppose it, German legal systems are very attached to the concept. Perhaps the French legal system stands out because of its duality?[17] Indeed, if it seems close to

16 It is interesting to note that for common law jurists, there is no notion of "fault" in contractual matters. Indeed, even if the term of "fault" is used in certain cases (*Poussard v. Spiers* (1876) 1 QBD 410) or in the *Sale of Goods Act* 1979 (sections 7, 9(2), 20(2)), it appears that the term must be understood as a synonym of the locution "non-performance of a contractual obligation", as section 65 of the *Sale of Goods Act* 1979, defining the fault as a "*wrongful act or default*" confirms. Such a definition squares with the tradition that could be dated back, at least judicially, to the solution rendered in *Paradine v. Jane* (1647) Aleyn; 82 ER 897). This disinterest – at lest in appearance – from *common law* jurists for the fault in contracts and more specifically with regard to the non-performance of a contractual obligation is symptomatically expressed by the fact that it is frequently absent from textbooks and other articles relating to contract law. Lord Edmund-Davies comments, in *Raineri v. miles* [1981] A.C. 1050, are, in this regard, more than significant: *"[i]t is axiomatic that, in relation to a claim for damages for breach of contract, it is, in general, immaterial why the defendant failed to fulfil his obligation, and certainly no defence to plead that he had done his best"*. The substantial work on the topic by Professor G.H. TREITEL must nonetheless be underlined ("Fault in the Common Law of Contract" in M. Bos and I. Brownlie (eds.) *Liber Amicorum for Lord Wilberforce*, OUP, 1987, P. 185 and following pages; *Remedies for Breach of contract: A comparative account*, Oxford Clarendon Press, 1988, p. 7 and following pages) followed by Professor Barry NICHOLAS ("Fault and Breach of Contract" in: *Good faith and Fault in Contract Law*, J. BEATSON, D. FRIEDMANN (eds.) Oxford Clarendon Press, 1995 reprinted 2002, p. 337 and following pages).

17 L-J. CONSTANTINESCO, *Inexécution et faute contractuelle en droit comparé (droits français, allemand, anglais)*, Kohlhammer Verlag, 1960, p. 483. For a schematic presentation of the three systems, see in particular, K. ZWEIGERT, H. KÖTZ, *An introduction to comparative law*, Third

common law with regard to duties to achieve a specific result, where the obligor's fault consists in not performing his obligation, it also comes near to the German tradition with the duty of best efforts where the obligee must show evidence that the obligor failed to perform with the diligence required by his obligation.

Nevertheless, a more elaborate study reveals, first, that such structural similarities do not necessarily have a practical translation and, second, that visible discrepancies often are reduced through the effects of exceptions. Consequently, it seems on the one hand that theoretical oppositions between the different legal systems are not impossible to overcome, and on the other that there can be observed, everywhere, a decline of systems based on moral fault.

This theoretical complexity does not allow a specific definition of the contractual breach to emerge. Common law authors suggest vague notions such as "a failure to comply with the express or implied terms of the contract",[18] a definition broadly shared by the *Vocabulaire juridique* of the Société Capitant, which follows the continental law tradition: "Contractual breach: non-compliance, by the obligor of an obligation originating in the contract … that triggers his contractual liability".[19] Wishing to uphold the unity of civil wrong both in the contractual and tort fields, PLANIOL offered to define it as a violation of the *obligatio*, in its *vinculum juris* meaning. In that way, he echoed the teachings of the history of the law of contract that show that, at the beginning, the non-performance was a tort. Still, if the fault, in contractual matters, equals the non-performance of a contract, the necessity and relevance of the notion of fault could be questioned, following the example of D. TALLON.[20] Why not be satisfied with the use of the phrase "non-performance of a contractual obligation"?[21]

A survey of comparative law of the European legal systems shows a undeniable decline of *culpa* as a condition for triggering contractual liability, which increasingly results from a mere non-performance **(I).** This tendency continues at the stage of ex-

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Edition, 1998, p. 486. See also S. WHITTAKER's comments, "Les sanctions de l'inexécution des contrats. Droit anglais, in: *Les sanctions de l'inexécution des obligations contractuelles. Etudes de droit comparé*, M. FONTAINE, G. VINEY (sous la direction de), 2001, p. 977.

18 W. W. McBRYDE, *The Law of Contract in Scotland (3rd ed. 2001), para 22-07: "a failure to comply with the express or implied terms of the contract"*.

19 G. CORNU. (dir.), Ass. Capitant, *Vocabulaire juridique*, 4e éd., Paris, P.U.F., 2003, see "Faute".

20 D. TALLON, "Pourquoi parler de faute contractuelle?", in: *Droit civil, procédure, linguistique juridique, Ecrits en hommage à Gérard Cornu*, PUF, 1994, p. 429. *Adde*. Ph. REMY, "La responsabilité contractuelle: histoire d'un faux concept", *RTD civ*. 1997, p. 323; "Critique du système français de responsabilité civile", *Droit et cultures* 1996/31, 31; Ph. LE TOURNEAU, L. CADIET, *Droit de la responsabilité et des contrats*, Dalloz Action, 2000, n° 802 and following paragraphs. Please note, however, the critical comments of M. Y.-M. LAITHIER *(Etude comparative des sanctions de l'inexécution du contrat*, Préf. H. Muir-Watt, LGDJ, 2004, n° 68, p. 96) regarding the debate relating on the existence or the non existence of the contractual fault: "Were it not to redefine more strictly the fault so that it is not only a language convention, the question whether it is still appropriate to 'talk about a contractual fault' is vain and leads to a dogmatism worthy of the outdated debates on the decline of article 1382 of the civil code".

21 Besides, equivalent phrases could be used, such as "failure of the obligor" or "breach of a contractual obligation". These phrases, all including the failure, strictly speaking, and the defective performance, do not raise any difficulty as to their meaning.

emption from contractual liability: the fault becomes an immaterial parameter **(II).** Lastly, the question as to whether there is still a residual role for fault in contractual matters must be addressed **(III).**

I. The Decline of the Moral Fault

In common law systems, the existence of a moral fault is, a priori, immaterial for the purposes of holding someone liable: the non-performance amounts to a difference between what was promised (expressly or impliedly) and what is achieved. It corresponds, under English law, to the notion of contract considered as a bargain.

On the contrary, other legal systems remain committed to the conception according to which it would be necessary to prove a moral fault to hold a contracting party liable – concept that could be summed up using the phrase "guilt principle".

Under French law, the word "fault" does not appear in any fundamental articles of the Civil code relating to contractual non-performance.[22] Article 1147 of the Civil code "because it refers to non-performance, rather than fault, it seems, if considered on its own, that this notion has no place in the contractual liability theory. However there is the possibility for the obligor to exclude his liability by proving that the non-performance results from an external cause. Thus, overcoming the apparent contradiction between these texts, judges and academics reconcile them in the following manner: non-performance of a contractual obligation is not enough to establish the liability of an obligor, there must be a contractual fault; but this fault, although presumed in article 1147 of the Civil code, must be proven in the case of article 1137".[23] Standards of conduct under article 1137[24] and 1147[25] of the Civil code are traditionally interpreted as establishing respectively an almost irrebuttable presumption of "fault" and a necessity to prove "fault", such fault being assessed in accordance with the *bonus pater familias* standard.

There is a false parallelism, inherited from PLANIOL, between tort and contractual breach.[26] For tort, the standard behaviour is the *bonus pater familias;* whilst the notion of

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22 It should nevertheless be pointed out that a brief search through the Civil code reveals that the term "fault" is used about 74 times, which shows its broad popularity in our system.

23 F. TERRÉ, Ph. SIMLER, Y. LEQUETTE, *Droit civil. Les obligations*, Dalloz, Précis, 9e éd., 2005, n° 571.

24 *"The obligation to conserve a thing, whether the sole finality of the agreement is the profit of one party or their common profit, compels the one who is responsible of it to give it all the care of a prudent administrator (al. 1). That obligation is more or less extensive depending on some contracts, whose effects, in this respect, are explained under the Titles which relate to them (al. 2)".*

25 *"A debtor shall be ordered to pay damages, if there is occasion, either by reason of the non-performance of the obligation, or by reason of delay in performing, whenever he does not prove that the non-performance results from an external cause which may not be ascribed to him, although there is no bad faith on his part".*

26 On the animated debates in French jurisprudence regarding the necessity to maintain or not a contractual liability distinct from delictual liability, see in particular G. VINEY, "La responsabilité contractuelle en question, *in Le contrat au début du XXIè siècle, études offertes à J. GHESTIN*, LGDJ 2001, p. 921 and the quoted references; *adde*. from the same author regarding delictual liability, "Pour ou contre un 'principe général' de responsabilité pour faute – une

contractual breach varies, as illustrated by articles 1927 and 1928 of the Civil code on depositaries.[27] Thus, it can be observed that *"contractual breach chisels while tort levels"*.[28] In this regard, the French distinction between a duty to achieve a specific result and a duty of best efforts is misleading: as M. TALLON points out, a paterfamilias performs all his obligations, should they be duties to achieve a specific result, or duties of best efforts.[29]

As is the case under French law, other legal systems remain, apparently, attached to the idea of guilt. This is particularly true of Austria, Sweden, Spain (article 1101 of the Civil code), Portugal (article 79 of the Civil code) or Germany (§ 280 al. 1 of the BGB).

This loyalty to fault is only apparent. The concept of *culpa*, of fault, is actually confused with the *injuria*, the non-performance. First, the analysis of the content of the obligations will help to determine the existence of a failure, which is then treated as a fault **(A).** Then, there is often a presumption of a moral fault derived from the mere non-performance **(B).**

A. Fault as a default in the performance of the contract

Whether one considers the nature of the obligor's obligation or the parties' intent according to implied terms, the autonomous assessment of the obligor's fault only plays a small role once the non-performance is established **(1).** Even in legal systems that still purportedly require fault, such fault tends to be objectively assessed, an assessment which implicitly refers back to the idea of guarantee **(2).**

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question posée à propos de l'harmonisation des droits civils européens", in: *Le droit privé à la fin du XXè siècle, Etudes offertes à P. CATALA*, LITEC, 2001, p. 555. *contra* in particular, Ph. REMY, "La 'responsabilité contractuelle': histoire d'un faux concept", *RTD civ.* 1997, p. 323.

27 Article 1927 of the Civil code states: "A depositary must take, in the keeping of the thing deposited, the same care as he does in the keeping of the things which belong to him." Article 1928 provides that: "The provision of the preceding article shall be applied more strictly: 1° where the depositary has volunteered for receiving the deposit; 2° where he has stipulated a salary for the keeping of the deposit; 3° where the deposit has been made solely in the interest of the depositary; 4° where it has been expressly agreed that the depositary would be liable for any kind of fault".

28 D. TALLON, *ibid.*

29 On the relevance of the distinction between duty to achieve a specific result and duty of best efforts, see G. VINEY, P. JOURDAIN, *Les conditions de la responsabilité*, Traité de droit civil, 3ème edition, LGDJ, 2006, n° 521 and following paragraphs. It must however be observed that the distinction is maintained and detailed by the French Reform Proposals, which in their article 1149 underline that: "The obligation is a duty to achieve a specific result when the obligor is compelled, except in case of a force majeure, to provide the obligee the promised satisfaction, so that, except in that case, his liability relies on the evidence that he lacked prudence or diligence".

1. The standards of care: definition of fault based on the content of the contract

Since it does not recognize named contracts, common law classifies the content of contractual obligations depending on the nature of the contract, by referring to the parties' intent. The practical results correspond, to a large extent, to the solutions reached by the application of the French dualist system, or the application of the specific regulations of countries that adopt the principle of moral fault as a starting point. Thus, article 1104 of the Spanish Civil code states that the obligor's fault derives from a failure to the required standard of conduct, "which is assessed according to the nature of the obligation and considering the circumstances". Consequently, as CONSTANTINESCO accurately highlighted,[30] "it is not possible to link the French system based on article 1147 of the Civil code and the English system to two opposite principles, one based on fault and the other solely based on non-performance, when their practical consequences, regarding fault, are identical". Whether or not one uses fault as the ground for liability thus seems meaningless.[31] In parallel, some common law provisions mirror the French distinction between duty of best efforts and duty to achieve a specific result, setting down for instance that a person who provides a service within his professional activity implicitly undertakes to provide the said service "with reasonable care and skill".[32] This is an instance of a duty of best effort a violation of which will have to be proven and which may be contested by proving the absence of fault.

In addition, several examples of convergence between English law and French law can be found. For the sale of twelve defective silk bags, the Court found an implied term corresponding to the seller's obligation, under French and Belgian law, to deliver goods

30 *Ibid.*

31 M. Y.M. LAITHIER notes in his PhD thesis that the notion of "fault" is not unknown to *common law:* "(…) contrary to generally accepted ideas, the exclusively objective nature of the non-performance of a contract under *common law* is not an axiom but an expired myth" (*quoted thesis*, n° 70, p. 97). The author specifies that the notion of fault is of interest to some *common law* authors. However, "the phenomenon remained unnoticed since the question was analysed from time to time and in places other than the chapters relating to the study of the remedies for non-performance of a contract" *(ibid.)*. The author adds: "but its existence [the fault's] is undisputable and it is astonishing to note that every author who demonstrated its applications in positive law were led, in a way or the other, to acknowledge French law and in particular its famous distinction between duty of best efforts and duty to achieve a specific result, less discredited abroad than could be imagined" *(ibid.)*. As a result, and in addition to the examples which will follow, the author provides for different expressions of the distinction depending on the nature of the obligation: "if obviously the obligation to pay or return a sum of money, the obligation to deliver a good conform and free from any defect are typically cases of strict liability, the obligation of a doctor, a lawyer, an architect, an expert in charge of evaluating a real estate, a mechanic, and more generally a person bound to conserve the property of a third party are cases where liability is based on a fault (presumed or proven) *(ibid.)*". (For a panel of examples, see G.H TREITEL, *The law of Contract*, 11th edition, London, Sweet and Maxwell, 2003, p. 840 and following pages). Illustrating M. Y.-M. LAITHIER's words, see E. MCKENDRICK, *op.cit.* p. 936-938; *adde.* B. NICHOLAS, "Fault and Breach of contract", *op.cit.* p. 338 and following pages.

32 *Supply of Goods and Services Act* 1982, s. 13.

which conform to contractual provisions: "under such circumstances, the purchaser has a right to expect a saleable article answering the description in the contract. Without any particular warranty, this is an implied term in every such contract".[33] Similarly, it was decided that the sale of a furnished house implies the guarantee that it is in a fit state to be inhabited: "a man who lets a ready-furnished house surely does so under the implied condition that the house is in a fit state to be inhabited".[34] A surgeon was held liable on the basis of an obligation to use reasonable diligence corresponding, under French law, to a best efforts safety obligation: "Every person who enters into a learned profession undertakes to bring to the exercise of it a reasonable degree of care and skill. He does not undertake that he will perform a cure; nor does he undertake to use the highest possible degree of care and skill".[35]

Finally, in the United-Kingdom, a contractor undertakes a duty to achieve a specific result regarding the materials and a best efforts duty regarding the service that he provides.[36] In the Netherlands, the duty is to achieve a specific result for materials (article 6:77 BW). Likewise, under French law, the contractor's liability varies depending on whether the service is material or intellectual, and depending on the risk. More often than not, it qualifies as a "lightened" duty to achieve a specific result under which the obligor can, in particular, exempt himself by bringing evidence of a lack of fault on his part: if the contractor does not prove a lack of fault or an external impediment, he will be declared liable.[37]

Under German law, a similar mechanism can be found for contracts under which the contractor does work or provides supplies for another, and for sale of goods contracts: if the contractor or seller's liability depends on a fault, that fault is presumed in case of non-performance or defective performance, in the sense of an objective failure to deliver pursuant to the contract's specifications (§§ 280, al. 1; 437 N° 3; 634 N° 4 of the BGB). The obligor bears the burden of proving that he complied with the required diligence though, proof which is difficult but not impossible to show. As a result, these rules are comparable with the "lightened" duties to achieve a specific result under French law.

It can rightfully be concluded, as do several common law authors, that the English technique of implied terms is nothing more than the translation of a body of rules[38] that

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33 *Gardiner v. Gray*, [1815] 4 *camp* 144, *per* Lord Ellensborough.

34 *Smith v. Marable*, [1843] 11 M&W 5, *per* Lord Abdinger CB.

35 *Lanphier v. Phipos*, [1838] 173 *ER* 581, *per* Tindal CJ.

36 *Young v. McManus Ghilds*, HL [1969] 1 AC 454: (s. 13 *Sale of Goods and Services Act* 1982).

37 Civ. 1ère, 20 December 1992, *Bull.civ.* I, n° 376, for a dry cleaner's liability: *"given article 1789 of the civil code; it results from this text that the worker, who only provides his work, cannot be held liable if the deterioration of the good or of the materials that he received in order to be shaped does not originate in his fault, which he must prove; the dry cleaner, entrusted with the other party's belongings, can exclude his liability by proving that he did not commit any fault"*. Civ. 1ère, 8 December 1998, *Bull.civ.* I, n° 343, regarding a mechanic's liability: *"the duty to achieve a specific result that a mechanic undertakes with regard to repairing his clients' cars results in a presumption of a fault and in a presumption of a link between the fault and the damage"*.

38 B. NICHOLAS, "Fault and breach of contract", in: Good faith and fault in contract law, J. BEATSON and D. FRIEDMANN (eds.) Clarendon, 1995, reprinted 2002, p. 345: "It could be said that what in the civil law is expressed overtly in rules governing the incidence of different types of contractual liability, is expressed in the common law under the guise of terms

are simply obligations deriving from the interpretation of the very content of the contract. The intensity of the obligation being assessed according to the same criteria as used for the definition of fault, the contractual liability seems, as a result, to be equated with the mere non-compliance with the terms of the contract.

Regarding the wrongful nature of the contractual failure, an interesting question was raised recurrently under French positive law. Can the same fact, imputable to a party, be considered as a contractual breach as regards the other party and as a tort towards a third party? In other words, assuming that a third party wishes to invoke a contract to seek to establish a party's liability when he suffers from a damage caused by its defective performance: should he bring evidence of a specific delictual or quasi-delictual fault (distinct from the contractual non-performance) or is it enough for him to show evidence of the contractual non-performance for the obligor to be held liable? On this question, the various Chambers of the French Cour de cassation have, for a long time, adopted opposing solutions.

In a decision dated 5 April 2005,[39] the commercial Chamber of the Cour de cassation indeed ruled "that a third party can only invoke the non-performance of a contract on the basis of delictual liability on condition that this non-performance constitutes a violation of the general duty not to cause nuisance to a third party". The Court here demonstrated an attachment to the classic vision, embodied in the principle of "relativity of the contractual fault", and correlatively in the principle of "the autonomy of delictual fault" in relation to contractual non-performance. According to the relativity principle, the contractual breach is defined within the contractual framework and only produces effects within that framework.

Since the end of the nineties, the first civil Chamber has adopted a completely opposite solution. In a decision dated 18 May 2004,[40] it thus ruled that evidence of a fault committed during the performance of the contract was sufficient for the author of such fault to be held liable on a delictual basis as regard third parties. According to the first civil Chamber, "for an action in tort by a third party, harmed by the non-performance of a contract, to succeed, it is enough for the aggrieved person to prove that his damage was, indeed, caused by this contractual fault. It is not necessary for him to show evidence of the existence of a tort arising independently from the breach of contract, and

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implied by law, and that these implied terms are fictitious expressions of what are in truth rules"; adde of the same author, "Rules and terms – Civil Law and Common Law" [1974] 48 Tul. L.R. 9746; G.H. TREITEL, The Law of Contract, 8th ed. Sweet and Maxwell, 1991, p. 190: "in truth, simply duties prima facie arising out of certain types of contracts".

39 Cass.com. 5 April 2005, *Bull.civ.* IV, n° 85, *Contrats, conc., consomm*, 2005, comm. n° 149, obs. L. LEVENEUR; D. 2005, panorama, 2848, obs. B. FAUVARQUE-COSSON; *RDC* 2005, P. 687, obs. D. MAZEAUD; *RTD civ.* 2005, p. 602, obs. P. JOURDAIN; see previously Cass. Cass. com., 8 October 2002, n° 98-22858.

40 Cass. civ. 1ère, 18 May 2004, n° 01-13844, *Bull. civ.* I, n° 141, p. 117, *D.* 2005, p. 187, obs. D. MAZEAUD; *RTD civ.* 2004, p. 502, obs. J. MESTRE et B. FAGES; *adde*. p. 516, obs. P. JOURDAIN.; see previously, Cass. civ. 1re., 15 December 1998, n° 96-21905 et n° 96-22440, *Bull. civ.* I, n° 368, p. 253; Cass. civ. 1re, 18 July 2000, n° 99-12135, *Bull. civ.* I, n° 221, p. 144. The second and third civil Chambers had joined, in the nineties, the first civil Chamber's position. See particularly Cass. civ. 3e., 5 February 1992, n° 90-16943, *Bull. civ.* III, n° 42, p. 26.; Cass. civ. 2e., 4 October 1995, n° 93-11287, *Bull. civ.* II, n° 230, p. 134.

detachable from the non-performed contract. Such a solution can be approved if it is exclusively analysed from the third party's interest, whose burden of proof is very much lightened. The award of damages will therefore be easier than if he had to bring evidence of negligence or lack of care from the obligee, as required under article 1382 of the Civil code".[41]

In a ruling rendered in a plenary session, on 6 October 2006, the Cour de cassation judges settled this difference in favour of the first civil Chamber, admitting "that a third party to a contract can invoke, on the basis of delictual liability, a breach of contract where the breach has caused him damage".[42] The commercial Chamber has just agreed to the solution adopted by the solemn assembly of the Cour de cassation.[43]

Following the opinion of a number of academics, it cannot be denied that such a solution marks the end of the principle of relativity of contractual fault, for which is substituted the principle of identity between delictual and contractual breach. Such a solution leads to a blurring of the distinction between contracting parties and third parties to a contract, to a weakening of the balance between the principle of relative effect of a contract and opposability as regards third parties, and, above all, to endangering the foreseeability of damage, all this in order to provide better compensation for victims. Indeed, following this precedent and if later cases do not provide for more details on the nature of the causality[44] between non-performance and damage, courts will have to allow anybody proving a damage related to the non-performance of a strictly contractual obligation (i.e. non-competition clause) to be compensated by the obligor,[45] the obligor not being allowed to invoke any exclusion or limitation clause since the third party will be acting in the non-contractual field.

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41 D. MAZEAUD, *RDC*, 2005, p. 687.

42 Cass. Ass. Plén., 6 October 2006, n° 05-13255, *Bull. civ.* A.P. n° 9, *D.* 2006, p. 2825 note G. VINEY; *RLDC*. 2006 n° 32, p. 3 obs. J. MESTRE; *RLDC* 2007, n° 34, p. 5 note Ph. BRUN; *RLDA* 2006, n° 11, p. 70 note Ph. JACQUES; *Resp. civ. et assur.* 2006, étude 17 L. BLOCH; *JCP G* 2006, II 10181 note M. BILLIAU; *adde*. concl. A. GARIAZZO; *JCP G* 2007, I 115 obs. Ph. STOFFEL-MUNCK; *JCP E* 2007, 1000 note F. AUQUE; *RJDA* 2007, n° 1, p. 3 note F. ASSIE; *RTD civ.* 2007, p. 115 obs. J. MESTRE et B. FAGES; *adde*. p. 123, obs. P. JOURDAIN.

43 Cass. com., 6 March 2007, pourvoi n° 04-13.689, to be published in the *Bulletin*.

44 For a shift in the debate on the causality field, see the comment of the First Prosecutor M. GARIAZZO, relating to the decision rendered in plenary session, on 6 October 2006, esp. n° 11-1 and 11-2 (available online on the following link: http://www.courdecassation.fr/jurisprudence_publications_documentation_2/actualite_jurisprudence_21/chambres_mixtes_assemblee_pleniere_22/arrets_travaux_preparatoires_23/assemblee_pleniere_24/avis_9475.html). Similarly, J. and Y. FLOUR, J.-L. AUBERT, E. SAVAUX, *Droit civil, Les obligations, Tome 3. Le rapport d'obligation*, Sirey, 4ème édition, 2006, n° 183.

45 Other authors had offered to distinguish between the nature of the non-performed obligation. See for instance, for a distinction between "strictly contractual obligations" and "failure to a general duty enclosed in the contract but generally due in non-contractual relationships" G. VINEY, *Introduction à la responsabilité*, 2e édition, LGDJ, 1995, n° 215; P. JOURDAIN, obs. in *RTD civ*. 1992, p. 567; *ibid*. 1993, p. 362. For a distinction between "obligations stipulated exclusively for the obligee's benefit" and those that are also "for the benefit of other persons", see S. CARVAL, obs. in *RDC* 2006, p. 1233.

Nevertheless, a coherent solution emerges, under French law, that offers the following alternative:[46] either the aggrieved person is allowed to invoke the contractual non-performance, but it will be necessary reciprocally to allow the obligor to invoke the contract, which must lead to the acknowledgement of the contractual nature of the liability, which would constitute a certain similarity with the German theory *"Vertrag mit Schutzwirkung für Dritte"*[47] (contract with protecting effects on third parties); or, using a strict conception of the principle according to which a contract is only enforceable between parties, it could be decided that the obligor cannot invoke his own contract as against the aggrieved person. However, in that case, the aggrieved party should not be able to establish the opposing party's fault based on the contract. Only a tort resulting from a failure to the general duty of prudence and due diligence should be taken into account. Similarly, the French Reform Proposals propose in its article 1342[48] a means to reconcile seemingly opposing interests. This article provides:

"When the non-performance of a contractual obligation is the direct cause of damage to a third party, the third party can seek remedies against the obligor on the ground of articles 1363 and 1366. He is then subject to all limits and conditions that are imposed on the obligee to be compensated for his own damage.

He can also seek remedies on the ground of non-contractual liability, but he bears the burden of showing evidence of one of the generating factors provided under articles 1352 and 1362".

In parallel, a movement making liability more objective is developing. This tendency, clearly observed in tort matters, is translated in contractual matters by the growth of an objective conception of fault.

2. Objectivization of fault and the guarantee principle

On the one hand, in the assessment of the obligor's failure references are made to objective standards such as the "reasonable duty of care", the *"bon père de famille"* (good pater-

46 G. VINEY, "L'action en responsabilité entre participants d'une chaîne de contrats", in: *Mélanges Dédiés à Dominique Holleaux*, Litec, 1990, p. 399 and following pages; D. MAZEAUD, obs. in *RDC* 2005, p. 687.

47 See BGH, 28 January 1976, BGHZ 66, 51; BGH, 22 January 1968, BGHZ BGHZ 49, 350; the reform of German law of contract in 2002 did not modify the case law, see S. LORENZ, T. RIEHM, *Lehrbuch zum neuen Schuldrecht*, Beck, 2002, No 373. Also see S. LORENZ, "La responsabilité contractuelle dans l'avant-projet: un point de vue allemand", *RDC* 2007/1, p. 57, esp. p. 62; *adde*. B.S. MARKESINIS, H. UNBERATH, A. JOHNSTON, *The German Law of Contract, A Comparative Treatise*, Second edition, Hart Publishing, 2006, p. 204 and following pages.

48 To defend this position, see G. VINEY, aforesaid obs. Under Cass. Ass. Plén., 6 October 2006. *Adde.*, P. ANCEL, "Présentation des solutions de l'avant-projet", *RDC* 2007/1, p. 19, in particular p. 27-29. Also see J. HUET's comments, "Observations sur la distinction entre les responsabilités contractuelle et délictuelle dans l'avant-projet de réforme du droit des obligations", *RDC* 2007/1, p. 31, in particular p. 40-41; and E. SAVAUX's comments, "Brèves observations sur la responsabilité contractuelle dans l'avant-projet de réforme du droit de la responsabilité", *RDC* 2007/1, p. 45, in particular p. 51-55.

familias) or various ethical standards.[49] Generally, the subjective reasons that could explain the obligor's failure are irrelevant.

On the other hand, it is often difficult to distinguish the imputability[50] from the breach of contract. Dutch law offers a particularly patent example. Pursuant to article 6:74 and following articles of the NBW,[51] the non-performance of a contract is not enough to trigger the obligor's liability. However, far from requesting that this non-performance be *wrongful*, the articles solely add an imputability condition *(toerekenbaarheid)*, objectively assessed. Article 6:75 of the NBW explains the meaning to be given to the notion of imputability. This article states that "a failure in performance cannot be imputed to the debtor if it does not result from his fault, and if he cannot be held accountable for it by law, juridical act or common opinion either".[52]

Consequently, not only does fault appear superfluous as the basis for liability, but it also appears, on its own, insufficient to exclude it. From these observations, it emerges that the theoretical notion of *guarantee* seems to allow the basis for such a solution. Indeed, the notion of guarantee carries an automatic aspect which is exclusive of all notion of guilt, in order to compensate the "victims" of the non-performance. The guarantee is thus correlatively linked to the idea of the allocation of risks, since such possibilities imply that the risks tend today to be borne by specific categories of contracting parties more than others, here the seller or provider of services.

This vision of liability is preferred under common law.[53] It also affects certain obligations to achieve a specific result under French law. The guarantee constitutes a technique used by legal systems attached to the moral element of the fault, where a consensus can be found, for instance, on the guarantee regarding the conformity of sold goods. Generally, not only can the seller not be exempted by proving he has done his best, but he cannot invoke the fact that the defect is undetectable.[54]

As a last analysis, the failure has to be imputable to the obligor, meaning that there must be no "*cause étrangère*" (external cause) pursuant to the French terminology, in order for the non-performance to be established. The concept of external cause covers, as a result, both the imputablity and the lack of fault from the obligor when there is an obstacle to the performance, obstacle which could exclude the obligor's liability.[55]

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49 See for instance article 1176 of the Italian Civil Code: "*Nell'adempiere l'obbligazione il debitore deve usare la diligenza del buon padre di famiglia* (Cod. Civ. 703, 1001, 1228, 1587, 1710-2, 1768, 2148, 2167). *Nell'adempimento delle obbligazioni inerenti all'esercizio di un'attività professionale la diligenza deve valutarsi con riguardo alla natura dell'attività esercitata* (Cod. Civ. 1838 e seguente, 2104-1, 2174-2, 2236)".

50 See *infra*, II, A. 2.

51 Art. 6:74 NBW: "*1. Every failure in the performance of an obligation obliges the debtor to repair the damage which the creditor suffers therefrom, unless the failure cannot be imputed to the debtor*".

52 Art. 6:75 NBW: "*A failure in the performance cannot be imputed to the debtor if it does not result from his fault, and if he cannot be held accountable for it by law, juridical act or common opinion either*".

53 Raineri v. Miles, 1981 AC 1050, per Lord EDMUND-DAVIES: *"in relation to a claim for damages for breach of contract it is in general immaterial why the defendant failed to fulfil his obligations and certainly no defense to plead that he has done his best"*.

54 *Frost v Aylesbury Dairy* 1905 1 KB 608; *Kendall v Lillico* 1969 2 AC 31, 84; SGA 1979 section 14 as modified by the *Sale and Supply of Goods Act* 1994.

55 On this issue see *infra*, II. A. 2.

This conception is relevant for both the duties of best efforts and the duties to achieve a specific result; it is therefore transposable to dualist systems, and already known to unitary systems based on guilt. Consequently, D. TALLON suggested a definition of the breach of contract as the "non-performance of an obligation imputable to the obligor".[56] Following the same idea, PECL make use, under article 1:301 (IV) of the idea of non-performance understood as non-compliance with the contract, including or not a defence, and expressly distinguish the notion of non-performance from the breach of contract under common law, which specifically covers a non-performance that does not benefit from any defence.[57]

Since fault is reduced to non-performance, the moral aspect of fault seems artificial, all the more so because it does not reflect the reality of the contract as a social phenomenon.

B. Criticism of the subjective idea of fault

Firstly, the presumption of fault deriving from the non-performance of a contractual obligation often seems artificial **(1)**. Secondly, there seems to be a gap between the subjective conception of the fault and the social reality of the contract **(2)**.

1. The presumption of fault in case of non-performance is artificial

Several systems, while still attached to the principle of guilt, deduct from the mere non-performance a presumption of fault, sometimes stronger than others.

Under Roman law, the non-performance of an obligation to give by reason of the disappearance of the goods generally supposed that the destruction originated in the fault. The distinction between the *culpa* and the *factum* was, hence, blurred.

Under French law, the duty to achieve a specific result implies a "presumption of fault and a presumption of causality".[58] "From the mere fact that the result was not achieved, the obligor's liability is triggered and he bears the burden, to exonerate himself, to prove that the failure was the consequence of a force majeure event and cannot, as a result, be imputable to him".[59] The issue is thus to determine whether, when it comes to duties to achieve a specific result, it is not in fact a strict liability, similar to certain types of non-

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56 D. TALLON, *op.cit*. It must be observed that the French Reform Proposals use as a source of liability the "non-performance" instead of the "fault", as the drafting of article 1363 demonstrates: "The obligee of an obligation under a validly formed contract can, in case of non-performance, request the obligor to be compensated on the ground of the present chapter's provisions". Article 1364 then explains the wording: "Where the obligor undertakes the duty to provide a result, as defined under article 1149, the non-performance is established from the mere non completion of the result, unless the obligor justifies an external impediment under article 1349. In every other case, he solely owes compensation when he did not accomplish all necessary diligence".

57 *Principles of European contract law*, SLC, 2003, art. 1: 301, Comments IV, p. 82-83.

58 Cass. 1ère civ., 8 December 1998, precedent mentioned note 39. See for a similar ruling, Cass. civ. 1re., 20 June 1995, *Sté Cétifa Boutonnet et Fils c/Locatelli*, *JCP E* 1995, IV, n° 905.

contractual liability, such as product liability. The question arises, however, as to the basis for such liability, called strict or objective liability. Are they based on the absence of fault, *sensu lato*, or on an almost irrebuttable presumption of fault?[60]

Under Italian law, the defaulting obligor also bears the burden of proving that he did not commit any wrong (articles 1218 of the Civil code).[61] Under Spanish law, article 1183 of the Civil code also introduces a presumption of fault on the part of an obligor in relation to identified goods.[62] Similarly, in Portugal, article 799(1) of the Civil code enunciates a presumption of fault on the part of the obligor and article 801(1) (*"impossibilidade culposa"*) assimilates the wrongful non-performance to the impossibility to perform when this is due to the obligor. In Sweden, the "*presumtionsansvar*" exists for contracts of carriage on domestic routes ["*lag* (1974:610) *om inrikes vägtransport*", for the liability of sales representatives ["*lag* (1991:351) *om handelsagentur*"], and for the liability of professional depositaries detaining goods belonging to the client. Under Dutch law, pursuant to articles 6:74 and 6:75 of the NBW, the obligor must prove that the damage

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59 J. and Y. FLOUR, J.-L. AUBERT, E. SAVAUX, *Droit civil, Les obligations, Tome 3. Le rapport d'obligation*, 4ème édition, Sirey, 2006, n° 201, p. 148.

60 On this issue, see the thoughts of G. VINEY and P. JOURDAIN, *op.cit.* n° 527-2 and 530. "The real question would rather be whether the liability resulting from the violation of a duty to achieve a specific result is still a liability based on the fault or if it is not rather a strict liability comparable to those existing under tort law". After recalling the different theories opposing the jurisprudence, the authors conclude that "it should be acknowledged that contractual liability is then very similar to an objective liability within which the defendant can, similarly to the debtor undertaking a duty to achieve a specific result, only exclude his liability by bringing evidence of an external impediment. Besides, it can be observed that, from a practical point of view, there is little interest in continuing to link the fault – which is then quasi-conclusively presumed – to a liability triggered from the mere non completion of the result expected by the obligee (…). Still, from a theoretical point of view, it may be fair to acknowledge the existence of a fault each time there is a violation of a pre-existing obligation. Indeed, the debtor undertook a specific promise and his fault results from the mere fact that he did not keep it. The situation is different from the one encountered in objective non-contractual liabilities where the defendant is liable independently from any previous obligation".

61 Art. 1218. *Responsabilità del debitore "Il debitore che non esegue esattamente (1307, 1453) la prestazione dovuta è tenuto al risarcimento del danno (2740), se non prova (1673, 1681, 1693, 1784, 1787, 1805-2, 1821) che l'inadempimento o il ritardo è stato determinato da impossibilità della prestazione derivante da causa a luinon imputabile* (1256; att. 160)". See on this issue B. GARDELLA TEDESCHI's comments in: *Principles of European Contract Law and Italian Law, A Commentary*, L. ANTONIOLLI, A. VENEZIANO (eds.), Kluwer Law International, 2005, p. 384 which specifies that the phrase "*causa a lui non imputabile*" was introduced in the Italian Civil code in 1942 and is interpreted by the jurisprudence as referring to an event which occurrence completely exceeds the debtor's control sphere and that he will not be able to avoid. Besides, there must be a causality between the said event and the real impossibility to perform the obligation.

62 Art. 1183 "*Siempre que la cosa se hubiese perdido en poder del deudor, se presumirá que la pérdida ocurrió por su culpa y no por caso fortuito, salvo prueba en contrario, y sin perjuicio de lo dispuesto en el artículo1.096*".

cannot be ascribed to him. Similarly, under German law, according to § 280 paragraph 1 of the BGB, the "violation of an obligation" leads to the presumption of a fault on the part of the obligor, which is necessary as a basis for his liability.

The question of the strength of the obligation to pay a sum of money or to deliver consumable goods explains the presumption of fault. Common law and continental law consider that by contracting, the obligor guarantees that he will be able to deliver the promised goods. In most cases, liability is strict: the obligor is presumed liable from the mere non-performance and he cannot exclude his liability, even by bringing evidence of a lack of fault on his part. This is the case in particular in Italy, Sweden and England.

On the contrary, under German law, the presumption of fault is less artificial, since the German equivalent of the notion of imputability, the *"Vertretenmüssen"*, includes, in principle, a real element of fault in its subjective meaning. If, consistently with § 280 paragraph 1 of the BGB, the non-performance of an obligation leads to the presumption of imputability (*"Vertretenmüssen"*), the obligor can overcome this presumption by establishing that he "is not accountable for the violation of the obligation". § 276, paragraph 1 of the BGB however, states that the "the obligor must be accountable for any intentional act or negligence […]".[63] The obligor can, as a result, exclude his contractual liability by proving that non-performance is neither the result of negligence, nor the result of fraud on his part. Yet, if no obligation of due diligence is due by the debtor, he cannot be accountable for the non-performance. Such is the case, for instance, of a simple seller whose product is defective: not undertaking any obligation to examine the product, he is not responsible for the damage it may cause to the buyer,[64] despite the fact that there is obviously a case of defective performance.

Often artificial, the attachment to the subjective conception of fault could be, in addition, inadequate.

2. The unsuitability of the moral fault in relation to a certain reality of the contract

From American texts and the "implied term" technique, it emerges that in common law systems, fault is absent from contractual liability. Fault is incorporated into the very idea of non-performance.[65] Under common law, "the obligation to comply with a contract […] implies a prediction that damages will be payable if the terms are not complied with – and nothing else".[66] The payment of damages is never impossible.

The report submitted to the European commission by the Professor VON BAR working group highlights the same concerns with regard to the notion of wrongful non-performance in Italy. Indeed, the study group seemed worried about the role given to fault

63 Parties to contract can modify that standard of liability, especially by stipulating contractual guarantees. Furthermore, an implied guarantee is admitted when the debtor undertakes the "supplying risk", in particular under contracts regarding consumable goods.

64 See the rationale of the 29 November 2001 Act, BT-Drs. 14/6040, p. 210.

65 Restatement 2d Contracts, § 235(2): "*when performance of a duty under a contract is due any non-performance is a breach*". Similarly, B. NICHOLAS, *op.cit*. p. 345.

66 W. HOLMES, "The Path of the Law", 10 *Harvard Law Rev* 457 (1897), in particular p. 462.

under Italian regulations on contractual liability, when the basis for liability lies in the non-compliance with the promised obligation. The focus should be directed more towards the exceptions to these rules.[67]

K. ZWEIGERT and H. KÖTZ support the theory of the fault and contractual non-performance being treated the same in the name of legal certainty and the necessary effectiveness of international transactions.[68] Besides, a few international texts have adopted a similar approach, in particular in the CISG (article 30) and in the UNIDROIT Principles (article 7.1). According to B. NICHOLAS,[69] this convergence of solutions can be explained by the underlying criteria of the allocation of risks in the contract, which is more easily reflected in causes for exemption.

II. The Moral Fault in the Exemption from Contractual Liability

Whereas fault plays a role in establishing contractual liability, its other role is as an exemption cause. In this regard, although M. FAURE ABBAD is right to suggest that "rather than analysing the external impediment as an exemption cause, it would be more accurate to see in it the cause of a failure distinct from non-performance … if an obligor is prevented from performing, there is no non-performance *stricto sensu*",[70] the concept of fault nevertheless entertains, in many legal systems, ambiguous relations with the notions of imputability or impossibility. This ambiguity is very likely linked to the difficulty in determining the scope of the notion of fault and to define the role that it is expected to play in contractual matters.

Yet, the study of national laws leads to the observation that fault and imputability are confused, in such a way that it is impossible to determine whether one is exclusive from the other or if they are inextricably linked. In practice, it seems that fault is presumed from the imputable nature of the contentious event, which will automatically exclude the external impediment.

The determination of fault, or more precisely of the absence of fault on the part of the obligor does not seem to be, nowadays, a relevant parameter used to establish a case of exemption from liability **(A).** However, the obligee's fault can play a role in the assessment of the obligor's liability **(B).**

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67 *Study on Property Law and Non-contractual liability law as they relate to contract law*, SANCO B5-1000/02/000574; p. 80: "*However on the other hand, there are objections that the idea that fault is also the basis for liability in contract law, is not consistent with the category of obligations. The latter implies in itself liability for non performance. In the law of obligations it is not therefore about the grounds for liability (they are found in the contractual promise itself), but about the exceptions to it*".

68 K. ZWEIGERT, H. KÖTZ, *An introduction to comparative law*, OUP 1998, p. 513: "*the common law approach must be preferred: in the modern world exchange transactions are very largely standardised and they must be quickly and painlessly executed: it is truer to the reality of 'contract' as a social phenomenon if we normally treat the parties not as simply promising to do their best to produce the envisaged result but as actually guaranteeing it. It is also the better legal policy*".

69 *Op.cit.*, note 30.

70 M. FAURE ABBAD, *Le fait générateur de la responsabilité contractuelle*, Préf. Ph. Remy, LGDJ, 2003, p. 135.

A. The lack of fault from the obligor, an increasingly immaterial parameter with regard to exemption

In principle, the obligor's liability is triggered as soon as the contractual non-performance is established. However, under certain circumstances, the obligor is exonerated from his liability in particular and in a quasi-unanimous way, when an external cause, *lato sensu*, is established and when it makes the performance of the contract impossible. Although it is possible to isolate the different cases of exoneration **(1),** it remains, mostly in countries of civil law tradition, that a difficulty arises out of the distinction between fault, imputability and impossibility to perform the promised obligation **(2).** A shift seemed to have occurred so that nowadays it is the imputability of the non-performance that appears to be the cornerstone for the sanctions or the remedies for non-performance.

1. The expressions of the impossibility to perform a contract

The terminology fluctuates with regard to exoneration causes. Sometimes reference is made to "frustration", "impossibility", or "force majeure", "external cause" or "fortuitous event". In the end, the common idea to all those terms – and to all legal systems – is the impossibility for the obligor to perform his obligations due to an event that is unforseeable at the time of conclusion of the contract, overwhelming during its enforcement and not imputable to the obligor. If a common spirit seems to emerge regarding the circumstances to be taken into account, all national legal systems appear to provide for a different regime **(a).**

In addition, an issue intimately linked to the previous subject is that of the distinction which is made in relation to the notion of "*imprévision*", which also benefits from a specific regime **(b).**

a) Establishing "impossibility"

Under French law, there are different cases of exoneration from liability. Article 1147 states: "an obligor shall be ordered to pay damages, if there is occasion, either by reason of the non-performance of the obligation, or by reason of delay in performing, whenever he does not prove that the non-performance comes from an external cause which may not be ascribed to him, although there is no bad faith on his part". This last phrase is echoed in the article that follows which states that: "There is no occasion for any damages where, by reason of force majeure or of a fortuitous event, a debtor was prevented from giving or from doing what he was bound to, or did what he was forbidden to".

It is important, first of all, to clarify the meaning to be given and the distinction to be made between "external cause", "force majeure" and "fortuitous event".[71] Until the

[71] Among the numerous studies, see in particular G. VINEY, P. JOURDAIN, *Les conditions de la responsabilité, Traité de droit civil*, LGDJ, 2006, n° 383 and following paragraphs; *adde*. F. CHABAS, F. GREAU, Encyclopédie Dalloz, V° Force majeure, version 2007 (to be published); P.-H. ANTONNMATEI, *Contribution à l'étude de la* force majeure, préf. B.Teyssié, LGDJ, 1992; Ch. RADE, "La force majeure", in: *Les concepts contractuels français à l'heure des Principes du droit*

Jand'heur case,[72] the French Cour de Cassation seemed to confuse external cause and force majeure.[73] However since that case, a clear distinction is made between "force majeure and fortuitous event"[74] on the one hand, and "external cause", not imputable to the aggrieved party, on the other. Today, the trend is to consider that force majeure (and fortuitous event), along with acts of the aggrieved party and acts by a third party, are elements which make up external cause.[75]

Force majeure is traditionally qualified by the presence of three criteria: unpredictability, irresistability, and exteriority. Although it seemed for a brief period that the Cour de cassation no longer required a force majeure event to be irresistible,[76] it seems that, nowadays, the judges have returned to a more academic position and request that the three criteria be met.[77]

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européen des contrats, D. FENOUILLET, P. REMY-CORLAY (sous la direction de), Dalloz, 2003, p. 201.

72 Cass. ch. Réunies 13 February 1930, *DP* 1930, 1. 57, note RIPERT, *S.* 1930, 1. 121, note ESMEIN.

73 Among others, see Cass. civ. 2e, 6 December 1962, *Bull. civ.* II, n° 783; Cass. civ. 2e, December 11th 1964, *Bull. civ.* II, n° 811.

74 The terms "force majeure" and "fortuitous event", although once distinguished, are now considered as synonyms.

75 F. CHABAS, F. GREAU, *op.cit.* n° 2. However, there are still confusions in case law, so that it seems difficult to isolate conceptually the notions of "force majeure" and "external impediment". It is obvious in several Cour de Cassation cases, ruled in plenary session, regarding parents' liability deriving from their children's fault, where the term "force majeure" was used in one, and "external impediment" in the other (Cass. ass. plen., 13 December 2002, n° 01-14007, *Bull. civ.* A.P. n° 4, p. 7; n° 00-13787, *Bull. civ.* A.P. n° 4, p. 7). The Supreme court then decided to render a amending ruling, replacing the phrase "external impediment" with "force majeure" (Cass. ass. plen., 17 January 2003, n° 00-13787, not published). Another confusion can be detected in the Cour de Cassation case law. Indeed, if the third party's act or omission, or the aggrieved party's act or omission are exonerating causes that are part of the external impediment category, seemingly similarly to the force majeure, it appears that the judges seem to subordinate them, in order to grant them the effect of a total exoneration, to the merger of the "force majeure" criteria (see for instance, Cass. civ. 2e., 29 March 2001, n° 99-10735, *Bull. civ.* II, n° 68, p. 45). *adde.* The terminological difficulties linked to the use of locutions such as "exclusive cause" and "unique cause of damage" (see in general, the comments from F. CHABAS, F. GREAU, *op.cit.* n° 4).

76 For instance, see Cass. com., 1 October 1997, *Bull. civ.* IV, n° 240.

77 Cass. ass. plén., 14 April 2006, *Bull. civ.*, n° 5 et 6, *D.* 2006. 1577, note P. JOURDAIN, *D.* 2006, somm. 933, obs. Ph. BRUN, *D.* 2006, somm. 2638, obs. B. FAUVARQUE-COSSON, *JCP* G 2006, II, 10087, note P. GROSSER, *JCP* G 2006, I, 166, obs. Ph. STOFFEL-MUNCK, *RTD civ.* 2006. 775, obs. P. JOURDAIN, *Dr. Et patrimoine*, October 2006, p. 99, obs. Ph. STOFFEL-MUNCK, *Defrénois* 2006.1212, obs. E. SAVAUX, *RDC*, 2006, n° 4, p. 1207, obs. G. VINEY, *Gaz. Pal.* 9-11 July 2006, concl. R. DE GOUTTES, *Petites affiches*, 6 July 2006, n° 134, p. 14, note Y. LEMAGUERESSE, *Contr. conc. consom.* 2006, comm. 152, note L. LEVENEUR. *Adde*: M. MEKKI, "La définition de la force majeure ou la magie du clair-obscur", *RLDC* 2006, n° 29, p. 17, L. BLOCH, "Force majeure: le calme après l'ouragan", *Resp. civ. et assur.*, 2006, chr. n° 8,

Unpredictability is relative, meaning that it depends on the circumstances surrounding the contentious event. An event is unforeseeable, as long as there was no particular reason to believe that this event would occur, such as an earthquake in an area that is not subject to earthquakes. Unpredictability is assessed at the time of conclusion of the contract rather than on the day the event occurs.

Irresistability supposes that the event creates an impossibility of performance. It is insuperable. As a result, a mere difficulty, important though it may be, would not be enough. It does not matter, for instance, that the performance is onerous for the obligor; even if the obligor was not able to foresee the importance of this burden, he must perform it. Besides, if the conditions specified for the performance of the obligation become impossible, "there will be force majeure so long as there are no other means to perform. The force majeure therefore supposes an obstacle that cannot be overcome by any means when it occurs or an obstacle that could not be avoided in advance".[78] It is generally admitted that when the Cour de Cassation assesses the irresistible nature of the contentious event, it performs a control *in abstracto*, using as a standard of reference an ordinary, normally diligent person, placed in the same external circumstances as the agent.[79]

Exteriority is the criterion the relevance of which is disputed in contractual matters mainly because it gets confused with the notion of imputability, or more precisely of non-imputability of the damage to the obligor.[80] Two authors have nonetheless suggested an interpretation allowing to understand the role of exteriority in the qualification as force majeure: "the answers brought by case law show that when it is assessed with regard to the contracting party, exteriority is actually confused with the absence of imputability of the damage to the obligor. However, when it comes to assessing exteriority with regard to the goods which are the subject-matter of the contract or which are used for its performance, a much more rigorous approach is used, similar to the one found in tort, the obligor being treated as guaranteeing the damages caused by the goods, so that this cause of damage is not treated differently depending on whether the claim is in contract or in tort".[81] Consequently, when the obligor invokes his disease to be exonerated from liability, aside from its unpredictable and irresistible nature, he will have to prove that this disease is not imputable to him. Such an approach actually seems to be confirmed by the litigation regarding imprisonment. Indeed, the French Cour de cassation ruled several times, in matters regarding labor law as well as matters regarding leases, that "the force majeure lies in an unforeseeable event, external from the person himself", implying that a lessee, "who owes rent, cannot invoke his imprisonment as a cause of force majeure capable of preventing termination". The central idea of this reasoning seems to be that the imprisonment is the consequence of the debtor's behaviour. The event – the imprisonment – is imputable to the debtor. As such, the force majeure cannot be invoked.

D. NOGUERO, "La maladie du débiteur", *D.* 2006, chr.1566. *Adde*. Cass. civ. 2e., 13 July 2006, n° 05-17199.

78 F. CHABAS, F. GREAU, *op.cit*. n° 41. See in particular, Cass. civ. 1re., 12 July 2001, n° 99-18231, *Bull. civ.* I, n° 216, p. 136.

79 F. CHABAS, F. GREAU, *op.cit*. n° 51 and following paragraphs.

80 See, to confirm this view, F. CHABAS, F. GREAU, *op.cit*. n° 67.

81 F. CHABAS, F. GREAU, *op.cit*. n° 68.

Force majeure, once established, results in discharging the obligor from his obligation to perform and to compensate for the damage arising out of the non-performance. "However in bilateral contracts, there is another effect, in relation to the contracting party, this time. He is discharged of his own obligation".[82]

Under German law, the consequences of impossibility are treated differently: if the impossibility exonerates the debtor of his obligation to perform a service in kind (§ 275 al. 1 of the BGB), it does not exclude the debtor's liability completely. Indeed, if the performance was already impossible when the contract was formed, the obligor is liable for the non-performance, unless he proves that he did not or could not know of the impossibility (§ 311a al. 2 of the BGB). In this case, German law expressly excludes the obligor's fault[83] and holds him liable on the ground of the obligor's guarantee regarding his capacity to perform at the moment the contract was formed,[84] similarly to the solution adopted under common law.[85] If the impossibility arose after the formation of the contract, the non-performance leads, consistently with the general principle of § 280 of the BGB, to the presumption of the obligor's fault (§ 283 of the BGB); however this fault is not assessed with regard to the non-performance itself but with regard to the cause of impossibility.[86]

Common law[87] does not recognize the Roman principle of *impossibilium nulla obligatio*. Unless otherwise provided in the contract or if the contract is interpreted differently, the contract must be strictly interpreted. That which was intended by the parties is legally binding between them, even though this may imply apparently inequitable consequences for one of them. Such a position seems to emerge from the *Paradine v. Jane* case, the lessor was able to require the payment of the rent while the rented house had in fact been occupied by royal troops: "when a party by his own contract creates a duty or a charge upon himself, he is bound to make it good, notwithstanding any accident by inevitable necessity because he might have provided against it by his contract".[88] The parties should

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82 F. CHABAS, F. GREAU, *op.cit.* n° 117.

83 § 280, al. 3 of the BGB, which contains the list of the special provisions on liability for "*Pflichtverletzung*" (violation of an obligation/contractual fault), does not mention § 311a, al. 2 of the BGB.

84 See the rationale of the 29 November 2001 Act, *BT-Drs.* 14/6040, p. 165 by reading C.-W. CANARIS, *JZ*, 2001, p. 506.

85 Guarantee re all necessary skills to perform the task: *Harmer v Cornelius*, [1858] 141 *ER* 94, *per* Willes J: "*when a skilled laborer or artisan is employed, there is on his part an implied warranty that he is of skill reasonably competent to the task he undertakes*".

86 See S. LORENZ, T. RIEHM, *op.cit.*, no 344 and following paragraphs.

87 On this issue, see in particular, H. COLLINS, *The Law of Contract*, 4th edition, LexisNexis, 2003, p. 298-29; E. McKENDRICK, *Contract Law, Text, Cases and Materials*, Second edition, OUP, 2005, p. 867 and following pages.; J. BEATSON, *Anson's Law of Contract*, 28th edition, OUP, p. 560 and following; R. GOODE, *Commercial Law*, Third edition, Penguin Books, 2004, pp. 135, 242, 260; O. MORETEAU, *Droit anglais des affaires*, Dalloz, 1re edition, 2000, n° 637; *adde*. K. ZWEIGERT, H. KÖTZ, *An Introduction to Comparative Law*, Third Edition, 1998, p. 516 and following pages.

88 Paradine v. Jane [1647] Aleyn 26. "*when a party by his own contract creates a duty or a charge upon himself, he is bound to make it good, … notwithstanding any accident by inevitable necessity because he might have provided against it by his contract*". Similarly, one could read in the Taylor v. Caldwell

have foreseen the event and the consequences that they wished to attach to it. English courts here reason in terms of management and allocation of risks, coupled with a strict interpretation of the theory on the autonomy of the parties' intent. Nevertheless, it is traditionally taught that the initial impossibility can only result in nullity based on a substantial mistake, while a later impossibility could provide grounds for termination of the contract based on the "frustration of contract" theory.[89]

This theory, untranslatable for some,[90] initially only applied in maritime law,[91] and was then extended to all cases where the occurrence of an uncontrollable event, independent from the parties' intent, ended the contract by making its performance impossible.[92] Having reviewed the different examples of the" frustration" concept and the ideological bases for this theory,[93] it appears necessary to understand the legal reasoning used to justify the decisions.

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case, [1863] 3 B.&S. 826, *per* Blackburn J., p. 833, that: *"where there is a positive contract to do a thing, not in itself unlawful, the contractor must perform it or pay damages for not doing it, although in consequence of unforeseen accidents, the performance of his contract has become unexpectedly burdensome or even impossible"*.

89 See for instance J. BEATSON, *op.cit.*, pp. 530 and 313.

90 O. MORETEAU, *Droit anglais des affaires*, 1re édition, Dalloz, 2000, n° 637.

91 In this case, it was referred to *"frustration of the adventure"*.

92 *F.A. Tamplin Steamship Co. Ltd. v. Anglo-Mexican Petroleum Products Ltd.* [1916] *2 A.C.* 397, *per* Lord Loreburn, p. 404: *"When this question arises in regard to commercial contracts, the principle is the same, and the language as to 'frustration of the adventure' merely adapts it to the case at hand"*. Adde. Joseph Constantine Steamship Line Ltd. V. Imperial Smelting corporation Ltd. [1942] A.C. 154, *per* Viscount Maugham, p. 168: *"The doctrine of frustration is only a special case of discharge of contract by an impossibility of performance arising after the contract was made"*.

93 *J. Lauritzen A.S. v. Wijsmuller B.V. (The Super Servant Two)* [1990] 1 *Lloyd's Rep.* 1, *per* Bingham L.J., p. 8: *"The doctrine of frustration was evolved to mitigate the rigour of the common law's insistence on literal performance of absolute promises. (…) The object of the doctrine was to give effect to the demands of justice, to achieve a just and reasonable result, to do what is reasonable and fair, as an expedient to escape from injustice where such would result from enforcement of a contract in its literal terms after a significant change in circumstances (…)"*. However, it appears that the "frustration" theory plays in practice a limited role, in fact, for different reasons. First, this theory only has vocation to play an auxiliary role, when the parties do not have explicitly provided a force majeure or hardship clause. Further, when the said event was foreseeable, the "frustration" theory is not supposed to apply. Besides, "frustration" does not apply when the contentious event was caused by the behaviour of the parties who invokes it. More, the consequences attached to the "frustration" theory – the automatic termination of the contract, independently from the parties' intent – are so drastic that it is used with parsimony by judges. At last, judges wished to avoid that this mechanism constitute a means to end a contract that could have become uninteresting and thus block the binding force of the contract. See for instance, *Pioneer Shipping Ltd v. BTP Tioxide (The Nema)* [1982] AC 724, *per* Lord Roskill, p. 752: *"The doctrine of frustration is not lightly to be invoked to relieve contracting parties of the normal consequences of imprudent bargains"*; *adde.* similarly, *J. Lauritzen A.S. v. Wijsmuller B.V. (The Super Servant Two), op.cit., per* Bingham L.J., p. 8 and following pages: *"Since the effect of frustration is to kill the contract and discharge the parties from further liability under it, the doctrine is not to be lightly invoked must be kept within narrow limits and ought not to be extended (…)"*. For a thorough analysis

Lord Hailsham of St Marylebone LC[94] identifies at least five possible grounds for the "frustration of contract" theory: the "implied terms" or "implied conditions" theory,[95] the "just and reasonable result" theory,[96] the "foundation of contract" theory,[97] the "radical change in the obligation" theory and lastly, the "total failure of consideration" theory. However, it now seems that the test to be applied will be that of the "radical change in the obligation". The theory was developed in the *Davies Contractors Ltd v. Fareham U.D.C* case[98] and suggests a test necessarily difficult to pass in order to guarantee that exoneration from obligations under the contract only occur exceptionally and rationally. The idea is that once the test is properly applied, it is difficult for the court in charge of the appeal to overturn the decision. The test is meant to apply only in the case where no contractual provision is laid down by the parties (i.e. force majeure clause). Then, the judges will have to compare the new situation (the one which has occurred following the contentious event) to the one the parties had envisaged when entering the contract. The judges will thus weigh the difference between the rights and obligations of each party after the occurrence of the event compared to those they should have had, had the event

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see in particular, G.H. TREITEL, *Frustration and* Force majeure, 2nd edition, 2004, Sweet and Maxwell; E. McKENDRICK (ed.), Force majeure *and Frustration of Contract*, 2nd edition, 1995.

94 *National Carriers Ltd v. Panalpina (Northern) Ltd*, [1981] AC 675.

95 The "implied term" or "implied condition" theory is clearly developed by Lord Loreburn, in the *F.A. Tamplin Steamship Co. Ltd. v. Anglo-Mexican Petroleum Products Co. Ltd* case ([1916] 2 A.C. 397, esp. p. 403: *"Court can and ought to examine the contract and the circumstances in which it was made, not of course to vary, but only to explain it, in order to see whether or not from the nature of it parties must have made their bargain on the footing that a particular thing or state of things would continue to exist. And if they must have done so, then a term to that effect will be implied, though it be not expressed in the contract … In most of the cases, it is said that there was an implied condition in the contract which operated to release the parties from performing it, and in all of them I think that was at bottom the principle upon which the Court proceeded. It is in my opinion the true principle, for no Court has an absolving power, but it can infer from the nature of the contract and the surrounding circumstances that a condition which was not expressed was a foundation on which the parties contracted (…)*". It is nonetheless considered as having been introduced by *the Taylor v. Caldwell* case ([1863] 122 ER 309). This theory was highly criticized mainly because of its very artificial basis. See more generally, J. BEATSON, *op.cit.*, p. 542.

96 The theory – more accurately, the justification of the theory – is based on the idea to counterbalance the strict theory of the "absolute contract" and to manage, by discharging the debtor from his contractual obligations, to re-institute more justice in law (or at least in the contract), by reaching a just and reasonable result. See *Joseph Constantine Steamship Line Ltd. v. Imperial Shipping Corporation Ltd.* [1942] A.C. 154.

97 It is a rather indefinite theory according to which the contentious event would deprive the contract of its determination. This theory, because of its indefiniteness, has only known few applications in practice and has expressly been rejected by the House of Lords in the *F.A. Tamplin Steamship Co. Ltd v. Anglo-Mexican Petroleum Products Co. Ltd* case [1916] 2 A.C. 397, in particular p. 406.

98 [1956] A.C. 696. Lord Radcliffe, p. 729: *"Frustration occurs whenever the law recognizes that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. (…) It was not this that I promised to do"*.

not occurred. At last, in order for the "frustration" to be established, the contentious event must radically modify the rights and obligations of the contracting parties.

There are various cases of "frustration": "frustration by impossibility" (when the contract becomes impossible to perform because the employee has died or because the object of the contract has become unavailable), "frustration by illegality" (when the contract, valid at the time it is formed, becomes illegal due to the entry into force of a new law) or "frustration of purpose". This last hypothesis is the most problematic since it was viewed as the one allowing a party to be discharged of a contract that has become less attractive, particularly from an economical perspective. As such, cases of "frustration of purpose" are restrictively interpreted, and in a rather confused manner.[99]

Lastly, the excuse of "frustration" cannot be accepted if it was provoked by the obligor. This is the "self-induced frustration" theory.[100] In short, if the contentious event is imputable to the party who wishes to invoke it, then the said event cannot constitute a case of "frustration". However, imputability is only one step away from fault, as evidenced by the central case on the issue, *J Lauritzen AS v. Wijsmuller BV ("the Super Servant II")*.[101]

The notion of impossibility considered, under English law,[102] as an "excuse" (that is to say the absence of non-performance) is therefore not entirely foreign to common law systems. From a practical perspective, both parties are allowed to invoke "frustration" and the contract is completely annihilated for the future. English judges once took the view that there could be no restitution of sums already paid.[103] The severity of this rule was however strongly criticized, and the rule was first changed by case law[104] then by the legislator.[105]

Because impossibility, once established, discharges the obligor from his obligation to perform or excuses him for his non-performance, it seems necessary to distinguish it from the *"imprévision"* theory which, though similar in its requirements, is very specific with regard to its regime; and in this instance does not constitute a cause excluding liability.

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99 See the tricky articulation between the *Krell v. Henry* case, [1903] 2 *KB* 740 and the *Hern Bay Steam Boat Company v. Hutton* case, [1903] 2 *KB* 683. About this issue, see G.H. TREITEL, *Frustration and* Force majeure, Sweet and Maxwell, 2nd edition, 2004, paragraphs 7-014.

100 See in particular *Chitty on Contracts*, 29th edition, Sweet and Maxwell, 2004, paragraphs 23-059.

101 [1990] 1 *Lloyd's Rep* 1. See II.A.2.

102 Under US law, impossibility is also considered as an "excuse", that is as a non-performance which, by assumption, does not derive from the obligor's fault. *Uniform Commercial Code*, § 2-615; *Restatement* 2d § 266. Besides, US law distinguishes three cases depending on whether the change in the circumstances makes the performance impossible ("impossibility"), much more difficult ("impracticability") or trivial and uninteresting ("frustration"). On this issue see K. ZWEIGERT, H. KÖTZ, *op.cit.*, p. 531.

103 *Chandler v. Webster* [1904] 1 *K.B.* 493.

104 *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd.* [1943] A.C. 32. The claim was not ground on the contract but rather on the "restitution" concept, since it solely existed in embryonic stages at the time of the *Chandler v. Webster* case.

105 Law Reform Frustrated Contracts Act 1943 s. 1(2).

b) The difficulties in distinguishing between impossibility and "imprévision"

The modification of the contract for "*imprévision*" differs from the exoneration from liability due to force majeure, *lato sensu*, as it implies in certain cases the modification of the contract by the judge and in other cases the obligation to renegotiate the contract, whereas the force majeure necessarily implies the discharge of the party invoking it from the performance of his obligations and, as the case may be, the termination of the contract.

Nevertheless, if the differences between "*imprévision*" and force majeure regarding their effects are rather clear, it seems that difficulties can emerge when it comes to the circumstances defining one and the other. Indeed, although numerous legal systems make a distinction between cases where the performance of the contract, due to the occurrence of an event which was unforeseeable at the time the contract was entered into, is made impossible (force majeure *lato sensu*) and those where it is made very difficult or unnecessary *(imprévision)*, it appears that this distinction is not that obvious.

A topical example could be found under Dutch law where the distinction between force majeure and "*imprévision*" seems to be tenuous, at least with regard to the scope of each concept. Indeed, article 6:258 BW provides in its first paragraph that "upon the request of one of the parties, the judge can modify the effects of the contract, or he can set it aside in whole or in part on the basis of the occurrence of unforeseeable circumstances that are of such nature, that the contracting parties, with regard to criteria of equity and reasonableness, cannot expect that the contract be maintained as such (…)". The phrase "unforeseeable circumstances that are of such nature, that the contracting parties, with regard to equity and reasonableness criteria, can expect that the contract be maintained as such (…)" is very vague and comments relating to this article[106] do not help much in the understanding of the wording, except in making it clear that the cases covered are very restrictive and are similar to the wording of the PECL which envisage the situation where the performance of the contract "becomes excessively onerous for one of the parties due to a change in circumstances". However, although the wording under Dutch law appears rather vague, it is not just this article which causes a problem but also how it should be distinguished from articles 6:74 BW, 6:75 BW and related case law. Indeed, the combined reading of articles 6:74 (1) BW, 6:75 (3) BW reveals that the impossibility to perform[107] exonerates the obligor if this impossibility is not due to his fault,[108] but upon the condition that he does not bear the burden of the risk. This last requirement is assessed depending on the law, the juridical act and the common opinion.[109] Dutch

106 D. BUSCH, in: *The Principles of European Contract Law and Dutch Law, A Commentary*, D. BUSCH, E. HONDIUS, H. VAN KOOTEN, H. SCHELHAAS, W. SCHRAMA, Kluwer Law International, 2002, p. 288 and following pages.

107 Dutch law here refers to the notion of "*niet toerekenbare tekortkoming*", that is to the "force majeure".

108 Here, the fault seems to be envisioned negatively. Will not be at fault the debtor who, acting in *bonus pater familias*, failed to his contractual obligations due to an event that he could not reasonably foresee and whose consequences he could not foresee. V. J.M. SMITS, *op.cit.* p. 342.

109 On this issue, see the comments of J.M. SMITS, in: *The Principles of European Contract Law and DutchLaw, A Commentary*, D. BUSCH, E. HONDIUS, H. VAN KOOTEN, H. SCHELHAAS, W. SCHRAMA, KluwerLaw International, 2002, p. 341 and following pages, that specify the

authors agree that this article (6:75 BW) covers cases of exoneration of liability for force majeure. However, within their conception of force majeure is included both total impossibility but also relative impossibility, that is to say that the performance is theoretically possible but that it cannot be reasonably expected from the obligor.[110] Yet, the distinction between this "relative impossibility" and the "unforeseeable circumstances that are of such nature, that the contracting parties, with regard to criteria of equity and reasonableness, can expect that the contract should not be maintained as such" appears difficult to make.

Italian law also seems to be concerned by this issue since, although force majeure and "*imprévision*" are clearly distinguished in the *Codice Civile* of 1942 – a specific chapter called *risoluzione per eccessiva onerosità* is actually dedicated to the latter –, the academic debates around the notion of impossibility somehow create confusion. Indeed, "*imprévision*" arises, according to article 1467 of the C.c., when "an extraordinary and unforeseeable event makes the performance of the contract by one the parties excessively onerous". Yet, if articles 1218 and 1256 use the term "impossibility" to exclude the obligor's liability and also to end the contract, Italian authors disagree with regard to the meaning to be given to this notion of impossibility. Indeed, most authors use an objective test: the impossibility is established if another person, placed under the same circumstances is unable to perform the contract. Conversely, other authors consider the threshold of the notion of impossibility to be lower. Indeed, an obligation that requires more than ordinary diligence to be performed must be considered as being impossible. This theory is based on the good faith and loyal behaviour principles, so that efforts that exceed those that are normally due for the performance of the type of contract cannot be imposed on the contracting party.

Under German law, the "disturbance of the basis for the contract" theory *(Störung der Geschäftsgrundlage)* established under paragraph 313 of the BGB, is close to this analysis. However, German law distinguishes very clearly this theory from impossibility as defined under paragraph 275 of the BGB: impossibility, in its objective meaning (§ 275, first paragraph of the BGB), where the performance is technically impossible (i.e. the object of the contract does not exist anymore) and practical impossibility (§ 275, second paragraph of the BGB), where the performance in kind would infer costs totally disproportionate in comparison with the obligee's interests, both exclude performance in kind and can lead to contractual liability and to the avoidance of the contract. However, the disappearance of the basis for the contract as per paragraph 313 of the BGB mainly concerns cases of serious and unforeseeable interference with the contractual balance,[111] the subsequent use by the creditor of the contractual object being perturbed and the

meaning of the terms. By "law" it is referred to special provisions explicitly provided by the law that hold a person liable in specific cases (i.e. liability due to a third party's act ("*hullppersonen*": art 6: 76 BW) or liability due to the product designed to the performance of the contract ("*hulpzaken*": art. 6: 77 BW). By "legal act", the article aims at the explicit provisions of the contract granting a specific allocation of risks to one of the contracting parties in case of contractual non-performance. Lastly, by "common opinion", it is referred to both the society in general and to a specific group composing it (i.e. International commerce …).

110 V.J.M. SMITS, *op.it.*, p. 343.

111 The articulation of this situation with the practical impossibility of § 275 paragraph 2 of the BGB is not yet determined by German jurisprudence; for a priority of § 275 paragraph 2 of the

common error of both parties on a substantial reason for the contract. As for the effects, the disturbance of the basis for the contract leads firstly to an obligation to adapt the contract, and secondly to a right of unilateral termination.

Under English law, as seen before, the subsequent impossibility ends the contract ("frustration"). It has been argued that the "frustration of purpose" theory[112] and in particular the *Krell v. Henry* case was in fact a situation of "*imprévision*", at least in the conditions required. Nevertheless, this cannot be considered as the acceptance of the "*imprévision*" theory under English law, since the case remains isolated, the doctrine of the "frustration of purpose" is very uncertain and in any event, the judge never modifies the terms of the contract but can only decide its termination.

French law does not recognize the "*imprévision*" theory,[113] however this solution, which is source of inconsistencies at a domestic law level,[114] and which is isolated in comparative law terms,[115] may not necessarily be maintained.[116]

BGB motives of the November 29th 2001 Act, *BT-Drs*. 14/6040, p. 176; S. LORENZ, T. RIEHM, *op.cit.*, no. 408.

112 E. McKENDRICK, *Contract Law, Text, Cases and Materials*, Second edition, OP, 2005, p. 895; Y.-M. LAITHIER, *Etude comparative des sanctions de l'inexécution du contrat*, Préf. H. Muir-Watt, LGDJ, 2004, n° 248.

113 Cass. civ. 6 March 1876, *Canal de Crapone*, *DP*. 1876. 1. p. 193, note GIBOULOT; *S*. 1876. 1. 161; *adde*. H. CAPITANT, F. TERRÉ, Y. LEQUETTE, *Les grands arrêts de la jurisprudence civile*, t. 2, Dalloz, 2000, n° 163, p. 123. On the revision for unpredictability theory, see recently: B. FAUVARQUE-COSSON, "Le changement de circonstances", *RDC* 2004/1, p. 67; Cl. WITZ, "Force obligatoire et durée du contrat", in: *Les concepts contractuels français à l'heure des Principes du droit européen des contrats*, Dalloz, 2003, p. 175; D. TALLON, "La révision du contrat pour imprévision au regard des enseignements récents du droit comparé", in: *Droit et vie des affaires, Etudes à la mémoire d'Alain Sayag*, Litec, 1997, p. 403; Ph. STOFFEL-MUNCK, *Regard sur la théorie de l'imprévision: vers une souplesse contractuelle en droit privé français contemporain*, Pref. R. Bout, Avant-propos A. Sériaux, PUAM, 1994; Ch. JAMIN, "Révision et intangibilité du contrat ou la double philosophie de l'article 1134 du Code civil", in: Que reste-t-il de l'intangibilité du contrat?, *Dr. et patrimoine*, 1998, p. 46; Cl. MENARD, "Imprévision et contrats de longue durée: un économiste à l'écoute du juriste", in: *Le contrat au début du XXème siècle, Etudes offertes à J.Ghestin*, LGDJ, 2001, p. 661; J. GHESTIN, Ch. JAMIN, M. BILLIAU, *Les effets du contrats*, Traité de droit civil, 3ème édition, LGDJ, 2001, n° 290 and following paragraphs.

114 There is about revision for unpredictability a substantially different approach between civil and administrative courts, since the former admits it (CE 30 March 1916, (CE 30 mars 1916, *Gaz de Bordeaux*, *D*. 1916 3. 25; *S*. 1916.3.17, note HAURIOU), whereas the latter, as we saw, rejects it.

115 D. TALLON, "Hardship", in: *Towards a European Civil Code, Third Fully Revised and Expanded Edition*, Kluwer Law International, 2004, p. 499. The author notes that a majority of states, within European union, opted in favor of a theory of revision of the contract for unpredictability. However, countries such as France, Luxembourg or Belgium are still refractory to it. In a certain way, the United-Kingdom and the United States are generally hostile to a modification of the contract by the judge, while allowing the annihilation of the contract under certain circumstances. See on this issue, the thoughts of H. COLLINS, *The Law of Contract*, Fourth edition, Lexis Nexis, 2003, p. 293 and following pages.

116 The prohibition of the revision for unpredictability was "circumvented" in France through different means. First, with the outbreak, in some contracts, of an obligation to renegotiate,

As seen above, if the notions of force majeure or more generally of impossibility to perform and *"imprévision"* are understood in slightly different ways in various national laws, it remains that difficulties can arise in distinguishing the different notions.

In any event, only the impossibility – and not the *"imprévision"* – justifies that one of the parties should not be held liable in case of non-performance of his initial obligations. Yet, the distinction between fault, impossibility and imputability seems, at the very least, awkward.

2. The difficult distinction between fault, impossibility and imputability

In France, in the absence of a legal definition for force majeure,[117] attempts were made by the judges to establish one. However for a long time, force majeure and absence of fault were confused. One explanation resides in the fact that at the time there was no distinction between the nature of the obligations (to achieve a specific result or of best efforts) so force majeure could appear at the time as a variable concept. Nowadays, it seems established that "force majeure discharges the party who has undertaken a duty to achieve a specific result and who is not exonerated by showing an absence of fault. The concept is used in the field of strict liability".[118] Nevertheless, the relationship between the proof of absence of fault and the force majeure, in particular in the context of fault-based liability seems problematic. Indeed, it is traditionally considered that force majeure implies a presumption that the obligor has committed no fault.[119] However, there is an

based on the good faith principle. The *Huard* case (Cass. Com. 3 November 1992, *Bull. civ.*, n° 338, p. 241), the *Chevassus Marche* case (Cass. Com. 24 November 1998, *Bull. civ.* n° 277, p. 232) and the very controversial *Commune de Cluses* case (Cass. civ. 1re., 16 March 2004, *Bull. civ.* I, n° 86, p. 69) must be remembered. Furthermore, it should be reminded that parties are not defenceless against this prohibition of the revision for unpredictability. They can very well include index-linked clauses or hardship clauses. Finally, it must be noted that the French Reform Proposals provide for two new articles covering parties' judicial actions when no contractual provisions allowing for the renegotiation of the contract in case of a modification in the circumstances have been included. Article 1135-2 states: "For lack of such a clause, the party who loses his interest in the contract can request the President of the *Tribunal de grande instance* to order a new negotiation". Article 1135-3 mentions: "Where it applies, those negotiations would be carried out in accordance with chapter 1 of the present Title. A failure exempt from bad faith would allow each party to avoid the contract without any charge or damage". For an extensive study of the relations between the powers of the judge and the contract, see D. MAZEAUD, "Le juge et le contrat. Variations optimistes sur un couple 'illégitime', in: *Propos sur les obligations et quelques autres thèmes fondamentaux du droit, Mélanges offerts à J.-L. Aubert*, Dalloz, 2005, p. 235.

117 See, nonetheless, the French Reform Proposals, which suggest a definition of the force majeure, under article 1349 paragraph 3, providing that: "The force majeure consists of an uncontrollable event that the agent could not foresee or whose effects could not be avoided by appropriate measures".

118 F. CHABAS, F. GREAU, *op.cit.* n° 9 and following paragraphs.

119 Inversely, trickier is the question whether the lack of fault implies a presumption that there is force majeure, even though nothing in principle would lead to assume so. F. CHABAS et

ambiguity linked to the fact that force majeure and lack of fault have different functions and intervene at different levels. Once the obligee proves the fault of the obligor, the obligor can then show evidence of his absence of fault. This evidence helps establish that the *conditions for his liability* are not met. Conversely, the proof of force majeure exonerates the obligor from a liability that is normally incurred.[120] However, other authors along with a certain body of case law seem to consider that force majeure can be cumulated with fault, that they can act at the same level. On that basis, force majeure is assessed very objectively as one of the sources of the damage and it will only exonerate the debtor from his liability if it is the exclusive source of the damage. Further, if at the origin of the damage two sources can be found, one being the debtor's fault and the other a force majeure event, the remedies will only be partial.[121]

If, under French law, force majeure and fault entertain ambiguous relations, the same can be said of the notion of imputability. Indeed, article 1148 specifies: "an external cause that cannot be imputed to him". Indeed, whether considering force majeure, a third party or the aggrieved party's act or omission, if the contentious event is imputable to the obligor, he will not be able to rely on it. The difficulty does not originate in this observation but in the place of imputability. Is it not a prerequisite to force majeure? Doesn't force majeure suppose, to be established, that the external, unpredictable and irresistible event should also not be ascribed to the obligor?[122] Imputability here takes on its full meaning.[123] It allows, depending on the way it is understood, either to disqualify the

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F. GREAU (*op.cit.* n° 13.) observe that more than a difference in the proof, there is a difference in the substance. Indeed, "the obligor is discharged, not by what ordinarily stops a cautious, diligent and wise man (which is the criteria of the lack of fault) but by what is unpredictable for a cautious, diligent and wise man and what could not have been foreseen by this person, even though he had reached the highest precaution and diligence an average individual is capable of. The standard of comparison remains the cautious and wise individual and not the individual who anticipates and acts in an ordinary manner, rather the individual who surpasses himself". See also P. ANCEL (*op.cit.*, n° 13, p. 251, note n° 34), who underlines that the absence of the debtor's fault and of force majeure are not without link, "since the existence of force majeure necessarily excludes the fault. Inversely, the absence of fault does not in any way imply the force majeure: there are numerous cases where the fault will not be established, while the contracting party will not have been prevented to reach the promised result by an uncontrollable event".

120 F. CHABAS, F. GREAU, *op.cit.* n° 9; *adde*. Ph. BRUN, Responsabilité civile extracontractuelle, Litec, 2005, n° 318.

121 See in general on this issue F. CHABAS, F. GREAU, *op.cit.* Nos 11; 139.

122 Ch. RADE (*op.cit.*) specifies that there should be added to the three elements of the force majeure another subjective element "derived from the impossibility to ascribe to the debtor the non-performance of the obligation, which presupposes that the debtor does not have committed any fault that contributed to make the performance impossible".

123 The notion of imputability is difficult to grasp under civil law (Under French law, see in particular P. JOURDAIN, *Recherche sur l'imputabilité en matière de responsabilités civile et pénale*, Th. Paris II, 1982; *J.-Cl. Resp. civ. Et assur.*, fasc. 121-1, "Responsabilité fondée sur la faute, Imputabilité"; G. VINEY, P. JOURDAIN, *op.cit.*, n° 444; adde. F. ROUVIERE, *Le contenu du contrat: essai sur la notion d'inexécution*, PUAM, 2005, n° 48 and following *adde*. J. CARBONNIER, *Droit civil, Les obligations, les biens*, Vol. 2, 1re édition, Quadrige, PUF, 2004, n° 1072 et 1074). Sometimes fathomed as a constitutive element of the fault, originating in a subjective

application of force majeure or to prevent the obligor from benefiting from it. A fortiori, it means that the contentious fact will be imputable to the obligor and that he will thus have to compensate the obligee. The question therefore arises regarding the relationship between fault and imputability. The reasoning developed above implies either that imputability is included in fault, that it is an integral part of it; or that it is distinct from it but sufficient to discharge the obligor from his liability. In that perspective, is it relevant to talk about the absence of fault or would it be more relevant to refer to the absence of imputability? In addition, the question of the place of imputability in relation to causation should also be addressed…

As is obvious under French law, many questions exist regarding the relationship between fault, exoneration causes and imputability. It must nonetheless be noted that such difficulties are not exclusively French.

Under common law, one of the limits of the "frustration of contract" doctrine is the "self-induced frustration" category.[124] In summary, the only cases which might excuse the non performance of the contract reside in the occurrence of events that would make the contract impossible to perform. However, the exception to this "exception" is the demonstration that the event was caused by the defaulting party. Indeed, a number of cases had specified that the event likely to qualify for the concept of "frustration" must intervene "without blame or fault on the side of the party seeking to rely on it".[125] Yet, in the *Super Servant II* case,[126] a question of interpretation occurred with regard to the meaning to be given to the above-mentioned phrase. The Court of appeal, rejecting the defendant's theory ("Wijsmuller"), according to which the phrase could only be understood strictly, that is to say when the party seeking to rely on the contentious event acted wilfully or in direct violation of a pre-existing obligation,[127] adopted a broader approach and considered the notion of control as a qualifying criterion. Indeed, the test to be applied would be, according to Lord Bingham, whether the party seeking to invoke the

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conception of the fault, sometimes considered as an element in itself of liability, it seems nevertheless required in many legal systems. Sometimes called "culpability", it expresses "the psychological ability of the agent to understand the scope of his acts and to deal with its consequences" (G. VINEY, P. JOURDAIN, *op.cit.* N° 442). If limited to the contractual field, imputability can be understood as the cause of the non-performance. The debtor, when bringing evidence of his lack of fault, proves that the non-performance cannot be ascribed to him. Hence, imputability comes near to causality without being confused with it. Causality is in a way the basis for imputability. Therefore, if for some imputability uses casuality as a basis, and for others, fault as a receptacle, the uncertainty surrounding the concept understandable.

124 *See supra*. E. McKENDRICK, *op.cit.* p. 884 and following; J. BEATSON, *op.cit.* p. 550 and following *Chitty on contracts*, 29th edition, Sweet and Maxwell, 2004, para. 23-059.

125 *"A frustrating event must take place without blame or fault on the side of the party seeking to rely on it". V.J Lauritzen AS v. Wijsmuller BV (The "Super Servant Two")* [1990] 1 *Lloyd's Rep* 1; *adde. Bank Line Ltd.* v.Arthur Capel & Co. [1919] AC 435, esp. 452; *Joseph Constantine Steamship Line Ltd, v. Imperial Smelting Corporation Ltd.*, [1942] AC 154, in particular p. 171; *Davis Contractors Ltd, v. Fareham UDC*, [1956] AC 696, in particular p. 729; *The Hannah Blumenthal* [1983] 1 AC 854, in particular pages 882 and 909.

126 *Ibid.*

127 Lord Bingham considers that enforcing such a theory: *"confine [s]the law in a legalistic strait-jacket (…)"*.

contentious event "had the means and opportunity to prevent it but nevertheless caused or permitted it to come about".[128]

The theory of the "self-induced frustration" illustrates the fact that common law systems entertain to some extent a relationship with the notion of fault or at the very least with that of liability. However, a doubt may appear: did the Court of Appeal not base its decision on imputability? Indeed, since by definition the frustration doctrine must be interpreted strictly, it seems logical, or at least understandable, to restrict cases of "excuse" by adding a criterion of non-imputability of the event to the party seeking to rely on it. Thus where English courts specify that "frustration" can only be invoked "without blame or fault on the side of the party seeking to rely on it", the view could be taken that the courts do not expect that a fully-fledged fault be necessarily established but rather that the contentious event not be *imputable* to him.

Italian law, in particular through its articles 1218 and 1256 of the *Codice civile*, seems to adopt a very similar approach when the phrase *"causa a lui non imputabile"* is used. Indeed, this phrase is interpreted by academics and case law as referring to an event that does not originate in the obligor's negligence *"colpa"*, (…) something that is entirely outside his scope of control and that he cannot prevent".[129]

Dutch law is also striking in the relationship that it suggests between imputability and fault. Indeed, article 6:74 BW specifies in its first paragraph that "every default in the performance of an obligation compels the obligor to compensate the damage caused to the obligee, unless the said failure cannot be ascribed to the debtor".

Article 6:75 BW specifies, besides, that a "default in the performance [of a contract] cannot be ascribed to the obligor if it does not originate in his fault and if he cannot be held liable by the effect of the law, of a juridical act or by common opinion". Hence, Dutch law seems to focus only on the imputability to exonerate the obligor from his liability. Not only is this feature striking, but it is interesting to note that the evidence of non-imputability relies not only on the demonstration that the risk is not borne by the obligor but also that the obligor did not commit any fault. The evidence of a fault will demonstrate, at least partially, that the contentious event is imputable to the obligor. On the contrary, from the absence of fault will be deduced the absence of imputability.

Fault, lack of fault, imputability, force majeure… all these notions suggest a certain conceptual ambiguity in the definition of the respective scope of each notion. However, it seems to emerge from the analysis of the various systems that it is not so much fault that exonerates the debtor from his obligation to perform the contract but rather the non-imputability of the contentious event to the party seeking to rely on it.

One of the paradigms of the external cause in tort is the act or omission of the victim, which is necessarily echoed under contract law: the impact of the obligee's "fault" on the obligor's liability must now be examined.

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128 *Per* Lord Bingham LJ: *"Wijsmuller's test would, in my judgment, confine the law in a legalistic strait-jacket and distract attention from the real question, which is whether the frustrating event relied upon is truly an outside event or extraneous change of situation or whether it is an event which the party seeking to rely on it had the means and opportunity to prevent but nevertheless caused or permitted to come about*".

129 B. GARDELLA TEDESCHI, in: Principles of European Contract Law and Italian Law, A commentary, *op.cit.*, p. 384.

B. The impact of the obligee's fault on the assessment of certain remedies for the non-performance

Several European legal systems recognize the notion of a "mitigation requirement" (that is not to be assimilated to a duty since it is not due to others).[130] This requirement imposes two types of behaviour: the first one, negative, requires a party not to act in a way which might aggravate the damage caused, and the second one, positive, dictates that a party should take measures to reduce the damage.

This *"Obliegenheit"* is recognized under German law and under common law. It has remained, until now, unknown to the French legal system,[131] although some rulings are inspired by the principle.[132] A typical example is the contract of employment: while under common law a laid-off employee must seek another job, in France he would be entitled to compensation amounting to the shortfall resulting from the non-payment of salary until the term of his contract. The idea of the victim's fault and of shared liability through causation being widely recognized, the theoretical concept could be introduced without any methodological difficulties – as is the case under article 9:504 of PECL – and would have the advantage of satisfying the idea of raising the moral standard in business and of compensating for the damage actually sustained.

To admit that the obligor is partially discharged in consequence of the damage resulting from the obligee's inactivity would suppose that fault be understood as a non-performance ascribed to the obligee – that the obligee does not perform an implied obligation to take all reasonable measure to mitigate his damage, or that the non-performance only be partially ascribed to the obligor.[133]

If the existence of fault appears to establish liability and to exclude it, once the non-performance imputable to the obligee is established, the seriousness of this non-performance also plays a role in the consequences of non-performance.[134]

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130 On the difficulties regarding the definition of "duty" or "obligation" to mitigate one's own damage, see Y.-M. LAITHIER, above-mentioned thesis, n° 368; and generally on this theme: S. REIFERGESTE, *Pour une obligation de minimiser son propre dommage*, Préf. H. Muir-Watt, PUAM, 2002; A. LAUDE, "L'obligation de minimiser son propre dommage existe-t-elle en droit privé français?", *LPA* 20 nov.2002, n° 232, p. 55 and following pages.

131 If substantive law only grants it a restricted importance, jurisprudence works multiply: Y.-M. LAITHIER, *above-mentioned thesis*, n° 338 and following paragraphs. It must nonetheless be noted that the French Reform Proposals, in their article 1373, authorizes the judge to reduce compensation when the victim, by blatant negligence, let a damage aggravate without acting or did not do anything to minimize it. It is not an obligation undertaken by the debtor, rather an option for the judges submitted to conditions. In parallel, the wording of article 1344, that seems to continue article 1373, must be recalled: "the expenses incurred to prevent the imminent occurrence of a damage or to prevent its aggravation as well as to reduce its consequences constitute a damage to be compensated, as long as they were reasonably incurred".

132 Cass. civ. 1re, 3 July 1985, *Bull. civ.*, I, n° 210; Cass. com. February 5th 1985, *Bull. civ.* IV, n° 48.

133 See 6:98 BW, criteria of imputability of the damage to the debtor to extend his liability.

134 Under Swiss law, the rule regarding fault-based liability is mentioned in the part of the Code dealing with the consequences of the non-performance (article 99).

III. The Residual Role of Serious Fault ("Faute Caractérisée") in the Consequences of the Non-performance

Although, among the consequences of non-performance, fault continues to play a certain role **(A)**, it seems that in the context of termination of the contract, its role is marginalized, to make room for an assessment of the level of behaviour **(B).**

A. Some isolated consequences of serious fault

In several European legal systems and under article 9:503 of the PECL, the requirement for predictability of damage is excluded in the case of a wilful non-performance (fraud), gross fault *("faute lourde")* being treated in the same way in France.[135] Similarly, under Austrian law, the wilful or serious fault enables the award of compensation for loss of profits. However, the degree of severity of a fault is generally not taken into consideration by common law systems.

Gross fault can be defined in two different manners: either it is considered by reference to the obligor's behaviour, or it can be assessed with regard to the essential character of the non-performed obligation. French law is particularly interesting when it comes to the assessment of the gross fault.

Substantive law hesitates, indeed, between the two conceptions. The mixed Chamber of the French Cour de cassation took the view, in decisions dated 22 April 2005, that the gross violation "is defined by an extremely serious negligence almost amounting to fraud and indicating the obligor's inability to achieve his contractual mission", and specifying that it "could not result from a mere delay" or from the mere fact "for the carrier to be unable to provide clarification on the cause of the delay".[136]

While favouring an analysis of the gross violation based on the severity of the debtor's conduct, the French Cour de cassation did not deny the role played by the essential character of the non-performed obligation. The failure to perform a substantial obligation can limit the efficiency of *contractual* limitation or exclusion clauses: they will be considered void if they contradict the scope of the obligations. As underlined by G. VI-

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135 Articles 1150 and 1151 of the French civil code, article 1225 of the Italian civil code; article 1109 of the Spanish civil code.

136 Cass. ch. mixte. 22 April 2005, n° 03-14.112, *Arrêt Dubosc*, *Bull. civ. mixt.* n° 4 et n° 02-18.326 *Arrêt Ka France, Bull. civ. mixt.* n° 3, *JCP G* 2005. II.10066 note G. LOISEAU; *RDC*, 1 July 2005, n° 3, p. 651 avis du Premier Avocat Général R. de GOUTTES; *ibid.* p. 673, obs. D. MAZEAUD; *ibid.* p. 752, obs. Ph. DELEBECQUE; *RTD civ.* 2005 p. 604, obs. P. JOURDAIN; *RTD civ.* 2005 p. 779, obs. J. MESTRE et B. FAGES; *JCP E* 2005, n° 40, p. 1446, note C. PAULIN; *ibid.*, 668, obs. M. CHAGNY; *Contrats, conc., consom.* 2005, comm. n° 150, obs. L LEVENEUR; *RJDA* 2005, n° 808 et p. 667, rapport GARBAN; *Droit et patrimoine*, oct. 2005, p. 36 note G. VINEY; *D.* 2005, Jur. p. 1864, note J.-P. TOSI; *ibid.* Pan. p. 2748, in particular 2750, obs. H. KENFACK.; *ibid.* p. 2836, obs. S. AMRANI-MEKKI et B. FAUVARQUE-COSSON. The ruling was echoed in Cass. Com. 21 February 2006, Bull. Civ. IV, n° 48, *RTD civ.* 2006, p. 322, obs. P. JOURDAIN; *Contrats, conc., consom.*, 2006, comm. 103, obs. L. LEVENEUR; Cass. Com. 13 June 2006, Bull. Civ. IV, N° 143, *D.* 2006, AJ p. 1680, obs. X. DELPECH, *JCP G.* 2006, II 10123, note G. LOISEAU, *RTD civ.* 2006 773, obs. P. JOURDAIN.

NEY, when it is contractual, the clause limiting compensation is void "if it contradicts the extent of the obligation and detracts from the essence of the contract, which obviously does not exclude that it also might be declared void, based on article 1150 of the civil code and on the principle which treats gross fault as a fraud, on a strict definition of gross fault. However, only the evidence of such a fault, which must be brought exclusively by the obligee, will prevent the enforcement of clauses restricting liability or compensation provided in a standard contract approved by decree".[137] Indeed, the French Cour de cassation seems inclined to maintain its *Chronopost* ruling and to declare void clauses limiting liability based on article 1131 and on the causation theory, when these limitations do not originate in a legal provision.[138, 139]

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137 Above-mentioned footnote. The dissenting position of the Première Chambre civile, that seems to embrace an objective vision of the gross violation, must be recalled. See lastly Cass. civ. 1re., 4 April 2006, n° 04-11848, *LPA* 26 oct. 2006, p. 18, note M.-Ch. MEYZEAUD-GARAUD.

138 Cass. com., 30 May 2006, n° 04-14974, *Bull. civ.* IV, n° 132; *D.* 2006, AJ, p. 1599, obs. X. DELPECH; *D.* 2006, jur., p. 2288, note D. MAZEAUD; *D.* 2006, p. 2646, obs. B. FAUVARQUE-COSSON; *D.* 2007, pan., pp. 115-116, obs. H. KENFACK; *RDC* 2006, p. 1075, obs. Y.-M. LAITHIER; *RDC.* 2006, p. 1159, obs. Ph. DELEBECQUE; *RDC* 2006, p. 1225, obs. S. CARVAL; *RTD civ.* 2006, p. 773, obs. P. JOURDAIN; *contrats conc. consom.* 2006, Comm. 183, note L. LEVENEUR.

139 In a case dated 13 February 2007, (Cass. Com. 13 February 2007, appeal n° 05-17.407, *RLDC* 2007, N° 38, p. 6 note G. LOISEAU; *JCP G* 2007, II. 10063, note Y.-M. SERRIET; *JCP G* 2007, ACT. 95, obs. M. ROUSSILLE), which appeared on the Cour de cassation website and to be published in the *Bulletin*, the Commercial Chamber rendered a decision which is surprising for the commentators. Indeed, on the subject of a limitation clause contained in a software supply contract, the Court took the view that "the failure to comply with an essential obligation" is "sufficient to exclude the application of the limitation clause". There are two possibilities: either the Court takes the view that the clause is of no effect and in this case the decision is in line with the Chronopost decision of 1996, or it wants to prevent the clause from applying by invoking the gross fault, consisting in the mere failure to comply with an essential obligation. If that is the solution which the Court intended to reach, a distinction should therefore be made depending on the source of the clause: either it is contractual and the gross fault is committed by the mere breach of an essential obligation, or it is of legislative origin, and in such case, a subjective gross fault must be found, that is to say a fault "of extreme gravity, bordering on fraud and showing that the obligor is unable to accomplish his contractual mission". If this last interpretation is retained, this would mean that in the case of a contractual clause, the notion of essential obligation would have a double function: in some cases, a breach would enable the court to invoke a gross fault, which would have the effect of disapplying the limitation clause, or in other cases, this same breach deprives the obligation of a cause, so that it contradicts the undertaking and should be considered void. However, a decision of 5 June 2007 (Cass. Com., 5 June 2007, n° 06-14.832 (to be published) seems to exclude such an interpretation. Indeed the Commercial Chamber of the Cour de Cassation holds a decision invalid on the basis that the judges had not found any gross fault likely to prevent the application of a limitation clause in a contract. The Cour de Cassation, basing its decision on articles 1131 and 1134 of the Civil Code, took the view that "by making such a decision, without determining, as requested, whether the impossibility to locate the goods delivered to the company during their transport

Most European legal systems admit that an exemption or limitation clause is not applicable in case of a wilful or gross fault.[140] Moreover, although under English law, there is no notion of gross or wilful fault in the narrow sense, which would allow to foil the application of a limitation or exemption clause, the Lords had developed the doctrine of "fundamental breach", which though not applicable anymore[141] nowadays, seemed to be similar to the notion of gross fault understood in its current objective meaning. As a result, nowadays, in the United-Kingdom, there is no substantive rule relating to the validity of a clause or of a contract in the case of either "fundamental terms" or of "fundamental breach of contract". It does not mean that a clause discharging the debtor of all liability in case of "fundamental breach of contract" will necessarily be valid.[142] It merely means that there is no prohibitive rule on the issue. The clause could be set aside by searching for the intent of the parties[143] or by the implementation of the rule *contra preferentem*[144] that leads to a very similar result.[145] However, since the *Unfair Contract Terms Act* of 1977 came into

constituted the breach of an essential obligation enabling the Court to declare void the limitation clause (which was contained not in standard terms but in the contract between the parties), the Court of Appeal failed to give a legal basis to its decision." It can therefore be deduced that with regard to contractual limitation clauses, a gross fault should not only be assessed subjectively, but that in addition, the finding of such a fault seems superfluous when the clause is intended to limit the amount of damages awarded for breach of an essential obligation, such a case being confined to the avoidance of such a clause based on the disappearance of the cause of the obligation.

140 See PECL, national notes, art. 8:109.

141 A distinction should be made between "fundamental terms" and "fundamental breach of contract". Regarding the notion of "fundamental terms": *"There were, it was said, in every contract certain terms which were fundamental, the breach of which amounted to a complete non-performance of the contract. (…) It formed the 'core' of the contract, and therefore could not be affected by any exemption clause"* (J. BEATSON, *op.cit.* p. 174). Regarding the notion of *"fundamental breach of contract"*: *"(…) no party to a contract could exempt himself from responsibility for a fundamental breach. Its limits were never precisely defined, but it was said that a party could only claim the protection of an exemption clause when he is carrying out his contract, not when he is deviating from it or is guilty of a breach which goes to the root of it"* (J. BEATSON, *op.cit.*, p. 174-175). *Karsales v. Wallis* [1956] 1 *WLR* 936, *per* Denning LJ: *"a breach which goes to the root of a contract disentitles the party from relying on the exempting clause"*. These two notions, sometimes, used interchangeably, (*Suisse Atlantique Société d'Armement Maritime S.A. v. N.V. Rotterdamsche Kolen Centrale* [1967] 1 A.C. 361, *per* Lord Upjohn, p. 421), simply reveals that a limitation or exemption clause cannot have any effect in case of a "fundamental breach", neither can it cover a "fundamental term". Analysed in such a way, this theory appears to be very objective and ignores the parties' intent. It was at that time considered as a substantive rule but was quickly disclaimed (already, but with some doubts in *Suisse Atlantique Société d'Armement Maritime S.A. v. N.V. Rotterdamsche Kolen Centrale* [1967] 1 A.C. 361; then permanently in: *Photo Production v. Securicor*, [1980] All *ER* 556).

142 See nonetheless on the contrary, a decision under Australian law: *Glebe Island Terminals Pty. Ltd v.Continental Seagram Pty. Ltd* [1994] 1 *Lloyd's Rep.* 213 *(New South Wales Court of Appeal)*.

143 It is referred in this case of the situation where the drafting of the clause is not clear, which will lead the judge to interpret the clause based on the parties' intent. Yet, it is highly probable that if the clause deals with a fundamental breach, it will not be implemented. V. J. BEATSON,

force, the techniques studied by the Lords began to be abandoned in favour of the "reasonableness" test provided by the law. Indeed, as evidenced by the *Georges Mitchell* case,[146] it appears that the interpretation of these clauses is now strict, especially since the validity of such clauses is now dealt with by legislation.[147]

B. Avoidance for non-performance: a necessary assessment of the extent of the non-performance[148]

If termination, as provided under article 1184 of the French civil code, is as a matter of principle decided by the court – since it is for the judges a "means to pass moral judgement on the parties' respective conduct",[149] case law authorizes under certain circumstances and under certain conditions, that the termination exceptionally be non judicial, thus allowing to end a relation "deprived of any economical vitality by the severity of the failures to which it is subject".[150]

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op.cit. p. 177.; E. McKENDRICK, *Contract Law*, Seventh Edition, Palgrave Macmillan, 2007, n° 11-7, p. 234.

144 V. J. BEATSON, *op.cit.* p. 170.

145 *"Similarly, whilst the House of Lords in the Suisse Atlantique case ruled out the 'substantive' doctrine of fundamental breach, they ruled that* the contra preferentem *rule should be applied to fundamental breaches as follows: the more serious the breach, the less likely it is that the parties intended to exclude or limit liability for that breach. […] Nevertheless, as illustrated by the following case, there remains a key difference between the 'substantive' and the 'construction' doctrines of fundamental breach; under the latter, but not the former, a clearly worded exclusion or limitation clause may apply even to breaches of conditions of the contract*', H. BEALE, A. HARTKAMP, H. KÖTZ, D. TALLON, *Cases, Materials and Text on Contract Law*, Hart Publishing, 2002, p. 506; *adde*. The comments of Lord Wilberforce, in the *Suisse Atlantique Société d'Armement Maritime S.A. v. N.V. Rotterdamsche Kolen Centrale* case [1967] 1 A.C. 361, in particular p. 435.: *'Some deliberate breaches … may be, on construction, within an exception clause (for example, a deliberate delay for one day in loading). This is not to say that 'deliberateness' may not be a relevant factor: depending on what the party in breach 'deliberately' intended to do, it may be possible to say that the parties never contemplated that such a breach would be excused or limited; … but to create a special rule for deliberate acts is unnecessary and may lead astray"*.

146 *Georges Mitchell (Chesterhall) Ltd. V. Finney Lock Seeds Ltd.* [1983] *QB* 284 et [1983] 2 A.C. 803.

147 On those issues see E. MCKENDRICK, *op.cit.* p. 460 and following pages; J. BEATSON, *op.cit.* p. 185 and following pages.; H. COLLINS, *op.cit.* p. 256 and following pages; *adde*. H. BEALE, A. HARTKAMP, H. KÖTZ, D. TALLON, *Cases, Materials and Text on Contract Law*, Hart Publishing, 2002, p. 506 and 509.

148 Among the numerous studies on the termination of contracts for non-performance, see, recently J. ROCHFELD, "Résolution et exception d'inexécution", in: *Les concepts contractuels français à l'heure des Principes du droit européen des contrats*, P. REMY-CORLAY, D. FENOUILLET (sous la direction de), Dalloz, 2003, p. 213 and following pages.

149 J. CARBONNIER, *Les obligations*, 22e éd., PUF, T. IV, 2000, § 190.

150 Ch. JAMIN, "L'admission d'un principe de résolution unilatérale du contrat indépendant de sa durée", note sous Civ. 1re 21 February 2001, *D.* 2001.1568.

In the context of judicial termination, French law is, by principle, indifferent to the cause of the non-performance. Indeed, article 1184 does not mention the causes of the non-performance; as a result, whether it originates in an external impediment or in the obligor's fault does not matter in theory, so long as the non-performance is established.[151] However, the vast majority of both French and Belgian[152] contemporary authors consider that fault is necessary for termination since this mechanism is based on the idea of sanction and not on the theory of risk.[153] However, one can be consider that "it is not the *cause* but the *extent* of the non-performance that enables the determination of cases of termination. It is by taking into account the sufficient extent of the default that the judge agrees or refuses to terminate the contract, and not according to its fortuitous or deliberate origin. It is by taking into account the sufficient importance of the default that the judge may approve or disapprove the unilateral termination by the creditor, without having to distinguish between fortuitous or deliberate non-performance. And it is also by taking into account the existence of the default as provided by the law that the contract is automatically terminated, whether the non-performance occurs fortuitously or results from the fault of one of the parties".[154] Hence, the question that will be of

151 See for instance, Y.-M. LAITHIER, *op.cit.* n° 233; also see Ch. JAMIN, "Les conditions de la résolution du contrat: vers un modèle unique? Rapport français", in: *Les sanctions de l'inexécution des obligations contractuelles, Etudes de droit comparé*, M. FONTAINE, G. VINEY (sous la direction de), Bruylant, LGDJ, 2001, p. 451 and following pages, in particular p. 453, n° 2; *adde*. J. GHESTIN, Ch. JAMIN, M. BILLIAU, *Les effets du contrat*, Traité de droit civil, LGDJ, 2001, n° 453. Compare the French Reform Proposals, which head towards the integration of the "risks theory" in the termination, would the termination constitute the measure responding to the non-performance of the contract, no matter the cause (article 1158)" (Exposé des motifs, Inexécution des obligations (art. 1157 à1160-1), par Judith ROCHFELD, in: *Avant-Projet de réforme du droit des obligations et de la prescription*, P. CATALA (sous la direction de), 2006, p. 54. Article 1158 therefore provides, in its first paragraph: "In every contract, the party towards whom the obligation was not performed or imperfectly performed, can either chose to pursue the performance of the contract or to induce the termination of the contract or to claim damages, which can, if necessary, come in addition to the performance or the termination".

152 S. STIJNS, "La résolution pour inexécution en droit belge: conditions et mise en oeuvre", in: *Les sanctions de l'inexécution des obligations contractuelles, Etudes de droit comparé*, M. FONTAINE, G. VINEY (sous la direction de), Bruylant, LGDJ, 2001, p. 513 and following pages, in particular p. 515, n° 5, p. 542, n° 26 and following paragraphs.

153 See in particular, J. GHESTIN, Ch. JAMIN, M. BILLIAU, *Les effets du contrat*, Traité de droit civil, LGDJ, 2001, n° 453.

154 Y.-M. LAITHIER, *op.cit.*, n° 234, p. 319. Y.-M. LAITHIER suggests a test coming directly from English law whose relevance to determine the "sufficiently seriousness" of the non-performance should be highlighted: "it seems that the judge is primarily preoccupied by the consequences induced by the non-performance and those of the upholding or the annihilation of the contract, to deduce from it in a second step the level of severity of the alleged failure" (*op.cit.* n° 236, p. 321). The author, to explain his analysis, directly refers to Judge Buckley's comments in the *Decro-Wall International S.A. v. Practioners in Marketing Ltd.* Case, ([1971] 1 *W.L.R.* 361, in particular p. 380) which offers an explanation of the criteria of the non-performance that reaches the "roots of the contract": *"I venture to put the test in my own words as follows: will the consequences of the breach be such that it would be unfair to the injured party to hold him to the contract*

interest here is whether the faulty behaviour of one of the parties allows the termination of the contract, even though each party's reciprocal economical obligations were performed.

A priori, there is nothing preventing it.[155] This is evidenced by a number of cases which, although they do not adopt a systematic reasoning, seem to admit the possibility of terminating a contract based on the mere failure to meet a standard of behaviour, independently from the economical obligations resulting from the contract. This is the case in particular for "aggressive, insulting and threatening behaviour of the lessors against the lessees, making the continuation of regular contractual relations impossible between them",[156] or when the lessee, while paying his rent, recurrently sends the lessor letters of insults.[157] As a result, if fault is not a condition required for the termination of the contract, it seems nonetheless that it could be a cause for such termination.

In the context of termination by the parties, the question also arises as to whether there should be fault. French case law has, on the issue, evolved and seems to have changed, at least in terminological terms, from noting a "sufficiently serious failure" to "a sufficiently reprehensible behaviour".[158] Various interpretations of this apparent shift have been contemplated. Should this behaviour be understood from a strictly subjective point of view, thereby automatically attracting criticism for failing to take a systematic approach, leading to charges of unpredictability and thus of damage to legal certainty? Should a more objective approach be adopted, taking into account the importance of the non-performed obligation? The last possibility has the merits, on one hand, of making the types of behaviour more identifiable, treated less on a case by case basis, without going so far as to systematize them, and on the other hand, of not departing too much from traditional solutions which used to take into account the nature of the non-per-

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and leave him to his remedy in damages as and when a breach or breaches may occur? If this would be so, then a repudiation has taken place." Also see the thoughts suggested by J. GHESTIN, JAMIN et M. BILLIAU, *op.cit*. n° 456, p. 518; *adde*. P. GROSSER, *Les remèdes à l'inexécution du contrat: essai de classification*, Th. Paris I, 2000, n° 204 and following; J. ROCHEFELD, "Résolution et exception d'inexécution", in: *Les concepts contractuels français à l'heure des Principe du droit européen des contrats*, D. Fenouillet, P. Remy-Corlay (sous la direction de), Dalloz, 2003, p. 213, in particular p. 218 and following pages.

155 See for instance, in particular Y.-M. LAITHIER, *op.cit*., n° 235, p. 321; J. GHESTIN, Ch. JAMIN, M. BILLIAU, *op.cit*. n° 456.; B. FAGES, *Le comportement du contractant*, Préf. J. Mestre, PUAM, 1997, n° 731 and following paragraphs; *adde*. n° 660.

156 Cass. civ. 3e, 29 April 1987, n° 84.-17021, *Bull. civ*. III, n° 93; *RTD civ*. 1988, p. 536, obs. J. MESTRE.

157 Cass. civ. 3e, 3 June 1992, n° 90-20422, inédit titré, *GP* 1992, 2, p. 656, obs. J.-D. BARBIER.

158 Cass. civ. 1re. 13 October 1998, n° 96-21485, *Bull. Civ*. I, n° 300, p. 207; *D*. 1999, p. 197, note Ch. JAMIN and followingmm., p. 115, obs. Ph. DELEBECQUE; *Defrénois* 1999, p. 374, obs. D. MAZEAUD.; Cass. civ. 1re. 20 February 2001, n° 99-15170, *Bull. civ.* I, n° 40, p. 25; *D*. 2001, p. 1568, note Ch. JAMIN and followingmm., p. 3239, obs. D. MAZEAUD; *RTD civ*. 2001, p. 363, obs. J. MESTRE et B. FAGES; *Defrénois* 2001, p. 705, obs. E. SAVAUX.; Cass. civ. 1re. 28 October 2003, n° 01-03662, *Bull. civ.* I, n° 211, p. 166; *Droit et patrimoine* 2004, n° 126, p. 64, obs. L. AYNES; *JCP* G 2004, II, 1279, note Ch. LACHIEZE; *RTD civ.* 2004, p. 89, obs. J. MESTRE et B. FAGES; *Defrénois* 2004, p. 378, note R. LIBCHABER; *adde*. p. 381, note J.-L. AUBERT; *RLDC* 2004, n° 2, p. 5, note E. GARAUD.

formed obligation but also more subjective criteria such as unfairness.[159] Therefore, and without being too specific about these theories, it seems to emerge that, as is the case in the context of termination by the judges, fault is not a condition but could definitely be a cause for the termination of the contract by the parties.[160] This fault could be subjective as well as objective, however, bearing in mind that the decision lies in the hands of the obligee, it may be more appropriate, to ensure the legal certainty of transactions, to maintain a more objective approach[161] allowing to define a behaviour which is almost unquestionably reprehensible. French case law is thus evolving towards a competing principle of termination by the parties.[162] Article 1158 of the French Reform Proposals suggest the introduction of this possibility for the obligee.[163] Such developments would enable an alignment with other systems and with international and European law texts.[164]

Under Italian law, similarly, the contract cannot be terminated when the non-performance is not important for the obligee (article 1455 of the civil code).[165] It seems that the assessment of this criterion is made according to a double test: objective and subjective. On the one hand, the role and function of the non-performance in the contrac-

159 About those issues see in particular, J. ROCHEFELD, *op.cit.* p. 218 and following pages.

160 Incidentally, a decision expressly pointed out the "gross fault" of the obligor giving ground to the termination of the contract without prior notice. See Cass. civ. 1re, 2 February 1999, n° 97-12964, *Bull civ.* I, n° 38, p. 25.

161 The question is therefore raised, in that perspective, regarding the opportunity of an out-of-court termination based on a failure to act in good faith. If we sympathize with both the incentive and deterrent effects of such a possibility (see in particular B. FAGES, *op.cit.* n° 814 and following paragraphs), the question that is posed is that of the systematisation or at the very least the rationalisation of what a good faith conduct is, by opposition to what a bad faith conduct would be and *a fortiori* of the severity that a bad faith conduct must reach to be defined as a particularly harmful behaviour.

162 Civ. 1re, 13 October 1998: "the severity of a party's behaviour can give ground to the unilateral termination of the contract by the other party at his own risk", *D.* 1999, jur. 197, note Ch. JAMIN. Civ. 1re 21 February 2001, mentioned above: "*… no matter whether it is a fixed term contract or not*".

163 Article 1158 in its second and third paragraphs states: "When opting for termination, the creditor can either request from the judge, or on his own, give formal notice to the debtor to complete his undertakings within a reasonable period of time, otherwise he will be entitled to terminate the contract. When the non-performance remains, the creditor notifies the debtor the termination of the contract and the reasons grounding it. The termination will thus be effective when the debtor receives the notification".

164 At the "non-national" level: UNIDROIT Principles, article 7.3.1. PECL, article 9.301. At the international level: the Vienna Convention on Contracts for the International Sale of Goods of 11 April 1980, article 49. At the national level: Switzerland, Germany, Italy, Quebec (article 1605 of the New Code for Quebec), the Netherlands (art. 267) and United-Kingdom.

165 However the contract can also be terminated by the occurrence of an impossibility after the contract is signed and in case of an excessive cost of the performance. See G. ALPA, M. DASSIO, "La dissolution du lien dans le Code civil italien", in: *Les sanctions de l'inexécution des obligations contractuelles, Etudes de droit comparé*, M. FONTAINE, G. VINEY (sous la direction de), Bruylant, LGDJ, 2001, p. 871 and following pages, in particular p. 876, n° 7.

tual relation must be assessed objectively. On the other hand, the obligee's interest in receiving the performance of the contract as it was promised is also taken into consideration, in a subjective manner.[166] This "double test" does not, strictly speaking, indicate whether fault is a condition for termination under Italian law but seems, at the very least, not to exclude it as a cause. The same solution can be found under German law (§ 323 paragraph 5 BGB) where, in addition, the obligor's bad faith can influence the assessment of the extent of the non-performance, so that even a non-performance of small importance can lead to the termination of the contract when it results from the obligor's wilful conduct.[167] Furthermore, German law even allows the termination (still unilaterally, hence non judicial) of the contract in case of gross violation of accessory duties derived from the good faith principle (§ 324 BGB); the examples used by the German legislator to illustrate the (limited) scope of this provision are similar to the French cases mentioned above.[168] Dutch law[169] generally considers that any type of non-performance (delay, default, impossibility to perform even when this impossibility existed at the conclusion of the contract or when the non-performance can be excused) entitles the obligee to terminate the contract (articles 6:82-83 and 6:265 BW).[170] There is nonetheless an exception to the right granted to the obligee to terminate the contract for non-performance. Indeed, if the non-performance, considering its specific nature or its minor importance, cannot form the basis for the termination of the contract, the judge can decide to refuse its termination for non-performance.

Under common law, non-performance of the contract does not automatically lead to termination of the contract ("termination for breach"). Indeed, once a breach of contract is established, the obligee can either decide to terminate the contract or decide to maintain it ("affirming the contract"). Generally, a party to a contract can request its termination, based on any type of non-performance, whether minor ("trivial") or fundamental. However, such a unilateral power tends to generate abusive situations such as those in which a party, realizing that the price at which his goods are sold to the buyer are much inferior to the price he could achieve elsewhere, decides to invoke a trivial non-performance to be released from the contract. In order to deal with such conduct, English judges have developed case law aiming at preventing such abuses.

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166 L. ANTONIOLLI, in: *Principles of European Contract Law and Italian Law, A Commentary*, L. ANTONIOLLI, A. VENEZIANO (eds.), Kluwer Law International, 2005, p. 406 and following, in particular p. 408-409.

167 See BGH, 24 March 2006, BGHZ 167, 19.

168 Footnotes 156 and 157.

169 C.B.P. MAHE, E.H. HONDIUS, "Les sanctions de l'inexécution en droit néerlandais", in: *Les sanctions de l'inexécution des obligations contractuelles, Etudes de droit comparé*, M. FONTAINE, G. VINEY (sous la direction de), Bruylant, LGDJ, 2001, p. 837 and following pages, in particular p. 852, n° 30 and following paragraphs.

170 V. H.J. VAN KOOTEN, in: *The Principles of European Contract Law and Dutch Law, A Commentary*, D. BUSCH, E. HONDIUS, H. VAN KOOTEN, H. SCHELHAAS, W. SCHRAMA (eds.), Kluwer Law International, 2002, p. 364 and following pages, in particular pages 365-366.; C.B.P. MAHE, E.H. HONDIUS, "Les sanctions de l'inexécution en droit néerlandais", in: *Les sanctions de l'inexécution des obligations contractuelles, Etudes de droit comparé, op.cit.*p. 837, in particular n° 30, p. 852.

It emerges, in particular, from the *Hong Kong Fir Shipping Co Ltd. v. Kawasaki Kisen Kaisha Ltd.* case that the test to be applied to find out whether a contracting party is entitled to end his contract is whether the defaulting party "substantially" deprived the obligee of the benefits of the performance of the contract.[171] The test to be applied thus is not objective, it is not limited to the mere observation of a failure to perform a contractual obligation, this failure must "substantially" deprive the contracting party of the benefits of the performance of the contract. The traditional case is called "repudiation". It covers the situation where a party indicates to the other, expressly or by his conduct, that he does not intend to be bound by the contract and that as a result he does not intend to comply with the obligations resulting from it. The only difficulty in that case, which implies a discretionary control by the judges, is in determining whether non-performance affects the contract as a whole or only part of it. Aside from these situations that are, in the end, only slightly problematic, English judges, followed by the legislator, have early on adopted a distinction based on the contractual obligation that was not performed: was it a "condition" or a "warranty"? A breach of condition – violation of a fundamental obligation of the contract, that is an obligation that goes to the root of the contract – can lead to the termination of the contract whereas a breach of warranty – violation of a term of the contract considered as less important – can give rise to a claim for damages, but not to termination. The parties and the legislator can decide that such or such term will be a condition or a warranty and the judges will carry out a strict interpretation of the parties' intent. As a result, it is possible to see obligations that are fundamentally accessory to the main obligation being defined by the parties as a condition, thus enabling the termination of the contract for a failure that is sometimes insignificant. It is precisely to avoid abuses of this right that English judges, in the *Schuller AG v. Wickman Machine Tool Sales Ltd.* Case,[172] held that the court should ensure that the term was properly used, by the parties, in its technical accepted meaning rather than its common accepted meaning. Consequently, in situations where the contract raises doubts in relation to the parties' true intent, judges take into consideration the consequences of naming a clause a condition, so that the more unreasonable the consequences, the less the parties will be considered to have agreed to them. This represents the means to fight against a solution that could be unfair or even absurd and to reintroduce a certain idea of fairness.[173]

Another means for judges to fight against abuses is the category of "innominate terms" also called "intermediate terms".[174] These obligations are distinct from "condi-

171 [1962] 2 *QB* 26; [1962] 1 *All ER* 474. *per* Lord Diplock LJ: "(…) *does the occurrence of the event deprive the party who has further undertakings still to perform of substantially the whole benefit which it was the intention of the parties as expressed in the contract that he should obtain as the consideration for performing those undertakings?*".

172 [1974] AC 235.

173 See for instance, E. McKENDRICK, *Contract Law*, 7th edition, Palgrave Macmillan, 2007, n° 10.3 and following paragraphs, in particular p. 212; *adde*. H. COLLINS, *op.cit*. p. 360.

174 Hong Kong Fir Shipping Co Ltd v. Kawasaki Kisen Kaisha Ltd [1962] 2 QB 26, esp. 70, per Diplock LJ: *"There are many … contractual undertakings … which cannot be categorized as being 'conditions' or 'warranties' … Of such undertakings all that can be predicated is that some breaches will and other will not give rise to an event which will deprive the party not in default of substantially the whole benefit which it was intended that he should obtain"*.

tions" as they do not lead, in the event of a breach, to the termination of the contract. Besides, they are distinct from "warranties" as the judge is not forced to award damages. This category confers on the judge a greater flexibility in the choice of sanctions against the contractual violation. A study of case law reveals that judges increasingly tend to qualify obligations as "innominate". Indeed, aside from specific cases, such as commercial contracts where predictability is fundamental, judges tend to prefer the intermediate qualification, allowing them to reach a solution, which although less predictable, will be fairer.

Whether in presence of a condition, warranty or innominate term, the party seeking to rely on the breach bears the burden of proving it. In principle, fault does not have any role to play. Indeed, this is a strict liability, the mere failure to perform an obligation being sufficient to establish the breach. Showing evidence of the party's absence of fault will be unnecessary. Conversely, there are obligations called "care and skill" for which the party seeking to rely on the non-performance will have to prove that reasonable care was not provided in the performance of the obligation. Once fault is established, the presumed defaulting party will be able to show as a defence that that he provided all necessary care to the performance of his obligation and that consequently he did not commit any fault.

Chapter 7:
Préjudice

Main Concerns

The word '*préjudice*' does not escape the particular difficulties which the search for a common terminology presents. The study of comparative law together with both Acquis Communautaire and Acquis International, reveals that there are certain points of overlap.

1. **The term '*préjudice*' can be kept.** '*Préjudice*' is a term used in all instances when one wishes to convey the extent of recoverable damage: it also signifies, in this context, the harm caused to the victim's property or to his person, including the damage incurred to his patrimonial or non-patrimonial interests.

This term is often accompanied by descriptors, which serve to delineate the extent of the recoverable damage: for damage to be recoverable, it must be certain, foreseeable, and linked to the act alleged to have caused the loss. These requirements are commonly encountered across the board.

An entirely interchangeable use of the words '*dommage*' and '*préjudice*' is to be avoided. All the same, it seems pointless to complicate the terminology by insisting on a strict difference of meaning between '*préjudice*' and '*dommage*' – even for the sake of fastidiousness – when such a distinction seems to lack any substantial or concrete consequences.

In English, the terminology gives rise to supplementary difficulties because the term '*préjudice*' in French seems to correspond to many different words: 'damage', 'injury' and 'loss'. These different labels express subtle nuances that it is possible to clarify in French: 'damage' would seem to be translated most precisely by '*préjudice matériel*' (material damage), 'injury' by '*préjudice physique*' or '*préjudice moral*' (physical or mental injury caused to a person), and 'loss' by *préjudice financier* (financial loss). However, it would be desirable to prefer in English – as far as possible – a generic term, such as 'damage' or 'harm', taking care to clarify that recourse is being had to a generic, expansive meaning.

2. **The categories of '*préjudice*' or heads of recoverable damage** should be subject to a more precise terminological classification: the distinction between patrimonial and non-patrimonial damage, often raised in the texts studied, could be fine-tuned. This further precision appears necessary particularly where the regimes governing each category of damage are not the same.

Acquis Communautaire and Acquis International

The study of Acquis Communautaire and Acquis International reveals the variety of terms used to refer to the harm caused to one of the parties due to the failure of the other party to fulfil his obligations. In French, this harm is called '*préjudice*' or '*dommage*'.

The term '*préjudice*' is, without doubt, the more neutral of the two, and the more stable: it is the yardstick by which recoverable damages are measured. This terminological stability is nonetheless weakened when it comes to refining the term itself or describing the different categories of '*préjudice*'.

'*Préjudice*' is a term which appears in various international and Community sources.

In this discussion, the focus will be primarily on the use and acceptance of the term '*préjudice*' in the field of contract law.

Nevertheless, it should be borne in mind that criminal law is particularly rich in references to the notion of '*préjudice*', both from a substantive perspective[1] and as regards the procedural rules on conflict of laws[2] or conflict of jurisdictions.[3] For example, the European Court of Justice (ECJ) in the context of the legal rules applicable to competence, clarified the interpretation of Article 5.3 of Regulation 44/2001, 22 December 2000, concerning judicial competence, and the recognition and enforcement of judicial decisions in civil and criminal matters (formerly, the same article of the Brussels Convention of 27 September 1968): the harm referred to in this text, (the location of the occurrence of such harm being one of the elements causing competence to attach to a particular jurisdiction), concerns direct harm and excludes *'le préjudice patrimonial consécutif à un dommage initial survenu et subi par elle [la victime] dans un autre Etat,'* (patrimonial *préjudice* following from initial damage arising and suffered by [the victim] in another Contracting State).[4]

This part of the judgment gives an insight into the precise detail and scope of the term '*préjudice*': it is considered to be the consequence of the initial damage. In other words, '*préjudice*' could be seen to be the legal consequence of the sum of the facts (moreover, Article 5.3 of the aforementioned regulation deems "the place where the compensatable incident" occurred or might have occurred, to be a determining factor for the purpose of assigning competence): to reprise the suggested terminology enshrined in the Proposals for Reform of the Law of Obligations and Limitation Periods (the French Reform Proposals),[5] '*préjudice*' would amount to the damage incurred to the victim's

1 See, *Les Principes de droit européen de la responsabilité civile*, Group on Tort Law, November 2006 – Article 2.101.

2 See, Règlement no. 864/2007 on the law applicable to non-contractual obligations of 11 July 2007, JOUE no. L 193 of 31 July 2007, p. 40; O. BOSKOVIC, 'Les dommages et intérêts en droit international privé – ne pas manquer une occasion de progrès,' JCP éd. G 2006, I. 163; DICEY and MORRIS, *The Conflict of Laws*, Sweet and Maxwell, 13th Edition, p. 1531.

3 See, for example., O. BOSKOVIC, *La réparation du préjudice en droit international privé*, LGDJ 2003.

4 ECJ, 19 September 1995 – C-364/93 – *Antonio Marinari. v Lloyds Bank plc and Zubaidi Trading Company.*

5 *Documentation française*, 2006.

patrimonial or non-patrimonial interests, flowing from the harm – the damage – caused to the victim's property or to his person.[6] This terminological distinction adds what could be described as rigorous precision to legal vocabulary. Such precision does not however seem to translate in practice in the field of contract law: analysis of acquis, just as much international acquis as those of the Community, reveals that the terms '*préjudice*' and '*dommage*' are considered to be interchangeable.

In the area of contract law, the French term '*préjudice*' is in fact still employed to denote recoverable damage.[7] It is sometimes replaced with the term '*dommage*', used, in such cases, as a synonym. Thus, the term '*préjudice*' encompasses, consistently, a generic notion **(I)**. The term is coupled with qualifiers to stress the conditions which must be met before harm can be considered to be recoverable, and to indicate the nature of the harm being considered. In light of this, it seems important on a terminological level, to pose the question as to whether it is pertinent to adopt more precise expressions to describe these heads of damage or categories of *préjudice* **(II)**.

I. 'Préjudice', a Consistent Term

The term '*préjudice*' can be found in numerous international texts **(A)** as well as Community texts **(B)**. In all these diverse instances, it is used to denote the harm occasioned to one of the contracting parties. The texts studied are not always consistent in their choice of wording. Certain texts use, in this generic sense, terms other than '*préjudice*', such as '*dommage*' or '*fait dommageable*'; this diversity is even more blatant in the English versions of the texts, where various different terms are used to translate the term '*préjudice*', for example 'harm', 'loss' and 'damage'.

A. International texts

In the French text of the Vienna Convention of 11 April 1980 on Contracts for the International Sale of Goods, (CISG) the term '*préjudice*' appears in Article 25 which defines the notion of 'fundamental breach'. In this context, the term is employed in a generic sense; descriptive, without legal connotations. '*Préjudice*' is therefore a measure of whether the alleged failure is of a sufficiently essential nature: this will be found where the damage which flows from the failure is such that it substantially deprives the other party of what he anticipated to gain from the contract. This damage will need to have been foreseeable to the party at fault or to a reasonable person possessing similar qualities, in the same circumstances. In the context of this provision, the term '*préjudice*' is synon-

6 See the note on Article 1343 of the French proposal which states: '*Est réparable tout préjudice certain consistant dans la lésion d'un intérêt licite, patrimonial ou extra-patrimonial, individuel ou collectif.*' ('Every certain loss is reparable where it consists in the prejudicing of a legitimate interest, whether patrimonial or extra-patrimonial.') This Article is found in a section which contains provisions common to contractual and non-contractual liabilities.

7 The definition given by Article 2.101 of the *Principes de droit européen de la responsabilité civile* states: '*Le préjudice est l'atteinte matérielle ou immatérielle à un intérêt juridiquement protégé.*' ('Damage requires material or immaterial harm to a legally protected interest').

ymous with damage[8] and expresses the idea of a serious deprivation for the creditor (it is clear that the terms which feature in the English version do not translate the same notion of '*préjudice*', and rather insist on the notion of seriousness of harm occasioned to the creditor's interests: 'to the detriment', 'to deprive').

In the field of international transport, both the terms '*préjudice*' and '*dommage*' are found in various international agreements, used to characterise the harm occasioned to the interests of one of the parties to the contract, whether this harm concerns the victim's property or his person. In this context, the two words are used as synonymous. Many examples can be cited to illustrate the interchangeability of the terms.

Article 5 of the UN Convention of 31 March 1978 on the transport of goods by sea (the Hamburg Rules) provides that the carrier is responsible for the 'loss' resulting from 'losses' or 'damage' suffered by the merchant as well as for delay.

The UNIDROIT Convention of 23 April 1970, concerning travel contracts, provides in Article 13 that the travel organiser must answer for all 'loss or damage' caused to the traveller by reason of his complete or partial failure to perform his obligations as organiser, unless he can show he acted with due care and diligence. Article 19 of this text imposes liability on holiday intermediaries to compensate all 'loss or damage' suffered by the client by reason of the failure of the intermediary to fulfil his obligations under the Convention.

The Warsaw Convention of 12 October 1929 for the unification of certain rules relating to international carriage by air, uses the term '*dommage*' (damage) in many provisions. Thus Article 10 sets out that the dispatcher (or "consignor") is responsible for all damage suffered by the carrier or any other person, by reason of the irregularity, incorrectness or incompleteness of declarations made in the consignment note, and relating to the goods. Articles 17 and those following, which concern the responsibility of the carrier, also refer to this term: the carrier is responsible for damage suffered in case of death, injury or bodily damage, when this damage occurs onboard an aircraft or during embarking or disembarking operations (Article17). The carrier is also responsible for damage suffered in case of destruction, loss or damage to registered luggage or any goods, if the occurrence which caused the damage took place during transport (Article 18), and also for damage caused by delay (Article 19). In the same manner, the Montreal Convention of 28 May 1999 which is destined to replace the Warsaw Convention, contains a chapter III entitled 'liability of the carrier and extent of compensation for damage'. Articles 17, 18 and 19 outline the liability of the carrier in case of death or injury suffered by the passenger, damage caused to cargo and damage resulting from a delay.

The Convention of Budapest of 22 June 2001 regarding the contract for the carriage of goods by inland waterway, in Article 16, expressly provides for the liability '*pour préjudice*' of the carrier. The *préjudice* results either from loss or damage suffered by the merchandise while entrusted to the carrier until its delivery, or from the occurrence of a delay in transportation. The carrier is responsible unless he can prove that the damage was the result of circumstances '*qu'un transporteur diligent n'aurait pu éviter et aux conséquences desquelles il n'aurait pu obvier*' ('which a diligent carrier could not have avoided and the consequences of which a diligent carrier could not have obviated'). Article 18 of this text regarding grounds for the exoneration of responsibility uses the terms '*dommage*' and '*préjudice*' indifferently as if they were synonyms (See in particular Article 18.2).

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8 See in this sense, V. HEUZE, *La vente internationale de marchandises*, LGDJ 2000, no 299, p. 348.

Article 7.4.2 of the UNIDROIT Principles of International Commercial Contracts (the 2004 version of the UNIDROIT Principles) links compensation to the existence of 'harm'. The principle of '*réparation intégrale*' is affirmed, '*préjudice*' encompassing both the loss suffered and the benefit, which the creditor is deprived. The '*préjudice*' is not necessarily pecuniary (see also the observations under heading B which follows). The UNIDROIT Principles specify the criteria needed for '*préjudice*' to be recoverable: the harm must be certain (Article 7.4.3), foreseeable (Article 7.4.4) and linked to non-performance or improper performance (Article 7.4.2). Compensatory payments can be reduced if the harm is partially imputed to the creditor (Article 7.4.7) and the creditor assumes an obligation to minimize the loss sustained by reasonable measures (Article 7.4.8).

B. European Community texts

Section 5 of Chapter 9 of the Principles of European Contract Law (PECL) is dedicated to 'the right to damages'. Damage can be compensated, in the terms of article 9:501, when the 'loss' is caused to the creditor by the debtor during non-performance, and moreover the debtor does not benefit from a ground of exoneration. The *préjudice* occurs as much in a case of non-performance as in a situation where there is a simple delay in performance (The latter case is dealt with by the provisions of article 9:508). As M. PERRUCHOT-TRIBOULET notes, the framers have clearly confirmed that the awarding of compensation is subordinate to the existence of *préjudice*.[9] The commentaries regarding article 9:501 recall that damages under PECL cannot be accorded without the existence of *préjudice* which can be the result of fault or no fault. As in the UNIDROIT Principles, the *préjudice* must be the foreseeable result of non-performance: the creditor has the right to obtain an amount which corresponds to the value which he would have received on performance of the contract, on the condition that the debtor had foreseen or should have foreseen the consequences of his default. Contrary to the provisions of the CISG and the UNIDROIT Principles, this condition of foreseeability is done away with in cases where the non-performance is intentional or the result of a serious fault *(faute lourde)* of the debtor. PECL outlines that the debtor is bound to compensate neither the '*préjudice*' attributable to the creditor nor that which could have been mitigated by taking reasonable measures (Articles 9:504 and 9:505). The commentaries regarding article 9:501 recall that damages under PECL cannot be awarded without the presence of *préjudice*, whether resulting from fault or otherwise.

In the European Contract Code drawn up by the Pavia Group ('The Pavia Project'), the term '*préjudice*' is used in many provisions. For example, article 64 outlines that compensation is owed to the victim of *préjudice* in the case of an illusory representation. Article 79 gives the creditor the right to refuse performance by a third party if it will cause '*préjudice*' on his account. The creditor can equally refuse the performance anticipated if that performance 'prejudices himself [the creditor]' by the terms of article 80. By virtue of article 108, the creditor can suspend performance of a bilateral contact unless this suspension is not in good faith; 'if the refusal prejudices a basic right of the person' it will not be considered to be in good faith. Two provisions concerning mistake (articles

9 *Regards croisés sur les principes du droit européen du contrat and followingr le droit français*, edited by C. PRIETO, PUAM 2003, p. 513.

147 and 151) mention *préjudice*: the party who caused the contract to be annulled must compensate the 'loss' which is incurred (article 147) and in certain cases, mistake simply gives rise to rectification or compensation of 'loss'. Article 159 allows a consumer to be compensated for damage caused by a good. Articles 162 and those following relate to contractual responsibility. Article 162 outlines the conditions necessary for contractual responsibility to arise: the debtor is bound to make reparation for the damages which can reasonably be declared to be the result of non-performance, late performance or incomplete performance. Like the provisions of PECL, this provision specifies that except in the case of fraud or fault, the debtor is bound to make compensation for loss for which he is implicitly assumed to be answerable as a normal well-advised person, from the moment of the conclusion of the contract. Article 171 deals with the accumulation of remedies and states that accumulation is only possible when it does not confer a benefit greater than the *préjudice* suffered.

In the field of transport, article 1 of Regulation 2027/97 of 9 October 1997 on air carrier liability in the case of accidents,[10] largely inspired by the aforementioned Montreal Convention, specifies that the regulation fixes the obligations of carriers in regard to their responsibility towards passengers *'Pour les préjudices subis lors d'accidents en cas de décès, de blessure ou toute autre lésion corporelle dès lors que l'accident qui est à l'origine dudit préjudice a lieu à bord d'un aéronef ou pendant les opérations d'embarquement ou de débarquement,'* ('For damage sustained in the event of death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board an aircraft or in the course of any of the operations of embarking or disembarking'). The regulation continues in article 3 to detail precisely the conditions of responsibility of the carrier for *'un dommage subi, en cas de décès, blessures ou de toute autre lésion corporelle par un voyageur'* ('damage sustained in the event of death or wounding of a passenger or any other bodily injury by a passenger'). The two terms – *'préjudice'* and *'dommage'* – are used as synonyms.

On the sidelines of the field of Contract law, in the strict sense, certain Community texts in the field of commercial law refer equally to *'préjudice'* in this generic sense.

Articles 81 and 82 of the EC Treaty concern the nullity of agreements which are prohibited by Community law. These provisions do not bring any finer precision to the civil sanction applicable by virtue of the law of the Member States concerned. In this regard, the Community case law states that, *'c'est au droit national qu'il incombe de définr les autres conséquences attachées à la violation de l'article 85 (désormais article 81) du Traité, telles que les obligations de réparer le préjudice causé à un tiers ou une éventuelle obligation de contracter'* ('the other consequences attaching to an infringement of article 85 (formerly article 81) of the Treaty, such as the obligation to make good the damage caused to a third party or a possible obligation to enter into a contract are to be determined under national law').[11] The ECJ has considered that the effectiveness of the rights conferred by the Treaty must be guaranteed by the law for the individuals who would have suffered damage from the infraction of the rules of articles 81 and 82 to claim compensation.[12] The European case law underlines the fundamental nature of compensation eventually accorded by virtue of national law: reparations must be made for *préjudice* suffered. The

10 *OJ* l 285 17 October 1997.

11 CFI, 18 September 1992, T-24/90, ECR-2223.

12 ECJ, 20 September 2001, C-453/99, *Courage/Crehan*.

question for the national judge essentially concerns the determination of *préjudice* and the existence of a causal link which must connect the prohibited behaviour and the damages claimed.

Directive 2005/29/EC of 11 May 2005 concerning unfair commercial practices in the internal market,[13] by virtue of article 11.2, allows Member States to accord the power to forbid unfair commercial practices, in the sense of the Community text, to courts or competent administrative authorities, even in the absence of proof of 'loss or damage'.

However, most of the derived legal texts do not envisage '*préjudice*' as such. They often use circumlocution to characterize the harm suffered to the rights of one of the parties. For example, article 4.6 of Directive 90/314/EEC of 13 June 1990 concerning package travel, package holidays and package tours[14] provides for the '*droit à dédommagement*' ('right to compensation') of the consumer for non-performance of a contract, in the case of surrender of the contract by the consumer following the cancellation of the holiday by the organizer. In the same fashion, article 3.3 of Directive 1999/44/EC of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees[15] defines the repair of the good or its replacement as 'remedies' in case of a defect. Moreover, the different texts of derived Community law endeavour to consider the different categories of *préjudice*.

II. Heads of Damage/Categories of Préjudice: Poorly Identified Sub-categories

In the different texts analysed, '*préjudice*' is divided into sub-categories of heads of recoverable *préjudice*. In its generic sense, as discussed above, *préjudice* must meet certain conditions in order for the victim to be able to be compensated: in roughly the majority of texts studied, *préjudice* must be certain, foreseeable and it must have a sufficient causal link with the harmful act.

Added to these general conditions attaching to *préjudice* in its generic sense are specific conditions depending on the particular category of *préjudice* concerned. Thus, it is a question of studying the terminology used to identify the heads of 'préjudice', often known as damages or '*dommages*' in French. In the interests of clarity and coherence, we will use the term '*préjudice*'. A notable distinction exists between patrimonial *préjudice* **(A)** and non-patrimonial *préjudice* **(B).** Without a doubt, breaking '*préjudice*' down into these two categories alone will not enable us to classify the various heads of *préjudice* entirely; certain reservations remain **(C).**

A. Patrimonial categories of prejudice

International and Community texts both provide for the recovery of material *préjudice*. The terminology used varies: such *préjudices* are described as material, financial, patrimonial or pecuniary. These terms are sometimes used as synonyms, sometimes to denote

13 *OJ* L 149 11 June 2005.

14 *OJ* L 158 23 June 1990.

15 *OJ* L 171 7 July 1999.

precise sub-categories. They all characterize an infringement of the victim's rights which results in the latter's patrimonial impoverishment. The texts studied give no definition of patrimonial *préjudice*; they strive rather to detail precisely the elements required for the calculation of damages. (See on this point the observations in the acquis section of the study, under the '*dommages et intérêts/indemnité*' heading).

On the matter of recoverable heads of *préjudice*, article 5 of the CISG indicates that the CISG does not apply to the responsibility of the vendor for bodily injuries caused to third parties ('death or personal injury caused by the goods to any person'). Apart from this article, the CISG does not define the heads of recoverable *préjudice*. According to the majority of academic/extra-judicial opinion, the heads of *préjudice* stemming from losses, or lost gains, must be material or economic in nature; the possibility of recovery for mental *préjudice* is therefore excluded.[16] There is scant case law relevant to the interpretation of this provision. What case law does exist confirms that the CISG Principles rule out recovery for bodily injuries: for example, in a case concerning leaks from a fitting containing salt water, a Swiss court held that personal injuries ('*préjudice*') flowing from the defect in the fitting were not covered by the CISG but that the harm ('*préjudice*') caused to the premises of the purchaser fell within the scope of the text.[17]

In UNIDROIT Principles and PECL, it seems to go without saying, according to the wording of the provisions of both texts, that recovery is possible for material *préjudice*. Both texts, in fact, expressly state that 'recoverable *préjudice*' includes non-pecuniary *préjudice*, thus implicitly signifying that pecuniary *préjudice* is taken for granted as being recoverable. Article 7.4.2 of UNIDROIT Principles states the principle of *réparation intégrale*, as has been seen above. '*Préjudice*' includes the loss suffered as well as the benefit missed. Subsection 2 of this provision implies the distinction between material and non-material *préjudice*: it indicates that the *préjudice* can be non-pecuniary ('such harm may be non-pecuniary') and notably that it can be the result of physical or mental suffering. Comment number 5 concerning this provision states that the UNIDROIT Principles allow for the recovery of *préjudice 'non matériel*' (non-material harm). In the PECL, following the example of the UNIDROIT Principles, recoverable *préjudice* comprises 'non pecuniary loss' as well as future *préjudice*, the realisation of which is reasonably likely. The comments appearing under this provision recall that recoverable *préjudice* is not limited to financial losses, and the notes expressly allow for the recovery of '*préjudice non pécuniaire*'.

Articles 163 and 164 of the Pavia Project make an express distinction between recoverable 'patrimonial loss' (article 163) and recoverable 'non patrimonial loss' (article 164). Article 163 details that patrimonial loss includes both the loss suffered and the benefit lost and that recoverable patrimonal loss includes secondary damages.

This distinction between patrimonial and non-patrimonial *préjudice* is more clearly asserted in the UNIDROIT Convention of 23 April 1970 on travel contracts. Articles 13, 14 and 19 concern '*préjudice*' in the broadest possible manner without any further distinction. However, article 13.2 sets monetary caps on recovery, the amount of which can be increased by the signatory states, under certain conditions depending on the type of *préjudice*: 'personal injury', 'damage to property' or 'any other damage'.

16 See V. HEUZE, *op.cit.*, n° 449, p. 402.

17 Handelsgericht Zurich, 26 April 1995, available online at www.unilex.info.

B. Non-patrimonal categories of préjudice

Non-patrimonial categories of *préjudice* are not clearly defined: they are treated as the residual category of *préjudice* not included in 'patrimonial *préjudice*'.

In certain texts, it is the general way in which *préjudice* is described which causes non-patrimonial *préjudice* to be considered as included in the heads of recoverable *préjudice*. Thus, as mentioned aboved, article 13.2 of the UNIDROIT Convention of 23 April 1970 concerning travel contracts set a ceiling of indemnification, the amount of which varies according to the nature of the *préjudice*: bodily damage, damage to property or any other *préjudice*. This last provision could be considered as covering non-patrimonial *préjudice*.

As mentioned above, UNIDROIT Principles like those of PECL, envisage recovery for non-pecuniary *préjudice*.

Comment number 5 on article 7.4.2 of UNIDROIT Principles explicitly outlines the notion of non-material *préjudice*. The commentary refers to *pretium doloris*, *la perte des aménités de la vie, le préjudice esthétique etc. aussi bien que l'atteinte à l'honneur ou à la réputation* (pain and suffering, loss of certain amenities of life, aesthetic prejudice etc., as well as harm resulting from attacks on honour or reputation). Examples are given in the area of the law concerning international business contracts: non-pecuniary *préjudice* concerning contracts which are generally concluded *intuitu personae*, such as contracts concluded by artists, elite sportsmen or even consultants. The concrete example used to illustrate the Comment concerns harm to the reputation of an architect which could be compensated by damages, but equally by other forms of redress such as the publication of a notice in the newspaper. A Mexican arbitration ruling had the opportunity to clarify the interpretation of UNIDROIT Principles in respect of this provision.[18] The decision concerned an exclusive distribution contract between a Mexican agricultural producer and a distributor based in California. The contract contained an arbitration clause which stipulated that in the case of a dispute, UNIDROIT Principles would apply. Since the producer failed to fulfil his contractual obligations, the distributor invoked the arbitration clause. The arbitration tribunal applied UNIDROIT Principles. Damages were awarded to the distributor to compensate the financial loss suffered, but recovery was not granted for the non-pecuniary *préjudice* alleged by the distributor, consisting of the damage to his reputation in the Californian market. On this matter, the tribunal found, in fact, that this type of *préjudice* could in theory be recovered but in the instant case the facts did not support such an award.

Comment number 5 on Article 9:501 of PECL equates mental *préjudice* with non-financial *préjudice*: '*souffrance, douleur, dérangement, troubles psychiques*' (pain and suffering, inconvenience and mental distress) are the examples given to illustrate what mental *préjudice* might comprise. In the case of contract law, the concrete example used to demonstrate this type of *préjudice* is that of the defective performance of travel contracts: where the benefit conferred is of a greatly inferior quality to that promised, and the tourist is therefore entitled to ask for damages in respect of the inconvenience suffered and the pleasure deprived. The notes on this same provision clarify the nature of non-pecuniary *préjudice*: pain and inconvenience resulting from bodily harm, disappointment or grief, attacks on one's personality, one's good name or one's honour or the death of a partner or of another close person.

18 Centro de Arbitraje de México, 30 November 2006, available online at www.unilex.info.

The Pavia Project contains more detailed provisions on the definition of '*dommage moral réparable*' (recoverable mental suffering) alluded to in article 164. subsection 1 of this provision deems that the *préjudice* is recoverable in such instances as: serious mental distress or emotion resulting from physical injuries, harm caused to one's '*patrimoine moral*' (mental patrimony), offences against the memory of a deceased partner, physical pain such as conditions causing bodily suffering even in the absence of any pathological, organic or functional condition of suffering, or even harm caused to one's general health.

Article 5 of the Directive cited above concerning package travel, package holidays and package tours gave rise to a decision of the ECJ of particular relevance to the present study.[19] Article 5 refers to two distinct categories of *préjudice* addressing the possibility for Member States to limit the amount of compensatory damages to be awarded in each instance. Member States can decide that recovery for damages resulting from the non-performance or improper performance of a contract be limited in accordance with applicable international conventions, whereas in respect of damages other than bodily damages Member States can allow for these to be limited by the terms of the contract itself, so long as the limitation is not '*déraisonnable*' (unreasonable). In this ECJ decision, a young girl had reserved a package holiday to Turkey. In the course of her holiday, she contracted serious food poisoning caused by the food supplied in the holiday resort. She took an action in damages against the tour operator. At first instance, the Austrian courts awarded her damages linked to her physical suffering but refused to grant compensation for the *préjudice* suffered by the loss of enjoyment of her holidays on the grounds that Austrian law does not allow for the recovery of such *préjudice*: enjoyment has no pecuniary value and thus no patrimonial impoverishment was occasioned.[20] On appeal, the Austrian courts decided to withhold judgment and to refer a preliminary question to the ECJ in order to determine whether Article 5 of the Directive declares a right to recovery for mental *préjudice*. The ECJ responded in the affirmative, basing its ruling on two grounds. First, that the aim of the Directive is to eliminate distortions of competition among holiday operators established in the various Member States: national differences in the recoverability or non-recoverability of such *préjudice* must not be dwelt upon. In so ruling, the ECJ supported an autonomous interpretation of the notion of damage used in the Directive. Second, that the objective of the Directive is to protect the consumer tourist: this protection must incorporate compensation for the '*préjudice*' resulting from the loss of enjoyment because this '*préjudice*', per Consideration 22 of the *Leitner* judgment, '*a pour eux une importance particulière*' (is of particular importance to consumers). This last argument was supported by the letter of the text itself which draws a distinction between bodily *préjudice* and all other *préjudices*, in terms of the setting of upper limits on damages. The Advocate General, moreover, emphasised that the use of different systems for the two classes of *préjudice* seems logical, to the extent that mental *préjudice* – being necessarily subjective – must be capable of being limited in a reasonable way, as regards its compensation, by the contract's own provisions.[21]

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19 ECJ, 12 March 2002, Case C-168/00 *Leitner v. TUI Deutschland GmbH & Co. KG*.

20 This reasoning was referred to in the conclusions of the Advocate General, A. TIZZANO, in this case.

21 See equally, on the sidelines of contract law, the notion of *préjudice* defined by Article 9 of Directive 85/374 concerning the responsibility for defective products: the term '*dommage*' (damage) describes '*le dommage causé par la mort ou par des lésions corporelles; le dommage causé*

C. Hesitations regarding certain specific categories of préjudice

The dichotomy between patrimonial and non-patrimonial *préjudice* is sometimes a troubled one, particularly since each of these categories calls for a precise regime to regulate certain aspects of their application. In a communication dated 11 July 2001, the Commission stressed that national divergences concerning the nature of certain *préjudices* posed a threat to attempts at harmonisation. Certain *préjudices* pose a problem of delimitation concerning their domain of application, such as mental *préjudice* (mental injury) (**1**), or bodily harm (**2**); purely financial or economic loss constitutes, perhaps, a third independent category (**3**).

1. Mental injury

Firstly, mental injury is not a consistent category, as seen above. It is given a greater or lesser meaning in different texts: for some, it constitutes a generic category which encompasses all *préjudices* linked to harm to the person, while for others, certain classes of harm are excluded such as the loss of enjoyment, or disappointment. To avoid ambiguities, therefore, each time mental injury is referred to, it is necessary to set out explicitly what comes within that heading.

2. Personal injury

Secondly, it can be seen from the texts analysed above that the classification of personal injury is unclear. This type of *préjudice* is either considered as a patrimonial *préjudice* when it leads to economic loss, or as a species of mental *préjudice*. For example, article 7.4.2 of UNIDROIT Principles sees aesthetic *préjudice* as falling within the rubric of non-material *préjudices* according to the meaning given to such *préjudices* in the Principles. Many texts on the topic of international transport make provision for material injury caused to luggage, merchandise or to the person of the traveller (for example, see articles 17 and 18 of the Montreal Convention referred to earlier). Different regimes apply in respect of these distinct types of *préjudices*, with *préjudice* resulting from harm to the person of the traveller being submitted to a more favourable regime from the traveller's point of view (for example, see Article 21 of the Montreal Convention). It might be necessary perhaps to isolate personal injury, whether its consequences are patrimonial or non-patrimonal, and to accord it an entirely distinct name.

à une chose ou la destruction d'une chose, autre que le produit défectueux lui-même' ('the damage caused by death or bodily injury; the damage caused to a good or the destruction of a good other than the defective product itself'). Article 9 states that this provision '*ne porte pas préjudice aux dispositions nationales relatives aux dommages immatériels*' ('does not affect national provision pertaining to non-material damage').

3. Pure Economic Loss

Thirdly, the question deserves to be asked whether certain categories of *préjudice* are not becoming entirely autonomous in their own right. On this point, '*le préjudice économique ou financier*' ('economic loss') raises similar questions to those encountered in the field of criminal law.

Economic loss is most often contained in the categories of patrimonial or extra-patrimonial *préjudice*: it is to be compensated not in and of itself, but rather by application of the principle of *réparation intégrale*, so long as it meets the general requirements of certainty, foreseeability, and there exists a sufficient causal link with the harmful act. French terminology reflects the fact that economic loss is currently contained within an existing category: there is no specific reference to economic loss to be found in either Community or international acquis.[22] For example, after restating the principle of *réparation intégrale*, article 7.4.2 of UNIDROIT Principles provides that compensation includes the loss suffered as well as the benefit deprived as a result of the non-performance. The Comment on this provision adds that the benefit deprived will very often present itself as the loss of a chance: Article 7.4.3 states that the loss of a chance is to be compensated '*dans la mesure de la probabilité de sa réparation*' ('in proportion to the probability of its occurrence'). Thus the analysis of recoverable economic loss will focus on the causal link.

However, English terminology seems to treat financial or economic loss as being a separate class of *préjudice* in its own right. Thus, harm caused to a patrimonial interest (which is not the consequence of harm caused to the possessions or to the person of the victim) can constitute, independently, an economic loss.[23] An example of this type of loss in contract law can be seen in a judgment of the Cour d'appel de Paris.[24] In this case, three passengers from a medical assistance company were travelling to Libreville via Brussels with the airline Sabena, with a confirmed reservation. They were heading to Gabon with a view to making a deal with Gabon authorities whereby the latter would cover the costs of a rally. On the stopover in Brussels, after waiting for a long period, the passengers were not permitted to board because the flight had been overbooked. They ended up arriving one day late. Because of their lateness, the Gabon authorities cancelled all meetings. The passengers obtained resulting damages covering, notably, the economic loss associated with the contract that would have been concluded in Gabon: the limited

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22 On this point, see Ch. LAPOYADE DESCHAMPS, "La réparation du préjudice économique pur en droit français", *RIDC* 1998 at p. 367.

23 For a proposal of an even larger definition, see M. NUSSEMBAUM, "La réparation du préjudice économique", colloquium of the *Cour de cassation* of 26 April 2007 on the compensation of economic loss, available on the website of the *Cour de cassation*, www.courdecassation.fr. Economic loss would comprise faults of an economic nature (such as attacks on the integrity of the market by way of anti-competitive practices, or on the stock markets by way of practices which affect negatively the principle of equal access of investors to information), all types of economic loss resulting from activities of commercial production or service provision, and economic loss outright (loss of revenue or failure to earn resulting from criminal/criminally negligent faults).

24 Paris, 15 September 1992, *D.* 1993.98, note Ph. DELEBECQUE.

liability clause does not apply in cases of fraud. As Ph. DELEBECQUE stressed,[25] this means characterising *'une faute lucrative commise délibérément avec la conscience de la probabilité du dommage et son acceptation téméraire dans le but de réaliser un profit'* (a lucrative fault committed deliberately, with knowledge of the probability of damage being caused, and its reckless acceptance with the purpose of making a profit).[26] More and more, fundamental questions are being posed in relation to the principle itself, and in relation to the functional practicalities of compensation for such *préjudice*.[27] This type of *préjudice* is principally discussed in the analysis of Acquis International and Acquis Communautaire, in the discussion of the methods of assessment which can be used in order to determine the damages to be awarded.

Comparative Law

The term '*préjudice*' is used in a relatively consistent fashion in French. The study of comparative law reveals a factual equivalence, in francophone countries, between the terms '*préjudice*' and '*dommage*' while at the same time a scientific distinction exists and seems to be becoming widespread. The word '*dommage*' (a term, moreover, that is used in German Law) encompasses the harm suffered by a person to his body, patrimony or his extra-patrimonial rights, while the word '*préjudice*' refers to the consequences of that harm. On the other hand, only one term is used by the common law, 'damage' which although occasionally replaced by the terms 'harm' or 'loss' remains the most adequate term to translate the idea of '*dommage*' as much as the idea of '*préjudice*'. In the same fashion, in Italian law for example, the term '*danno*' is used indifferently as the only synonym for the French terms '*prejudice*', '*dommage*' and '*dommages et intérêts*'.

Cut off from the question of the necessity to prove *préjudice* in order to justify the granting of the payment of damages, it seems opportune to specifiy the terminological and conceptual distinction between the terms '*dommage*' and '*préjudice*' with which it is more and more often proposed to proceed, at least in France (**I**).

In addition, it is striking to note that a certain traditionalism exists amongst the different legal systems regarding both the characterisation and the classification of certain categories of *préjudice*, which in some cases is a tried and tested formula, and in others a contemporary development (**II**).

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25 Note referred to earlier, no. 9.

26 On the notion of lucrative faults in the domain of extra-contractual liability, see D. FASQUELLE, "L'existence de fautes lucrative en droit français", in *Faut-il moraliser le droit français de la réparation du dommage, colloque Paris V, LPA* 20 November 2002, p. 27.

27 For a consideration of the large body of writing on the topic in the field of criminal law, see for example *Pure Economic Loss in Europe* edited by M. BUSSANI, V. PALMER and U. MATTEI, Cambridge University Press, 2003.

I. The Distinction between the Terms "Préjudice" and "Dommage"

In **French Law**[28] and in **Quebec Law**,[29] the term *'dommage'* is used, in informal language, as a synonym for the term *'préjudice'*. *'Dommage'* refers to *'l'atteinte subie par une personne dans son corps (dommage corporel), dans son patrimoine (dommage matériel ou économique) ou dans ses droits extrapatrimoniaux (perte d'un être cher, atteinte à l'honneur), qui ouvre à la victime un droit à réparation (on parle alors de dommage réparable) lorsqu'il résulte soit de l'inexécution d'un contrat, soit d'un délit ou d'un quasi-délit, soit d'un fait dont la loi ou les tribunaux imposent à une personne la charge'* ('the harm suffered by a person to his body (personal injury), to his patrimony (economic or material damage) or to his extra patrimonial rights (loss of a loved one, slight on one's personal honour), which opens up to the victim the right to be compensated (one speaks therefore of recoverable damage) resulting either from the non-performance of a contract, or from a criminal act or quasi-criminal act, or from an act for which the law or the courts impose responsibility on a person').[30]

In French Law, if "*dans le langage courant, pour la jurisprudence et la très grande majorité de la doctrine, les termes de 'dommage' et de 'préjudice' sont de parfaits synonymes, qui peuvent être indifféremment utilisés l'un pour l'autre, (…) certains auteurs ont (…) proposé une distinction de ces deux notions: le dommage serait ainsi defini comme l'atteinte portée à la victime (destruction d'un bien, atteinte à l'intégrité corporelle, aux sentiments) et représenterait une notion objective de pur fait. Le préjudice serait quant à lui constitué par les conséquences juridiques de cette atteinte (perte patrimoniale ou extrapatrimoniale causée par le dommage), notion subjective prenant en compte la situation personnelle de la victime*" ("in informal language, in case law and the vast majority of the academic legal discussion, the terms *'dommage'* and *'préjudice'* are perfect synonyms, which can be substituted indifferently one for the other, (…) certain authors have (…) proposed a distinction between these two ideas: thus *'dommage'* would be defined as the harm suffered by the victim (destruction of goods, harm to bodily integrity or emotions) and represents a purely factual objective idea. In contrast, *'préjudice'* would be comprised of the judicial consequences

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28 German Law can, to a certain extent, be revealing even though from a terminological point of view it does not distinguish between the terms *'dommage'* and *'préjudice'*, both it seems being translated by the term *'Schaden'*. In effect, German law features a similar distinction, but it is limited to the domain of tort law. It distinguishes harm/injury (*'Verletzung'*) to a legally protected good (a *'Rechtsgutsverletzung'*) from *préjudice* caused by this harm. Moreover, this distinction is due to the desire of the German legislature to protect only certain *'Rechtsgüter'* (legally protected goods) with the system of tortious liablility (and notably, neither patrimony nor a general freedom to act). Consequently, for tortious liability to be imposed, above all, it must be established that harm (*'Verletzung'*) to a good that is legally protected (for example a car bumper or even a broken leg) has been *caused* by the defendant (first causal link – *'haftungsbegründende Kausalität'*), and next, that the *préjudice* (*'Schaden'*), meaning here the necessary compensation costs occasioned by the harm must be established (second causal link – *'haftungsausfüllende Kausalität.'*)

29 J.-L. BAUDOUIN, P. DESLAURIERS, *La responsabilité civile*, 6th Edition, Yvon Blais 2003, no. 287.

30 G. CORNU (ed.), *Vocabulaire juridique*, Association Henri Capitant, Puf, Quadrige 2002, see *Dommage*.

of this harm (partrimonial loss or extrapatrimonial loss caused by the damage) a subjective notion that takes into account the personal situation of the victim").[31]

This distinction has, moreover, recently been positively enshrined by leading academic commentators in the French Reform Proposals. This text states that *"dans toute la mesure du possible, le groupe a essayé de donner des sens distinct aux termes 'dommage' et 'préjudice' le dommage désignant l'atteinte à la personne ou aux biens de la victime et le préjudice, la lésion des intérêts patrimoniaux qui en résulte"*[32]

("in every possible way, the group has tried to give distinct meanings to the phrases '*dommage*' and '*préjudice*'; '*dommage*' refers to the personal injury or harm suffered by the victims property while 'préjudice' refers to the diminishment to patrimonial or non-patrimonial interest that ensues").

In addition, **Quebec law** uses the term '*dommage*' to characterise the pecuniary compensation for *préjudice* suffered. The expressions '*dommage*' and '*dommages et intérêts*' are frequently read as being used indifferently.[33]

In **Anglo-American law** the term 'damage' is generally used to describe the notion of the French term '*dommage*'. The terms 'harm' or 'loss' are found used as classic synonyms.[34] In addition, 'damage' – harm in the greater sense – must not be confused with the term 'damages', i.e. the compensatory payment aimed primarily at redressing the harm suffered – the 'damage'.

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31 The distinction is acknowledged but often 'expressly' excluded by authors. G. VINEY, P. JOURDAIN, *Les conditions de la responsabilité*, 3rd Edition, LGDJ 2006, no. 246-1 who state the reality of the distinction but do not deduce from it a clear distinction of the regime, meaning that (at least from a terminological point of view) in their work they equate the terms '*préjudice*' and '*dommage*', '*sauf à observer que ce que la responsabilité civile a pour objet de réparer ce sont bien les conséquences d'une atteinte à une personne ou à un bien*' ('noting however that it is the consequences of an injury to a person or a good that civil responsibility aims to compensate'). Sometimes, the equating of terms is implicit: *See*. S. RETIF, Jurisclasseur *Responsabilité civile et assurances*, Fasc. 101, no. 3: *'Cette distinction n'est pas fréquemment faite par les praticiens; les termes 'dommage' et 'préjudice' étant considérés comme synonymes, y compris d'ailleurs dans certains arrêts de la Cour de cassation*' ("This distinction is not frequently made by practitioners: the terms '*dommage*' and '*préjudice*' being considered as synonyms, including in several decisions of the *Cour de cassation*"). However, other authors are more attached to the distinction: Ph. LE TOURNEAU, *Droit de la responsabilité et des contrats*, Dalloz, 2004/2005, no. 1305 and 1309; L. CADIET, *Le préjudice d'agrément*, th. Poitiers 1983; S. ROUXEL, *Recherche sur la distinction du dommage et du préjudice en droit privé français*, th. Grenoble II, 1994, Y. LAMBERT-FAIVRE, *Droit du dommage corporel*, Dalloz, 45th Edition, no. 86; C. LAPOYADE-DESCHAMPS, "Quelle(s) réparation(s)?", in: *La responsabilité à l'aube du XIXe siècle: bilan prospectif*, *Resp. civ. et assur.*, special edition, June 2000, p. 62-.; Ph. BRUN, *Responsabilité civile extracontractuelle*, Litec 2005, no. 215 and no. 249; "Personne et préjudice", *Rev. gén. de droit de la faculté d'Ottawa*, 2003, p. 187; S. PORCHY-SIMON, "Dommage" in: *Dictionnaire de la culture juridique*, D. ALLAND, S. RIALS (eds), Lamy, Puf 2003, p. 412; X. PRADEL, *Le préjudice dans le droit civil de la responsabilité*, Avant-propos J.-L. BAUDOUIN, P. DESLAURIERS, Préf. P. JOURDAIN, LGDJ 2004, no. 15.

32 *Op.cit.*, p. 173, note 2.

33 J.-L BAUDOUIN, P. DESLAURIERS, *op.cit.*, no. 287.

34 *Black's Law Dictionary*, p. 945.

In **Italian** Law the term '*danno*' corresponds to both French terms '*préjudice/dommage*': The Italian Civil Code does not contain a definition of '*danno*', but sets out in Article 1223 the situations in which it is taken into account as well as the content of the obligation to compensate *(risarcimento danni)*. '*Préjudice*' can result from non-performance of an obligation (contractual responsibility) or even from an illicit deed (extra-contractual responsibility): In the first scenario the phrase '*danno contrattuale*', '*dommage contractuel*' or contractual damage is used.[35] The expression corresponds to an ancient usage and seems justified by the importance of case law in the matter of contractual obligations.[36] Contractual damage is damage which is contrary to the legal system and which offends the legitimate financial interests of the creditor: the act which produces the damage (non-performance or improper performance of a contract) violates the norm from which the bond of obligation draws its legal force as much as the subjective right which is derived from it (the claim).[37] The definition of the frontier between the two categories of damage (contractual and tortious) is not always easy to discern. To demonstrate this, '*préjudice*' can be caused either during the negotiations or in the carrying out of a contract which by its nature could cause the damages in both the domain of contractual responsibility and that of tortious responsibility, which can give rise to situations where an accumulation of responsibilities is possible.[38] Whatever the case may be, compensation for contractual *préjudice* has the function of rebalancing and controlling the economics of the contract in its pathological aspects, such as invalidity and non-performance.[39]

II. The Heads of Damage: The Diverse Categories of Préjudice

The distinction between patrimonial *préjudice* (**A**) and extra-patrimonial *préjudice* (**B**) can be suggested as a means by which to classify the different heads of damages indemnified in the area of contractual responsibility. The distinction is, for example, central to **German Law** and its application can be clearly seen in § 253, subsection 2 of the BGB which subjects 'non-patrimonial *préjudices*' ('*préjudices moraux*') ('*Nichtvermögensschäden*') to specific and supplementary conditions, distinct from those which are required for the indemnification of patrimonial *préjudices* ('*Vermögensschäden*').

On the other hand, **Quebec law,** has evolved and does not now present a uniform division in the matter of classifying indemnifiable *préjudices*. In effect, under the influ-

35 G. VISINTINI, Trattano breve della responsabilità civile. Fatti illeciti, in adempimento, fatto risarcibile, Padova 1999, p. 74; M. BARCELLONA, Inattuazione dello scambio e sviluppo capitalistico, Milano, 1980; A. DI MAJO, la responsibilità contrattuale, Torino 1997.

36 G. VISTINI, L'inadempimento delle obbligazioni, Trattato di diritto private diretto da P. Rescigno, 9, Milano p. 252; A. DE CUPIS, See 'Danno' in Enciclopedia del dritto, Varese 1962, p. 630.

37 A. DE CUPIS, V° "Danno", in Enciclopedia del diritto, Varese 1962, p. 631.

38 In this regard, the case of a transport contract is the best example: the damage caused to the good is indemnified on the grounds of contractual responsibility, the personal injuries on the grounds of tortious responsibility.

39 V. ZENO ZENCOVICH, V° "Danno" in A. BELVEDERE, R. GUARINI, P. ZANI, V. ZENO-ZENCOVICH, *Glossario*, 1994, p. 96.

ence of the Civil Code of Southern Canada, academic discussion developed a bipartite classification between pecuniary losses and non-pecuniary losses.[40] Since the coming into force of the Civil Code of Quebec, a tripartite division has been put into action, distinguishing: corporal, moral and material *préjudice*.[41] In any case, this definition is not that which was adopted by the *Quebec Charter of Human Rights and Freedoms (Charte des droits et libertés de la personne)*,[42] which distinguishes only between moral *préjudice* and material *préjudice*.

The **French Civil Code** does not expressly distinguish between the patrimonial *préjudice* and non-patrimonial *préjudice*.[43] At the very most, Article 1149 of the Civil Code states that *'les dommages et intérêts dus au créancier sont, en général, de la perte qu'il a faite et du gain dont il a été privé* (…),' ('Damages due to a creditor are, as a rule, for the loss which he has suffered and the profit which he has been deprived'). However, academic discourse proposes different classifications sometimes opposing, economic *préjudice* to moral *préjudice*,[44] sometimes material *préjudice* to both corporal and moral *prejudice*,[45] or even a division between exclusively economic *préjudice* and harm to interests that are not exclusively economic.[46] This effort at classification aims to outline the different varieties of

40 J.-L. BAUDOUIN, P. DESLAURIERS, *op.cit.*, no. 287, p. 229-230.

41 See Article 1458 subsection 2 of the Quebec Civil Code which states that: *'Elle [la personne qui a le devoir d'honorer les engagements qu'elle a contractés] est, lorsqu'elle manque à ce devoir, responsable du préjudice, corporel moral ou matériel, qu'elle cause à son cocontractant et tenue de réparer ce préjudice (…)'* ('The person who had the a duty to honor the contractual engagements he/she has entered into, is, when he/she does not fulfil his/her duty, responsible for all *préjudice*, personal injury, mental injury or material damage, he/she causes to their cocontractant and is bound to compensate this *préjudice*').

42 L.R.Q. C-12, Article 49 subsection 1, which states: *'Une atteinte illicite à un droit ou à une liberté reconnu par la présente Charte confère à la victime le droit d'obtenir la cessation de cette atteinte et la réparation du préjudice moral ou matériel qui en résulte'* ('Any unlawful interference with any right or freedom recognized by this Charter entitles the victim to obtain the cessation of such interference and compensation for the moral or material prejudice resulting therefrom').

43 However, the French Reform Proposals advance this distinction in Article 1343, which is common to both the contractual and tortious regimes of responsibility: 'Est réparable tout préjudice certain consistant dans la lésion d'un intérêt licite, patrimonial ou extrapatrimonial, individuel ou collectif' (Any certain loss is reparable where it consists of the prejudicing of a legitimate interest, whether patrimonial or extra-patrimonial, individual or collective.) *op.cit.*, p. 173.

44 Ch. LARROUMET, Droit civil. Les obligations. Le contrat, T. III, 5th edition, Economica 2003, n° 650 -.

45 F. TERRÉ, Ph. SIMLER, Y. LEQUETTE, *Droit civil. Les obligations*, Dalloz, 9th edition, 2005, n° 562. A. BENABENT, *Droit civil. Les obligations*, 10th edition, Montchrestien, 2005, no. 414; J. CARBONNIER, *Droit civil. Les obligations. Les biens*, Vol. II, Quadrige Puf, 1st edition, 2004, no. 1071, p. 2189; J. FLOUR, J.-L. AUBERT, Y. FLOUR, E. SAVAUX, *Droit civil. Les obligations*. 3. Le rapportd'obligation, 4th edition, 2006, no. 216, p. 163. The distinction between material *préjudice* and moral *préjudice* seems to be upheld in Belgian law also. See for example: I. DURANT, N. VERHEYDEN-JEANMART, *op.cit.*, no. 8, p. 313.

46 G. VINEY, P. JOURDAIN, *Les conditions de la responsabilité, Traité de droit civil*, 3rd edition, LGDJ, 2006, no. 250, p. 30.

préjudice which can be indemnified on the condition that they are immediate, certain and foreseeable consequences of the non-performance of the debtor, and to make the categories more comprehensible.[47] The principle used is that of *réparation intégrale* for the *préjudice* suffered by the victim/creditor, whether it be a question of contractual or tortious responsibility; the nature of the '*préjudice*' suffered is of little importance except that one must be mindful of the difficulty in evaluating non-patrimonial *préjudice*.[48]

In **Italian Law**, the classification between partimonial and extra-patrimonial *préjudice* is more developed in regard to tort than it is in the contractual sphere. However, a reference to patrimonial damage in the matter of contract law can be found in Article 1223 of the Civil Code. This text provides, in effect, for the calculation of the amount of the indemnification. It seeks to accomplish the primary purpose of the obligation to indemnify, namely the compensation of the *préjudice* caused. This obligation carries out another function, one that is comminatory in nature, identifying behaviour that is at fault.[49] On the one hand, the compensation must be total and complete, and on the other hand the debtor must not make a profit.[50] The expression '*dommage patrimonial*'[51] ('patrimonial damage') thus refers to all the '*utilités*'[52] (useful methods) which are capable of giving rise to a monetary estimation. As regards extra-patrimonial *préjudice*, it is not expressly laid out in the Code in regard to contractual matters, but some of the academic commentary considers that in the case of non-performance or improper performance of a contract, indemnification for moral *préjudice* is possible by virtue of Article 2059 of the Italian Civil code *(Danni non patrimoniali)*.[53]

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47 The wording of Articles 1150 and 1151 of the French and Belgian Civil Codes are frequently brought together to explain the specific nature of contractual damage as less important than tortious damage. On this question, notably in French Law, see G. VINEY, P. JOURDAIN, *Les effets de la responsabilité*, *op.cit.*, no. 319 and following.

48 P. JOURDAIN, "Les dommages-intérêts alloués par le juge", in: *Les sanctions de l'inexécution des obligations contractuelles. Etudes de droit comparé*, M. FONTAINE, G. VINEY (eds), Bruylant, LGDJ 2001, p. 263, esp. n° 10, p. 273.

49 V. CARBONE, Commento alll'art. 1223 codice civile, *in* C. RUPERTO, *La giurisprudenza sul codice civilecoordinata con la dottrina, L. IV, T.I*, Milano 2005, p. 402.

50 PINORI, *Il danno contrattuale*, *in* F. GALGANO (under dir.), *I grandi orientamenti della giurisprudenza civilee commerciale*, Padova 1998.

51 A. DE CUPIS, *voce "Danno"*, in *Enciclopedia del dritto*, Varese 1962, p. 628.

52 F. MASTROPAOLO, *voce "Danno"* , in *Enciclopedia giuridica Treccani*, p. 7.

53 C. AMATO, *Il danno non patrimoniale da contratto*, in G. PONZANELLI (cur.), *Il nuovo danno nonpatrimoniale*, Milano 2004, p. 141. Cfr. C. SCOGNAMIGLIO, *Il danno non patrimoniale contrattuale*, in *Ilcontratto e le tutele,. Prospettive di diritto europeo*, S. MAZZAMUTO (cur), Torino 2002, p. 467 and following; E. NAVARRETTA, D. POLETTI, *I danni non patrimoniale nela responsabilità contratuale*, in E. NAVARRETTA, *Il danno non patrimoniale*, Milano 2004; M. COSTANZA, *Danno non patrimoniale eresponsabiltà contrattuale*, in *Riv.crit.dir.priv.*, 1987, p. 127; M. GAZZARA, *Il danno non patrimoniale dainadempimento*, Napoli 2003.

A. Patrimonial prejudices

In **German Law**, patrimonial *préjudice* (*'Vermögensschäden'*) is generally defined as *préjudice* capable of being expressed in money or value. Within this category, German Law distinguishes between personal and material *'préjudice'*. This distinction is caused by the existence of certain specific provisions relative to personal injury only.

Personal injury (*'Körperschaden'*) refers to an attack on the physical integrity (the body or health) of the victim. The indemnification scheme for personal injury is specific to the extent that the victim can demand indemnification directly for the costs called the *"réparation"* (cost of medical treatment) without being obliged to make provision for *"réparation en nature"* (performance by the defaulter) (§ 249, subsection 2 BGB). Moreover, the victim can demand the indemnification of all future losses in his professional or private advancement (§ 842 BGB). In the case of a reduction in the victim's ability to work (disability), the victim can demand that a periodic allowance be paid (§ 843 BGB).

Material damage concerns, in short, all damage to patrimony, such as the deterioration of a good or the loss of a monetary right (a claim/debt owed for example). No specific provision applies to the scheme of compensation for such *préjudices*.

In **French Law** the approach of the courts towards indemnification of *préjudice* is quite liberal. The economic consequences of personal injury – for example, past or future expenses occasioned by the care required by the injured party, loss of profits or the chance of profits due to temporary or permanent professional incapacity – are indemnified just as much as harm to patrimony – consisting of loss of money, profits or the chance of profits.[54]

In Italian Law, the *préjudice (danno)* always appears as *danno emergente* and *lucro cessante*. The loss suffered by the creditor consists generally of the harm caused to his right to obtain the goods which are due to him, his rights to hold the property that makes up his patrimony, and to ensure respect to his person.[55] In the case of breach of contract, the elements taken into consideration to evaluate the damage are the content of the obligation and the value of the good or service due to the creditor.

B. Extra-patrimonial prejudice

Today, a number of legal systems seem to indemnify moral injury when it is the consequence of a breach of contract. Notably this seems to be the position in **French Law**: moral *préjudice* which can manifest itself as an attack on someone's name, honour or reputation is generally indemnified.[56] Moreover, the relevant French law regarding com-

54 See regarding this question the developments of G. VINEY et P. JOURDAIN, *Les conditions de la responsabilité*, *op.cit.*, no. 250 and following.

55 C.M. BIANCA, G. PATTI, S. PATTI, V° *"danno emergente"* , in *Lessico di diritto civile*, 3° ed., Milano, 2001, p. 230.

56 G. VINEY, P. JOURDAIN, *Les conditions de la responsabilité*, *op.cit.*, no. 253 and following.

pensation for personal injuries is very detailed. Thus, the law insists on distinguishing between heads of damage: whether it is the diminishment of the physical capacity without any economic effects, or *pretium doloris*, esthetic *préjudice*, or injury to amenities of life, or loss of affection or sexual injury.

Also, **Quebec law** includes, in the evaluation of monetary damages to be allocated to the creditor of the unfulfilled obligation, the moral *préjudice* which is manifested – along similar lines to French law: damage to reputation, honour, or private life. (Litigation in the areas of breach of employment contracts or service contracts illustrates this point in a greatly interesting manner).[57] Moreover in **Belgian Law**, it is traditionally considered that *'la réparation intégrale s'étend à tous types de dommages, qu'ils soient de nature matérielle ou morale'*.[58] (The principle of '*réparation intégrale* extends to all types of damage, whether of a material or moral nature). Thus a bank was forced to compensate for the *préjudice moral* which it caused to the beneficiary of a loan and his family due to a brutal and erroneous termination of the loan for default.[59]

German Law has traditionally been very reticent in allowing the compensation of non-patrimonial *préjudice*.[60] German terminology is, in this regard, quite fluid. The terms *'Nichtvermögensschaden'*, *'immaterieller Schaden'*, *'Schmerzensgeld'* are used indiscriminately to characterise the notion of non-patrimonial *préjudice*. In addition, the BGB uses the expression *'Schaden, der nicht Vermögensschaden ist'* (meaning, *préjudice* which is not patimonial *préjudice*). In the first version of the BGB (1900), only § 847 allowed the indemnification of non-patrimonial *préjudice*. This was subordinate to the operation of tortious liability of the person responsible, based on personal injury, injury to health, freedom or free sexual consent. From 1958, case law has also applied this provision in the case of injury to the right to a good character.[61] However, the scope of application of this provision remained trapped in the domain of tortious responsibility for fault (and for the acts of animals). It was not until 1 August 2002 that German law enshrined a quasi-general right to indemnification for non-patrimonial *préjudice* in the new § 253, al. 2 of the BGB.[62] Today, it seems to be conceivable to indemnify non-patrimonial *préjudice*, on

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57 J.-L. BAUDOUIN, P. DESLAURIERS, *op.cit.*, no. 1341, p. 887, note 72. The authors cite a great number of decisions which take into account moral *préjudice*, and harm to reputation in the evaluation of monetary damages consequent on the unilateral rescission of a contract.

58 For example, Civ. Charleroi (1st chamber), 30 January 1990, *J.T.*, 1990, p. 388 (mental injury suffered following numerous disturbances caused by the improper disconnection of electricity by the supply company). Equally, Trav. Mons (2nd Chamber), 16 November 1992, *J.T.T.*, 1993, p. 251 (mental injury suffered after an unfair dismissal). Cited by I. DURANT, N. VERHEYDEN-JEANMART, *op.cit.*, no. 8, p. 313.

59 *Ibid.*

60 Such was equally the case in French Law. See generally: G. VINEY, P. JOURDAIN, *Les conditions de la responsabilité*, *op.cit.*, no. 253.

61 BGH, 14 February 1958, BGHZ 26, 349 – Herrenreiter.

62 *'Ist wegen einer Verletzung des Körpers, der Gesundheit, der Freiheit oder der sexuellen Selbstbestimmung Schadensersatz zu leisten, kann auch wegen des Schadens, der nicht Vermögensschaden ist, eine billige Entschädigung in Geld gefordert werden'* – 'When the restitution of damage suffered is due because of an attack on a person's body, health, freedom or free sexual consent, a just indemnity in money can equally be demanded for damage which is not patrimonial'.

the grounds of contractual liability (which is important in relation to the security obligations of § 241, subsection 2 BGB) and also on the grounds of specialised regimes of responsibility (road traffic accidents, defective products…). However, the limitation of recovery to personal injury, harm to health, freedom and the freedom of sexual consent has endured.

Equally, the **common law** – both English and American Law[63] – tends to indemnify moral *préjudice* resulting from non-performance or poor performance of a contract.[64] In effect, it appears that the House of Lords has decided that former employees of a bank, made bankrupt after misconduct by its directors, were entitled to obtain monetary compensation to compensate for the damage to their reputation which made looking for a new job more difficult.[65] Taking a further step forward, the House of Lords in *Ruxley Electronics Ltd. v. Forsyth*,[66] awarded indeminfication for '*préjudice d'agrément*' ('loss of amenity') following from the fact that a swimming pool which was constructed did not conform to the contracted terms.[67] (The pool was far shallower than the contract had stipulated). This case was also the occasion of the explicit approval of the notion of 'consumer surplus' which designates a subjective value given to a good or a service beyond its value in the bargain.[68]

Compensation for extrapatrimonial *préjudice* is provided for in **Italian Law** by certain texts, but can also be seen in its application in national case law.[69] There, compensation for 'ruined' holidays was awarded, by reason of the breach of the package holiday contract,[70] or even for the breach of Article 2087 of the Civil Code on the part of the employer. This last text imposes the protection of working conditions for employees and also allows the suppression of behaviour that is not is good faith such as '*bossing*', which is understood to means the abuse by an employer of his position, or the illegitimate demo-

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63 J. BEATSON, *Anson's Law of Contract*, 28th Edition, 2002, OUP, p. 593 and following; E. McKENDRICK, *Contract Law*, Palgrave Macmillan Law Masters, Palgrave Macmillan, 2007, no. 20.13, p. 427 and following; by the same author, *Contract Law: Text, Cases, and Materials*, 2nd Edition, OUP, 2005, p. 1062 and following; G.H. TREITEL, *An Outline of the Law of Contract*, 6th Edition, OUP, 2004, p. 373.

64 Y.-M. LAITHIER, *op.cit.*, no. 115, p. 168 and following.

65 *Malik v. BCCI SA* [1997] 3. *All. ER.* 1. See also *Farley v. Skinner* [2001] *UKHL* 49; [2002] 2 *AC* 732 (damages awarded for 'distress and inconvenience' caused by a 'breach of contract').

66 [1996] 1 *AC* 344.

67 The work was nonetheless solid, safe and useful.

68 Y.-M. LAITHIER, *op.cit.*, no. 115, p. 169-170.

69 C. AMATO, *Il danno non patrimoniale da contratto*, in G. Ponzanelli (cur.), *Il nuovo danno nonpatrimoniale*, Milano 2004, p. 158.

70 Articles 94 and 95 of the Consumer Code. The first concerns the compensation for bodily injury and the second all other non-bodily injury. P. CATELANI, *Commento agli articoli 94 e 95*, in *Codice delconsumo. Commentaire*, Milano 2006, p. 716 and 726. The regulation was introduced by Article 16 of the Decree no. 111/95. S. MONTICELLI, M. GAZZARA, *Il contratto di viaggio*, in E. GABRIELLI, E. MINERVINI, *I contratti con i consumatori*, T. 2, Torino 2005, p. 799. See the case law which examined this: Trib. Roma, 6 October 1989, in *Resp. civ. prev.*, 1991, p. 521, commentary by L. Vaccà, *Inadempimento contrattuale e risarcimento del danno non patrimoniale: vacanze da sogno e vacanze da incubo*.

tion of a worker.[71] In the context of the relationship between doctor and patient, *préjudice* suffered by the patient taking the form of diminishment of physical capacity or loss of life, will fall within the ambit of moral damage (also recognised as damage being by ricochet).[72] Monetary damages are also accorded in the case of breach of the duty to inform or in the case where a medical examination carried out in violation of the patient's consent have caused *préjudice* to his person, health or life. As a matter of fact, the contractual nature of this last compensation is sometimes challenged.[73]

C. The emergence of new categories

The contemporary evolution of the law of contractual responsibility has seen the multiplication of categories of damage. Apart from the general movement towards the taking into account of moral *préjudice*, categories of economic loss have emerged such as ecological loss *(préjudice écologique)*, the cost involved to mitigate damage, and also pure economic loss. It seems however, that ecological damage remains *a priori* an idea in tortious responsibility and will not be subject to specific development within the framework of the present study.

By contrast, 'pure economic loss'[74] arouses the interest of the French jurist,[75] and equally the entire legal community. The notion can be defined as *'la perte pécuniaire indépendante de toute atteinte à la personne ou aux biens de la victime*' ('a pecuniary loss independent of any personal injury or property damage to the victim').[76] But nothing

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71 C. AMATO, *Il danno non patrimoniale da contratto*, in G. PONZANELLI (cur.), *Il nuovo danno non patrimoniale*, Milano, 2004, p. 160.

72 Cass., SU, 1 July 2002, n. 9556, in *FI*, 2002, I, c. 3060. commentary by A. Palmieri, *Risarcimento del danno morale per la compromissione di un intenso legame affettivo con la vittima di lesioni personali*.

73 Very recently the *Cour de cassation* handed down a leading decision concerning the contractual matter, which summed up its case law in the area: Cass., 14 April 2007, no. 8826, unreported. Comp. Cass, 24 January 2007, no. 1511, in *Giust. civ. Mass. 2007*, p. 1; Cass., 19 April 2006, no. 9085, in *Giust. civ. Mass.* 2006, p. 4; Cassazione civile, sez. III, 18 April 2005, no. 7997, *Giust. civ. Mass.*, 2005, p. 6. The debate concerning the nature of resulting responsibility focuses on the role of the doctor, depending on whether he was carrying out his work freely, and whether this was in the setting of a public hospital, or in private practice. See: M. SELLA, *La quantificazione dei danni da malpractice medica*, Milano 2005, p. 71 and following; M. BILANCETTI, *La responsabilità penale e civile del medico*, 5th Edition, Padova 2003, p. 764.

74 See generally; M. BUSSANI, V. V. PALMER (eds.), *Pure Economic Loss in Europe*, Cambridge University Press, 2003.

75 L. AYNES, "Réparation intégrale et la typologie des préjudices. Quelques données juridiques", Intervention au Colloque organisé par la Cour de cassation, 26 April 2007, on the theme of "La réparation du préjudice économique," in the context of the cycle *Risques, assurances, responsabilité 2006-2007*; *adde*. Ch. LAPOYADE DESCHAMPS, "La réparation du préjudice économique pur en droit français", *RIDC* 2-1998, p. 367.

76 L. AYNES, *ibid*.

excludes, at least in French law, that such loss can be the result of the non-performance or improper performance of a contract – for example, a transport or supply contract[77] – even if it seems that in other countries its favoured domain of application is limited to extra-contractual responsibility.[78]

Finally, more and more, the costs involved in minimising one's own damages are being considered as a separate category of damage. Well known to the common law under the denomination of the 'duty to mitigate', this duty to minimise damage suffered has as a corollary the right of the creditor to recover the sums dispersed to such an end, on the condition that they are reasonable. In France this idea is enshrined in Article 1344 of the French Reform Proposals. In effect, that article outlines: *'Les dépenses exposées pour prévenir la réalisation imminente d'un dommage ou pour éviter son aggravation, ainsi que pour en réduire les conséquences constituent un préjudice réparable, dès lors qu'elles ont été raisonnablement engagées'* (expenses incurred in the prevention of the imminent occurrence of harm, or to avoid its getting worse, or to reduce its consequences, constitute a reparable loss as long as they were reasonably undertaken).[79]

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77 Example cited by L. AYNES, *ibid*.

78 For a comparative study of the treatment of pure economic loss by certain European countries, see M. BUSSANI, V. V. PALMER, "The liability regimes of Europe – their façades and interiors," in *Pure Economic Loss in Europe*, Cambridge University Press, 2003, p. 120.

79 FARNSWORTH, *Contracts*, 4th Edition, New York, 2004, p. 778.

Chapter 8:
Damages – Indemnity

Main concerns

The present study is a clear illustration of the obstacles in terms of translation which are encountered in the search for a common terminology. Certain terms have specific connotations in certain legal systems, more so than others. In such cases, it will be preferable to adopt terms which are as close as possible to the various notions studied below, whilst remaining aware of the context of legal culture in which these expressions or words are intended to be used.

1. **The French expression "*dommages et intérêts*"** ("damages") may be retained, although the following observations should be taken into account.

In certain legal systems, such as the French legal system, the expressions *"dommages et intérêts"* and *"dommages-intérêts"* are usually employed as synonyms. Moreover, the juxtaposition of the two terms, *"dommages"* on the one hand and *"intérêts"* on the other, would appear to be generally considered as pleonastic, even though the use of the expression is widely accepted. If the expression *"dommages et intérêts"* is maintained in French, the English translation which is closest is probably the single term "damages", sometimes considered as synonymous with the expression "loss compensation". The English terminology thus highlights the compensatory role of damages. It will therefore be necessary to distinguish damages which do not have this function by qualifying them with the addition of a suitable adjunct ("exemplary damages", "nominal damages", "restitutionary damages" and "disgorgement damages").

The expression *"dommages et intérêts"* can be defined as the sum of money owed to the obligee to make good the loss or damage arising out of the failure to perform, or out of the faulty or late performance by the obligor of an obligation. Damages almost always cover, in the various legal texts which were examined, lost profits and loss suffered.

It emerges from the various sources which were studied that this expression implies a number of different functions: compensation for loss or damage, equivalent performance or a sanction. It would therefore be useful in terms of clarity to specify whether the damages are compensatory, equivalent performance damages or punitive damages.

Regarding compensatory damages in particular, the scope of the compensation granted should be determined in a precise and uniform way: should it include both the positive benefit, that is to say the advantage obtained by the obligee from the performance of the contract, and the negative benefit, that is to say the advantage derived from the fact that the obligee did not enter into a contract with a defaulting obligor?

2. The various sources which were studied seem to identify *"dommages et intérêts moratoires"* (damages for late performance) as a separate category, governed by a different legal regime. In such a case, in order to ensure a uniform terminology, the expression *"intérêts moratoires"* (interest for late performance) could be used, thus marking more clearly the different nature of this concept.

3. **The term "*indemnité*"** (indemnity) is also included in the terms which form the subject matter of this study.

In comparative law, this term would appear to be used essentially for convenience, without any specific legal regime being attached to its use.

A study of the Acquis reveals that this term is equivocal because it is used with two different meanings.

On the one hand, it refers to the sum of money payable under a contract in the event of non-performance, and which is payable, in certain cases, whether or not any loss or damage is incurred. In this first situation, it would be useful to clarify the terminology in relation to contractual provisions which relate to the payment of an indemnity. The question arises, based also on comparative law observations, as to whether the terminology used should vary depending on the function of such clauses: the word "penal clause" or "penalty clause" could be used when the clause has a punitive function and the word "liquidated damages clause" could be used for the clauses which aim to compensate the loss suffered by the payment of a predetermined sum.

On the other hand, the term applies, more narrowly, to certain mandatory protection regimes, which concern for example commercial agents and travelers. The terminology could, in relation to these two categories, be further clarified, on the basis that in certain situations, the indemnity does not have the function of compensating a loss suffered, but rather of ensuring that a financial balance is maintained between the parties when such balance is threatened by the termination of the contract. The first category is a compensatory indemnity whilst the second is akin to a client indemnity.

Acquis Communautaire and Acquis International

The study of Acquis Communautaire and Acquis International brings to light the variety of terms used to refer to the sum of money which is granted to compensate for a breach of contract. The sum of money which is granted is referred to by a number of names: "*dommages et intérêts*", "*dommages-intérêts*" (damages), "*indemnité*" (indemnity or liquidated damages), "*dédommagement*" (compensation) or even "*dommages*" (damages), sometimes qualified by adjectives which make the terms more precise, such as for example punitive damages or damages for late performance *("dommages et intérêts moratoires")*.

From a terminological point of view, the two most widespread families of terms would appear to be "damages" **(I)** and "indemnity" **(II)**.

I. "Damages": an Expression with a Variety of Meanings

The diversity of functions performed by damages is not specific to the field of contract. For example, article 10.101 of the *Principles of European Tort Law* drafted in November 2006 define damages as a money payment "to compensate the victim […] Damages also serve the aim of preventing harm".

A number of functions are attributed to damages in contract. Damages can compensate for a loss suffered; they can act as a deterrent, each party being strongly encouraged not to cause loss or damage to the other; finally they can be punitive when be a sanction for the defaulting obligor without any link with the loss suffered.

In almost all the texts studied, three categories of damages can be identified. The first category, damages for late payment, is defined positively with a separate and specific regime, which is almost uniform in the different texts analysed (**A**). Conversely, the second category, that of punitive damages, is largely rejected in contract (**B**). The third category is concerned with compensatory damages, which despite their natural function which is to compensate, have given rise to the most hesitations (**C**).

A. Damages for late payment

Damages for late payment are dealt with specifically in the texts which were examined. Generally speaking, their legal regime requires them to be evaluated as a fixed amount and payable automatically in the event that a delay occurs, without the obligee being required to show any loss arising out of the delay. It is therefore the moratory function which predominates in that it is the delay itself, without any further legal proceedings, which gives rise to a fixed sum compensation, independently from any loss being shown or invoked (**1**). However, the Directive of 29 June 2000 on combating late payment in commercial transactions[1] attributes to damages for late payment a double function which is more ambiguous, since it is both compensatory and deterrent (**2**).

1. The exclusively moratory function of damages/interest for late payment

In the debate on the content of the *lex mercatoria* such as could be applied in the field of international arbitration, it is generally considered that there is no transnational rule on interest for late payment.[2] However, such interest is the subject of provisions in a number of texts, both international and European.

Interest for late payment is dealt with in article 78 of the Vienna Convention of 11 April 1980 on the international sale of goods (CISG): any sum in arrears produces interest. The text is drafted in a very general way, in order to cover the money debts resulting from a contract of sale: price paid by the buyer or which must be restituted by the seller in the event of rescission, down payments, payment of balance, excess payment, expenses paid by one party on account of the other.[3] This interest has no compensatory function. Article 78 itself provides that the interest is without prejudice to the damages

1 Directive 2000/35/EC, *OJ* L 200 of 8 August 2000.

2 Y. DERAINS, "Intérêts moratoires, dommages-intérêts compensatoires et dommages punitifs devant l'arbitre international": *Etudes Bellet*, Litec 1991, p. 101; H. SCHONLE, "Intérêts moratoires, intérêts compensatoires et dommages-intérêts de retard en arbitrage international": *Études Lalive*, Helbing et Lichtenhahn 1993, p. 649.

3 A hesitation remains: does interest accrue on damages themselves? This question is linked to another difficult point which is not dealt with by the CISG: the starting point for interest on late payment (see V. HEUZE, *op.cit.*, n° 462 and 463, pp. 416-419).

which the obligee can claim under article 74; the obligee is not required to show any loss arising out of the delay in performance and academics unanimously agree that the obligor cannot avoid the payment of such interest by showing that the performance was impossible.[4]

Damages for late performance are also dealt with specifically in the UNIDROIT Principles on international commercial contracts (2004 version), the *Principles of European Contract Law* (PECL) and the European Code of Contracts drafted by the Academy of European Private Lawyers in Pavia ("Pavia Project").

Article 7.4.9 of the UNIDROIT Principles provides for specific rules which apply to damages for late payment ("interest for failure to pay money"). In the event of a delay in payment, the obligee is entitled to damages amounting to a lump sum equal to the interest upon that sum from the time when payment is due to the time of payment. The payment of these liquidated damages is independent from any loss and is due even in cases of *force majeure*: as highlighted by the commentary, this sum is not, in this last case, intended to compensate for a loss but to compensate for the enrichment of the obligor.

PECL distinguish ordinary damages and damages for late performance, which are dealt with in article 9:508. Damages for late performance are treated very specifically in this provision and can be completed by damages to compensate for additional loss, such as the future earnings lost by the obligee who could have entered into a contract with a third party should the payment have been made on time. Article 9:508 thus establishes the specificity of the damages for late performance, as underlined by the commentaries. The fact that these damages for late performance should be liquidated is affirmed, as is the fact that they are automatic: they arise out of a delay in payment, without on the one hand the obligee having to show the existence of a loss and on the other hand without the obligor being entitled to invoke any defence.

Article 169 of the Pavia Project contains specific provisions relating to the "compensation" for monetary obligations which apply unless otherwise agreed by the parties. The English translation of this provision is also ambiguous: it refers to "compensation" by the payment of "interest". A first reading of the text might give the impression that the damages referred to have a compensatory function. However, the provisions are in fact close to the UNIDROIT Principles and to PECL in the sense that they place the accent on the moratory character of the interest granted. The sums which are payable bear interest without the obligee having to prove the existence of a loss and without the obligor being able to invoke any cause in defence. The interest rate, in the absence of any specific clause, is fixed by reference to the rates published by the European Central Bank. The sum payable can be adjusted in accordance with the methods indicated in the text. All sums payable by virtue of this text bear interest themselves and can be adjusted.

2. The deterrent and compensatory function of interest for late performance in the directive on combating late payments

Interest on late payments has become an issue in terms of the creation of the Internal Market, because of the delays in payment which occur in respect of commercial transac-

4 V. HEUZE, *op.cit.*, n° 462, p. 416.

tions within the European Union. The objective of this directive is to establish obligations to pay interest on late payments which are a deterrent, both in terms of principle and procedure.[5] Recital 16 clearly sets out the ambitions of the directive: to make interest on late payments a sanction for the breach of contract which discourages debtors.[6] The legislator notes in this recital that delays in payment are financially attractive for debtors in most Member States because of the low rates of interest on late payments and the slow procedures for redress.

Article 3 of the directive provides that Member States should enable the creditor to claim interest for late payments. The delay runs either from the date for payment set out in the contract, or if there is no such date, automatically 30 days following the date of receipt by the debtor of an invoice or equivalent request for payment (or after the date of receipt of goods or services in certain cases). Article 3.3 provides that any agreement not in line with the terms of the directive is either not enforceable or gives rise to a claim for damages if it is grossly unfair to the creditor. The applicable interest rate is, unless otherwise provided, the sum of the interest rate applied by the European Central Bank to its most recent main refinancing operation carried out before the first calendar day of the half-year in question, plus at least seven percentage points.

Article 3.c specifies that the creditor "shall be entitled to interest for late payment to the extent that he has fulfilled his obligations and he has not received the amount due on time, unless the debtor is not responsible for the delay". This wording seems less strong than the texts mentioned above: the creditor receives a sum in compensation for the loss suffered in the case of a delay, but the debtor may, it seems, avoid the payment of such compensation by showing that he is not responsible for the delay. This compensatory aspect is reinforced by the fact that the creditor must be given the right, by virtue of article 3.e, to "claim reasonable compensation from the debtor for all relevant recovery costs incurred through the latter's late payment". These costs should be proportional to the debt and Member States can in fact fix maximum amounts for different levels of debt.

The diversity of functions attributed to the same term is even more striking in the study of the other damages.

B. Punitive damages

Punitive damages are excluded by most texts. They are impliedly excluded in the texts which are based on the principle of total compensation for loss suffered such as the CISG, the UNIDROIT Principles or PECL: the compensation should cover the whole loss, but only the loss. As stated by Mr. HEUZE in relation to article 74 of the CISG,

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5 See in particular the Regulation n° 805/2004 of the European Parliament and Council dated 21 April 2004 creating a European Enforcement Order for uncontested claims, *OJ* L 143 of 30 April 2004 and Regulation n° 1896/2006 of the European Parliament and Council dated 12 December 2006 creating a European order for payment procedure, *OJ* L 399 of 30 December 2006.

6 See in support of this point, *L'acquis communautaire – les sanctions de l'exécution du contrat* – under the direction of C. AUBERT DE VINCELLES et J. ROCHFELD, Economica 2006, esp., p. 32, n° 35.

"The principle applied by the CISG is that of total compensation for these heads of damages, which excludes not only liquidated damages or the capping of damages, the reduction of damages on the basis of equitable principles, but also an increase in damages by way of sanction. It is for this reason in particular that the defaulting party cannot be held liable to pay punitive damages".[7] The Pavia Project in its article 166 paragraph 1 which defines the function of the damages also impliedly excludes punitive damages ("Apart from the subsequent mitigating provisions, reparation must specifically aim to eliminate the harmful consequences of non-performance, defective performance, delay […]").

International arbitration raises the question as to whether transnational principles are emerging. Although the majority of academics take the view that there is a trend towards the creation of transnational rules regarding interest for late payment, as seen above, certain arbitrators have already held that the liability to pay punitive damages was not sufficiently widespread in comparative law for it to be accorded the status of a general principle.[8] However, an arbitral tribunal could, in an international case, hold one party liable to pay punitive damages without necessarily infringing, at the enforcement stage, the international *ordre public* (public policy) of the country in which enforcement is sought. Certain authors are even in favour of this type of judgment which allows a better compensation for loss in certain cases, in particular when it is possible to show the existence of a lucrative fault.[9]

Consequently, punitive damages may not be limited, as their name would suggest, to a pure function of punishment for the defaulting party. To some extent, they may amount to a deterrent, or even a means of additional compensation for loss when the loss is difficult to quantify.

The issue of punitive damages was in fact considered by the Commission with regard to competition law, in addition to contractual matters in the strict sense. In the Green paper on damages actions for breach of the EC antitrust rules, of 19 December 2005,[10] the Commission states, with regard to questions relating to damages, and mainly with regard to fixing the amount of such damages, that the courts could be given the possibility, whether automatic or conditional, to double the damages in the case of horizontal cartel agreements. The European Court of Justice (ECJ), in a decision of 13 July 2006,[11] takes

7 "Le principe retenu par la CVIM est celui de la réparation intégrale de ces chefs de préjudice, ce qui exclut aussi bien leur forfaitisation ou leur plafonnement que la réduction de leur indemnisation pour des raisons d'équité ou, au contraire, leur majoration à titre de sanction. C'est ainsi en particulier que la partie en défaut ne saurait être condamnée au paiement de dommages – intérêts punitifs." *Op. cit.*, n° 448, p. 401.

8 ICC judgment n° 5030/1992, *JDI* 1993.1004; ICC judgment n° 10114/2000, *Bull. ICC* 2201, n° 2, p. 105. In support, see also Ph. FOUCHARD, E. GAILLARD, B. GOLDMAN, *Traité de l'arbitrage commercial international*, Litec 1996, n° 1493, p. 845 and G. ROBIN, "Les dommages et intérêts punitifs dans les contrats internationaux", *RDAI* n° 3/2004, p. 247.

9 In support of this point, Ph. FOUCHARD, E. GAILLARD, B. GOLDMAN, *op.cit.*, n° 579 (regarding the American Supreme Court decision of 6 March 1995, *Mastruobuono v. Shearson Lehman Hutton, Inc., Rev. Arb.* 1995.295, note L. NIDDAM; G. ROBIN, *op.cit.* p. 264 and 265; J. ORTSCHEIDT *La réparation du dommage dans l'arbitrage commercial international*, Dalloz 2001.

10 COM (2005) 672 final – see also M. CHAGNY, "La notion de dommages et intérêts punitifs and followings répercussions sur le droit de la concurrence", *JCP G* 2006, I. 149.

the view in this respect that punitive damages awarded in the context of domestic claims could also be awarded in actions founded on Community rules and that these damages should compensate the loss suffered overall, which includes the actual loss, the loss of profits and the payment of interest.

C. Compensatory damages

The main function of damages is compensatory: the damages should compensate all of the damage suffered and therefore place the victim in the position in which he would have been had he not suffered the damage, by reasoning retrospectively. This function is sometimes completed, more or less clearly, with other functions, depending on the objectives pursued. Damages also aim to provide the creditor with an equivalent performance and to incite the parties to perform the contract correctly.

The functions of damages, other than a punitive function, are often complex, and usually combined. A hard core remains, however: the compensation for the loss in its entirety (**1**). The Pavia Project is particular in that it has abandoned this widely accepted principle (**2**).

1. Total compensation for the loss

In the above mentioned Green paper, the Commission questions the Member States in order to define whether damages are based exclusively on the notion of compensation or on the recovery of an illegal gain. This question echoes a judgment of 20 September 2001.[12] In this case, a lease of a public house, which contained an exclusive purchasing clause for beer (beer tie) was entered into between an English brewery and a tenant also established in England. The tenant, in an action brought against him for non-payment of two deliveries of beer, argued that the claim was invalid on the basis that the contract was contrary to European competition law and brought a counterclaim for damages. The ECJ was asked to decide whether a party to such a contract could claim damages from the other party to the contract in compensation for the loss suffered as a result of the performance of the contract. The ECJ reasserted that the question was governed by the law of Member States (point 31) but that national provisions which bar such a claim on the sole ground that the claimant is party to the contract were contrary to Community law. The ECJ adds, however, that the national jurisdiction may take into account the respective positions of the two parties: if one party is in a marked weaker position compared to the other, the national court may award damages to the extent that such party was not able to negotiate the clauses in the contract and avoid or limit its loss.

The diversity of the functions of damages also appears in other texts.

Damages are covered by section 2 of Chapter V of the CISG, which relates to "provisions common to the obligations of the seller and of the buyer". Damages arise out of a breach of contract; they are the compensation for any breach of the contract of sale, whether by the seller or the buyer, whatever the nature or seriousness of the breach.

11 Case C-295/04 to C-298/04.

12 Case C-453/99, *Courage Ltd/Bernard Créhan*.

Damages are therefore the means of fully compensating the creditor for his loss arising out of the non-performance when other remedies do not achieve a full compensation for the loss suffered. The damages therefore are in addition to the other remedies. If the debtor can show a valid defence, however, the creditor can no longer claim damages (article 79§ 5). Conversely, a creditor may sometimes claim damages in certain cases when other remedies are not available to him (article 83 gives the right to the buyer to claim damages in the case where he cannot require substitute goods or where he has lost the right to declare the contract avoided), or even when he may not rely on the breach itself (article 44 gives the right to the buyer to claim damages for the loss suffered when he has lost the right to rely on certain breaches of the seller but he has a reasonable excuse for his failure to give notice regarding the lack of conformity of the goods or their being subject to third party rights within a reasonable time). Under the terms of article 74, damages consist of a sum equal to the loss, including loss of profit; such damages may not exceed the loss which the party in breach foresaw or ought to have. Moreover, article 77 specifies that the party relying on the breach must take such measures to mitigate the loss, including loss of profit. If he fails to take such measures, the party in breach may claim a reduction in the damages in the amount by which the loss should have been mitigated. Specific rules for the calculation of damages are provided in the event that damages are claimed following the contract being avoided (art. 75 and 76). In such a case, the damages are intended to compensate for the loss arising out of the replacement of the goods: they are therefore calculated in principle by reference to the difference between the contract price and the price in the substitute transaction.

Section 4 of Chapter 7 relating to non-performance in the UNIDROIT Principles deals with damages. Article 7.4.1 sets out that any non-performance gives the aggrieved party a right to damages either exclusively or in conjunction with any other remedies. As indicated in the commentary under this provision, the cause of the non-performance is irrelevant; where the non-performance is excused, as for example in the case of *force majeure*, this could prevent the aggrieved party from receiving damages. Article 7.4.2 states that the creditor is entitled to full compensation for the harm sustained, which includes "both any loss which it suffered and any gain of which it was deprived, taking into account any gain to the aggrieved party resulting from its avoidance of cost or harm". The commentary below this provision points out that the non-performance should be a source neither of gain nor of loss for the aggrieved party. Account should be taken of the gain arising out of the non-performance (costs or losses avoided) and of the loss sustained as well as of the gain of which the aggrieved party was deprived as a result of the non-performance. The commentary highlights that generally, the gain will be uncertain and will frequently take the form of a loss of a chance (see in this respect the provisions of article 7.4.3). As in the CISG, the conduct of the aggrieved party will be taken into account, since such party is under an obligation to mitigate the damage (art. 7.4.7 and 7.4.8).

In the event of termination, article 7.4.5, in the same way as the CISG, states that the aggrieved party may recover the difference between the contract price and the price for the replacement transaction, so long as this is entered into within a reasonable time and in a reasonable manner. If no replacement contract is entered into, article 7.4.6 provides that the aggrieved party may recover the difference between the contract price and the price current at the time the contract is terminated. In both these cases, the aggrieved party may claim damages for additional loss. The damages in these cases enable the

aggrieved party to obtain compensation for the loss sustained and provide an equivalent to performance.

The question of the nature of damages referred to in article 9:501 of PECL is not answered any more clearly: do damages fulfill a compensatory function for the wrongful behaviour of one of the parties to the contract or do they reflect an equivalent performance of the contract? Article 9:501 would seem to tend towards the second interpretation, especially if it is read in conjunction with article 9:502: under the terms of this provision, the aggrieved party should be placed in the position it would have found himself in had the contract been duly performed. The damages cover "the loss which the aggrieved party has suffered and the gain of which it has been deprived" and are consequently intended to provide the aggrieved party with an equivalent performance. The aggrieved party will however be entitled to recover the reasonable costs incurred to mitigate the loss. Should the aggrieved party enter into a substitute transaction within a reasonable time and in a reasonable manner, it will be entitled to recover the difference between the original contract price and the price of the substitute transaction, as well as damages for any further loss, so long as these are recoverable (art. 9:506); the difference between the current price for the performance contracted for and the original contract price may be awarded as damages as well as damages for any further loss so far as these are recoverable (art. 9:507).

2. The principle of full compensation for the loss is abandoned by the pavia project

Article 163 of the Pavia Project provides that damages are recoverable for the loss sustained and the profits lost which the aggrieved party ("creditor" in accordance with the official translation) could reasonably have expected. The loss of the chance of a gain will be taken into account if it can be deemed with reasonable certainty that such gain would occur. The Pavia Project provides that the conduct of the creditor will be taken into account and that such creditor is under a duty to mitigate the loss.

This text however shows some original features.

Article 166 mixes, in an ambiguous fashion, the function of damages in relation to compensation and in relation to performance by equivalence. Indeed, it provides that "if possible, reparation shall take the form of specific performance or specific redress supplemented, if necessary, by a monetary indemnity". "If the entire or partial restoring to the former state is not possible or is too onerous for the debtor, considering the interest of the creditor, and in any case if the creditor so demands, suitable monetary compensation shall be paid". The Pavia Project is wider than the UNIDROIT Principles and PECL: the damages, under the terms of article 166, must provide the creditor with satisfaction of his interest (positive) in that the contract be punctually and exactly performed, also taking into account the expenses and costs incurred by him and which would have been covered by performance if the prejudice comes from non-performance, delayed or defective performance and the satisfaction of his interest (negative) in that the contract had not been made or the precontractual negotiation had not taken place, in the other cases, and particularly when damage comes from the non-existence, nullity, annulment, ineffectiveness, rescission, non-conclusion of the contract and in similar cases".

The Pavia Project finally sets itself apart from the UNIDROIT Principles and PECL in that is not attached to the principle of full compensation for the loss. Indeed, article 198

provides that the judge may, depending on the conduct, the interest and the financial conditions of the creditor, limit the amount of damages if full compensation should prove disproportionate and should create for the debtor (party in breach) obviously unbearable consequences, having regard to its economic situation, and if the non-performance delayed or defective performance is not due to such debtor's bad faith".

II. The Ambivalence of the Term "Indemnity"

The term "indemnity" is used in two different contexts: on the one hand, it refers to contractual clauses used by the parties to define the conditions for compensation (**A**) and on the other hand, it refers to the mandatory protective regime provided by certain international and Community legislation (**B**).

A. An indemnity provided by a contractual provision

This type of indemnity is very frequent in international contracts. These clauses have a double function, both compensatory and coercitive (**1**). This complexity is reflected in the terminology which is very hesitant (**2**).

1. The functional ambiguity of contractual indemnity clauses

The generic definition of these clauses is imprecise because of the great variety of clauses which can be agreed.[13] These clauses appear both in general conditions and in individual contracts. They are present in a great variety of contracts. They come into play in the event of delay, but also in the case of partial or total failure to perform certain obligations which are generally referred to as obligations to achieve a given result. They can be paid in a number of ways: direct payment, foregoing a sum due, or calling upon a bank guarantee. Their enforcement can be in addition to the performance of the obligation in question or to supplemental damages.

There is however a hard core on which all the texts which were analysed agreed: such a provision consists in the payment of a monetary sum in the event of late performance or wholly or partly defective performance, of a contractual obligation.

Such a clause is intended, on the one hand, to compensate for the loss suffered as a result of the non-performance by fixing in advance the amount of the indemnity payable in the case of a breach or a delay in performance, and on the other hand, because of its amount, to incite the parties to duly perform their respective obligations, with the defaulting party being "punished" by having to pay a lump sum which is not linked to the damage caused.[14]

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13 See the detailed examples of clauses provided by M. FONTAINE and F. de LY, *Droit des contrats internationaux, Analyse et rédaction de clauses*, edited by Bruylant and FEC 2003, p. 333-366.

14 In support of this point, see M. FONTAINE et F. de LY, *op.cit.*, esp. p. 370; U. DRAETTA et R. LAKE, *Contrats internationaux – pathologies et remèdes*, edited by Bruylant and FEC 1996, p. 114 and 115.

From a terminological perspective, it should be noted that a number of authors have put forward distinct names for these clauses, based either on the compensatory or on the coercitive function. In French, although such a clause will generally be referred to as a "*clause pénale*" (penalty clause), certain authors have suggested making a clearer distinction between the "*clause pénale*" with the meaning of a private punishment and the damages clause or lump sum indemnity clause which places the emphasis on the compensatory function.[15] In other languages, these functions are clearly distinguished: for example, in English, a distinction is made between the penalty clause and the liquidated damages clause. The International Chamber of Commerce has prepared guidelines (*Guide to penalty and liquidated damages clauses* – 1990) in which it recommends that it should be specified whether the clause has a deterrent element.

The terminological issues are crucial because from the wording used stem the difficulties encountered in relation to the legal regime which governs such clauses. Firstly, the terminology should enable such clauses to be distinguished from similar clauses, such as clauses providing compensation for revocation for example. Secondly, an effort with regard to the wording is fundamental in establishing the legal regime which governs such clauses; in this respect, crucial questions arise as to the validity of such clauses, the power of the judge to revise the amounts stipulated or the possibility of cumulating other sanctions with the payment of the sum provided.

Despite the issues at stake, the texts which were analysed in the context of Acquis reveal many hesitations.

2. Terminological hesitation: from penalty clause to damages clause

A first hesitation arises out of the purpose of the clause. Most texts provide that the purpose of such clauses is to stipulate a sum of money. Two texts however widen the possibilities. Both the BENELUX Convention of 26 November 1973 relating to penal clauses (not ratified) and the Pavia Project specify that the clause may prescribe a performance other than the payment of sums of money.

A second uncertainty arises out of the duality of functions mentioned above. The texts sometimes attempt to distinguish two types of clauses depending on the function fulfilled, but at the same time providing a uniform legal regime.

The abovementioned BENELUX Convention clearly puts forward a single expression: the penalty clause. Under the terms of article 1, a penalty clause is "any clause which provides that the debtor, if he fails to fulfill his obligation, must pay a sum of money or perform some other service by way of penalty or indemnity". This unitary logic calls for a legal regime which is also unified: the penalty clause only applies in the event of a failure to perform attributable to the debtor, excludes the performance of the obligation to which it is attached and may be reduced by the judge "if manifestly required by equity".

The UNCITRAL Uniform Rules of 1983 on Contract Clauses for an Agreed Sum due upon Failure of Performance effect the same terminological junction. Article 1 provides that the rules will apply "to international contracts in which the parties have agreed that,

15 In support of this point, see D. MAZEAUD, *La notion de clause pénale*, LGDJ 1992; A. PINTO-MONTEIRO, "La clause pénale en Europe", *Études offertes à J. GHESTIN, le contrat au début du XXIe siècle*, LGDJ 2001, p. 719.

upon a failure of performance by one party (the obligor), the other party (the obligee) is entitled to an agreed sum by the obligor, whether as a penalty or as compensation. The UNCITRAL rules only complete the intention of the parties. Subject, therefore, to any clause which is different or clause to the contrary, the clause can only apply if the debtor is liable for the failure to perform. The rules distinguish, always in the absence of any provision to the contrary, between a failure to perform resulting from a delay and the other failures to perform: in the first case, the obligee is entitled to both performance of the obligation and the agreed sum, whilst in the second case, the payment of the sum in theory excludes the performance of the obligation unless the sum agreed cannot reasonably be regarded as sufficient compensation for that failure. If the loss "substantially" exceeds the agreed sum, the obligee may, unless otherwise provided, claim damages to the extent of the loss not covered by the agreed sum. Finally, the clause cannot be reduced by a court or an arbitrator unless it is substantially disproportionate in relation to the loss that has been suffered.

The UNIDROIT Principles and PECL acknowledge the validity of contractual clauses which provide that a sum will be payable in the event of non-performance by a party who fails to comply with its obligations.

Article 7.4.13 of the UNIDROIT Principles deals with clauses which provide for an agreed payment for non-performance (*"indemnité"* in the French version). The specified sum *("indemnité")* is the term used to refer to the sum which is to be paid to the aggrieved party "irrespective of its actual harm". The specified sum may be reduced to a reasonable amount where it is grossly excessive in relation to the harm resulting from the non-performance and to the other circumstances. Article 9:509 of PECL contains similar provisions.

The commentaries in relation to both texts indicate that the clauses covered by the provisions include both clauses which have a compensatory function and those which operate as a deterrent against non-performance (penalty clauses proper). In the first case, the clauses evaluate the damages in a prospective way and facilitate the task of the aggrieved party in proving the damage. In the second case, the clauses generally fix a high amount which strongly encourages obligor to perform. The commentaries on article 7.4.13 of the UNIDROIT principles specify that the clause can theoretically only apply in the event of a non-performance for which the non-performing party is liable.

Article 170 of the Pavia Project makes use of a variety of terms which may at first sight lead to some confusion. This provision refers to the terms "penal clause", "penalty" and "compensation" in the same text. However, it would appear that the text only deals with clauses which have as their function the compensation of loss suffered by reason of the non-performance or a delay in performance or one of its obligations by the obligor. The obligee who relies on such a provision is not required to prove the existence or the extent of the loss. The judge may in accordance with equitable principles reduce the amount of the penalty if the latter is manifestly excessive. The text specifies, finally, that in contracts entered into with consumers, "penalty clauses against the consumer contained in the general conditions of the contract are of no effect in all cases".

Article 3 of the Council Directive 93/13/EEC of 5 April 1993 on unfair clauses in consumer contracts[16] defines what constitutes an unfair clause and refers to an annex which contains an indicative list of clauses which may, on the basis of the criteria set out,

16 *OJ* L 95 of 21 April 1993.

be held to be unfair. Article 1.e of this annex refers to clauses which have the object of effect of "requiring any consumer who fails to fulfill his obligation to pay a disproportionately high sum in compensation". This provision is neutral in French, in that it uses the term "*indemnité*" which could cover provisions which serve a compensatory purpose as well as a coercitive one; the English version is more precise and appears to place the emphasis on the compensatory function.

In the field of consumer rights, the same term "*indemnité*" is used in another sense. The purpose is no longer to exclude potentially unfair clauses, but to provide, in favour of the consumer, an indemnity in the context of a number of mandatory provisions.

B. An indemnity provided by a mandatory legal regime

The consumer is protected by a number of Community or international texts, in particular in the field of transport (**1**). The commercial agent also benefits from the payment of an indemnity when the contract is terminated, under the terms of mandatory provisions which exist for the protection of the agent by establishing or re-establishing a financial balance between the parties upon the termination of the contract (**2**).

1. The traveller's right to compensation

In the field of transport, the traveller is protected, on the one hand by mandatory provisions which guarantee a minimum level of indemnification, and on the other hand, by the introduction of an original right to compensation in the directive on package travel, package holidays and package tours. In the various texts which were studied, either the term "*indemnité*" (indemnity) is either expressly used, or it is implied by expressions such as "the right to indemnification" or "the right to compensation".

With regard to carriage by air, the traveller benefits from a particular protection. Although the interests of the carriers are taken into account, the present day trend, whether at international or Community level, is to guarantee a mandatory minimum level of indemnification.

The Montreal Convention for the Unification of Certain Rules for International Carriage by Air (28 May 1999), due to replace the Warsaw Convention in relation to international carriage by air, recognizes in its preamble the importance of ensuring the protection of the interests of consumers in international carriage by air and "the need for equitable compensation based on the principle of restitution". The Convention thus fixes limits for compensation according to the different types of damage. Articles 25 and 26 provide that the contract of carriage may not fix limits on liability which are lower that those laid down in the Convention, any such limits being null and void.

The 1997 Council Regulation on air carrier liability in the event of accidents, clearly states in recital 7 that it is appropriate to remove all monetary limits of liability no matter their origin. Article 3 of this regulation provides that the liability of a Community air carrier for damages sustained in the event of death, wounding or any other bodily injury by a passenger shall not be subject to any financial limit, be it defined by law, convention or contract.

An original right to compensation was introduced by the directive on package travel, package holidays and package tours.

Under the terms of article 4§ 6 of the directive, the consumer is entitled to compensation. This right is granted when he has exercised his right to withdraw following an alteration by the organizer of essential terms of the contract (article 4§ 5) or when the organizer cancels the package before the agreed date for departure for whatever cause other than the fault of the consumer. In either of these situations, article 4§ 6 provides that the consumer is entitled either to a substitute package or equivalent or higher quality (or of lower quality with a refund in the price difference) or to be repaid as soon as possible all sums paid by him under the contract. In either case, the consumer is entitled "if appropriate, to be compensated for non-performance of the contract". The text of the directive is not very clear on this point. Although the compensation is linked to the non-performance of the contract, it would appear that the right to compensation is not limited to the case of non-performance only: the wording of the directive seems to allow the consumer to claim compensation even though he has accepted to be provided with an equivalent package.[17] The conditions of exercise of this right are left for the Member States to decide. However, the directive specifies that no compensation can be claimed when the cancellation is on the grounds that the number of persons enrolled for the package is less than the minimum number required or when the cancellation is for *force majeure*.

2. The commercial agent's right to compensation

The commercial agent is protected in the event of the contract being terminated by the payment of an indemnity.[18]

The OHADA Uniform Act relating to general commercial law provides, under the terms of article 197, that "where relations between the principal and the commercial agent come to an abrupt end, the commercial agent shall be entitled to a compensatory allowance, without prejudice to possible damages". Any clause which derogates from this principle and from the conditions for its application to the detriment of the commercial agent is deemed unwritten. The compensatory allowance is not due in the event of termination of the contract on the agent's initiative, unless such termination is justified by circumstances attributable to the principal or is due to circumstances beyond the agent's control as a result of which the continuation of his activity can no

17 More affirmative concerning the link between the compensation and the non-performance, see E. POILLOT, *Droit européen de la consommation et uniformisation du droit des contrats*, LGDJ 2006, n° 436, p. 199. More ambiguous, see C. AUBERT DE VINCELLES et J. ROCHFELD (under the direction of), *L'acquis communautaire – les sanctions de l'inexécution du contrat, op.cit.*, n° 68, p. 29.

18 On the analysis of the indemnity claimed by an exclusive distributor in the context of art. 5.1 of the Brussels Convention of 27 September 1968 on the choice of jurisdiction in contractual matters, see ECJ case 14/76, *A. De Bloos c SPRL c. Société en commandite par actions Bouyer*, 6 October 1976, *Rec.* 1497. The case invites the national courts to ascertain whether, under the law applicable to the contract, an independent contractual obligation or an obligation replacing the unperformed contractual obligation is involved (point 17).

longer be reasonably demanded. The agent will not be entitled to claim such allowance if he caused the termination of the contract by serious misconduct. Article 199 of the Uniform Act imposes methods of calculation for the allowance for the first three years of the contract.

An indemnity for the commercial agent is also provided for under European law by Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents.[19] Article 17 provides that Member States shall take the measures necessary to ensure that the commercial agent is, after termination of the agency contract, indemnified or compensated for damage, for whatever reason other than the cases set out in article 18 (where the principal has terminated the agency contract because of default attributable to the commercial agent, where the commercial agent has terminated the agency contract, unless such termination is justified by circumstances attributable to the principal or on grounds of age, infirmity or illness of the commercial agent in consequence of which he cannot reasonably be required to continue his activities). The indemnity is due if the agent has developed the principal's network and the directive provides that the amount of the indemnity must be equitable. The indemnity does not prevent the agent from claiming damages. This accentuates the difference in nature between the indemnity which rewards the commercial efforts of the agent which have benefited the principal, and damages, which compensate for the loss which may have been sustained as the result of the termination. The right to the indemnity is even acknowledged in the event of a termination due to the death of the agent (art. 18.4). Article 19 of the Directive provides that the parties may not derogate from the provisions of articles 17 and 18 to the detriment of the agent. The ECJ in the *Ingmar* case[20] took the view that articles 17 and 18 protected the agent and more generally, through this profession, the freedom of establishment and the operation of undistorted competition (point 24). The rights which are guaranteed to the agent after the termination of the contract must therefore be applied where he carries on this activity in a Member States, in this case in the United Kingdom, although the principal is established in a non-Member State (California) and that the contract was expressly governed by the law of such country.

Comparative Law

Although they are close from a terminological point of view, there should be no confusion between the terms "damage" and "damages", the latter representing the monetary evaluation of the loss suffered; and referred to indiscriminately in francophone countries as "*dommages et intérêts*" or "*dommages-intérêts*" and "*Wertersatz*" in German. These damages, no matter the country, have as their primary function the reparation also referred to as compensation. Moreover, many legal systems are reluctant, specifically in contractual

19 *OJ* L 382 of 31 December 1986.

20 ECJ 9 November 2000, case C-381/98, *Ingmar GB Ltd c. Eaton Leonard Technologies Inc*, *Rev. crit.* 2001.107, note L. IDOT. *Contra* the French solution, Cass. Com. 28 November 2000, *D. aff.* 2001.305, note E. CHEVRIER.

matters, to award punitive damages, for two main reasons: firstly, it is considered that the function of damages is not to punish but to indemnify; secondly, from an economic perspective, it is accepted that the award of such damages would be contrary to the principle of predictability of the loss. However, through the operation of contractual derogations and, very exceptionally, through the intervention of the court, it appears that damages can take on a punitive function in the wider sense. These exceptions are becoming more generalised; it seems that increasingly, the authors are attracted to the idea of combatting breaches of contract which are motivated by profit, and which could be sanctioned by awarding to the obligee the profits arising for the obligor out of his breach of contract. This would make it possible to fight effectively against opportunistic behaviour, to render the market a more moral place, to make the cost of the obligor's behaviour more predictable. It would also fit well with the generalization of the duty to mitigate one's damage which is taking place at the moment.

Therefore, although the primary function of damages is clearly to compensate for the loss suffered, damages may have other functions. The question therefore arises as to the addition of a qualifying epithet to the expression "damages": compensatory damages, damages for late payment, punitive or exemplary damages. The expression "damages" becomes polysemic (**I**). Following directly from this point, the question of the evaluation of the amount of damages awarded, although central, is treated with a varying amount of attention by the different countries. Certain legal systems merely refer in an indirect way to loss of gain and actual loss suffered, others operate a distinction between the positive interest and the negative interest, the responses are inadequate in some countries and more elaborate in others. It would appear, however, that the traditional distinction, inherited from JHERING and defended by FULLER, between positive and negative interest – which distinguishes between the fact of putting the obligee in the situation in which he would have found himself had the contract been duly performed, and the fact of putting him in the situation in which he would have found himself had the contract never been concluded – could, if it were generalized, help better ascertain which interest should be protected and in which circumstances. Such an approach would lead to a better predictability with regard to the risks arising out of the conclusion of the contract.

Moreover, the term "indemnity" is notable in that although its use is disparate, even anarchical, it seems to appear in certain recurrent situations. The notion – insofar as it can be considered a notion – was never the subject-matter of a systematization, and yet it tends to reflect, on the one hand, the wider category of the sums paid independently from any idea of compensation, and on the other hand, the sum paid to make up for an unjust enrichment. It is perceived more in terms of what it is not, i.e. a sum intended to compensate for a loss, than in terms of what it is. An indemnity therefore remains an uncertain term, both in its meaning and in its legal treatment (**II**).

I. "Damages": An Expression with a Variety of Meaning

For the purposes of the present study in its French version, the well-established expression "*dommages et intérêts*" was adopted.

It does however give rise, from a terminological point of view, to two difficulties which should be mentioned in these preliminary remarks.

Firstly, two French expressions coexist: "*dommages-intérêts*" and "*dommages et intérêts*". This difference is not clearly apparent in the French Civil Code which uses, prima facie, one or the other expression as if they were interchangeable. In this way, article 1149 of the Code civil provides, in the event of a failure to perform a contractual obligation, that "*les dommages et intérêts dus au créancier sont, en général, de la perte qu'il a faite et du gain dont il a été privé, sauf les exceptions et modifications ci-après*" (the damages payable to the obligee are, in general, in respect of the loss he suffered and the gain of which he was deprived, except as provided below). The articles which follow, and in particular article 1152, refer to "*dommages-intérêts*".[21] The present day legislator as well as the courts have also tended to confuse the two expressions by treating them as synonymous. However, certain academics have argued, in particular with regard to contract, that the expressions each have a distinct meaning:[22] the "*dommages et intérêts*" consist of two separate elements – the loss suffered *("damnum emergens")* and the lost profits *("lucrum cessans")* – and have as their primordial function the compensation of the loss suffered, whilst the "*dommages-intérêts*" are "*une somme déterminée en bloc*" (a lump sum)[23] the main objective of which is to punish the perpetrator of a fault.

Secondly, difficulties arise with regard to the translation of these terms. For example, in English, there is no such distinction between "*dommages et intérêts*" and "*dommages-intérêts*". The sole term "damages" is used, synonymous with the expression "loss compensation" which clearly reflects the compensatory function of the sum awarded. Damages may however be qualified as soon as other functions come into play.[24]

Thus the expression "*dommages et intérêts*" (hereinafter referred to as "damages"), although traditionally considered as the indemnity awarded for the compensation of the loss suffered, appears to be given new functions and even sometimes a specific legal regime. It will be interesting to examine these damages in the different functions which they fulfill. The study will therefore deal with compensatory damages (**A**), damages for late payment (**B**) and punitive damages (**C**). In addition, penal clauses and liquidated damages clauses, which cause real terminological difficulties, will be considered separately (**D**).

A. Compensatory damages

The traditional and primary function of damages generally appears as being the compensation for loss suffered. However, although a vast majority of legal systems share this

21 See, in support of this position, the topical example of art. 1153 of the Civil Code which uses in the two first paragraphs both expressions in succession "*dans les obligations qui se bornent au paiement d'une certaine somme, les dommages-intérêts résultant du retard dans l'exécution ne consistent jamais que dans la condamnation aux intérêts au taux légal, sauf les règles particulières au commerce et au cautionnement. Ces dommages et intérêts sont dus sans que le créancier soit tenu de justifier d'aucune perte*".

22 See, for example, O. SAEDI, "Dommages-intérêts ou dommages et intérêts: celle-ci ou celle là; ou bien les deux?", *LPA* 7 June 2005, n° 112, p. 6.

23 O. SAEDI, *op.cit.*

24 J. EDELMAN, "The meaning of damages: Common Law and Equity", in: *The Law of Obligations, connections and boundaries*, A. ROBERTSON (ed.), UCL Press 2004, p. 31.

view, it remains that the notion of compensation is not univocal (**1**) and that it has been at the root of certain difficulties in the understanding of other mechanisms, in particular that of equivalent performance (**2**).

1. Various approaches to the notion of compensation

Rudolph von JHERING, in 1860, made a distinction between "positive interest" and "negative interest".[25] The positive interest, according to the author, refers to "everything which [the obligee] would have had if the contract had been valid".[26] Conversely, the negative interest[27] is defined by JHERING as "the interest in the non-conclusion of the contract. (…) it is intended more widely to compensate for the damage arising out of the reliance placed in vain by the obligee upon a contract which never proceeded, either because the contract was cancelled, or because the obligor defaulted".

However, if the distinction has been widely accepted in various legal systems (**a**), it appears that other systems, which had not devised a systematic procedure for evaluating the loss, do not recognize the notion of negative interest (**b**).

a) The distinction made between "positive interest" and "negative interest"

The distinction between positive and negative interest would appear today to have been adopted by a number of legal systems. Indeed, although the wording differs and the differences have been refined, the distinction between positive interest and negative interest appears to be the cornerstone of the evaluation of damages.[28] This is what seems to emerge from common law systems, with the distinction between "expectation" and "reliance interest" (**i**), from German law, with the distinction between "*status quo ante*" and "*status ad quem*" (**ii**) and from Swiss law (**iii**).

i. The distinction between "expectation interest" and "reliance interest" at common law

The notions of "positive interest" and "negative interest" are today frequently invoked in common law systems[29] in order to determine the function of damages and *a fortiori* their

25 V. R. VON JHERING, "De la culpa in contrahendo ou des dommages-intérêts dans les conventions nulles ou restées imparfaites (1860)", in: *Œuvres choisies*, t. II, translation O. DE MEULENAERE, Paris, Mrescq, 1893, p. 1, esp., p. 15.

26 R. VON JHERING, *op.cit.*, p. 16.

27 Y.-M. LAITHIER, *op.cit.*, n° 118, p. 173.

28 This is the case under Italian law. See C.M. BIANCA, *Il contratto*, 2nd ed., Milano 2000, p. 175.

29 See in particular J. BEATSON, *Anson's Law of Contract*, 28th ed., OUP 2002, p. 589 and following; E. McKENDRICK, *Contract Law*, Palgrave Macmillan Law Masters, 7th ed., Palgrave Macmillan 2007, n° 20.1, p. 402; from the same author, *Contract Law. Text, Cases, and Materials*, 2nd ed., OUP 2005, p. 1005; G.H. TREITEL, *An Outline of the Law of Contract*, 6th ed., OUP 2004, p. 369; H. COLLINS, *The Law of Contract*, 4th ed., LexisNexis 2003, p. 405.

amount.[30] Academics and judges, both in America and England,[31] retranscribe these notions through the concepts of "expectation interest" and "reliance interest".[32] Article 344 of the (Second) Restatement of Contracts provides as follows: "[j]udicial remedies under the rules stated in this Restatement serve to protect one or more of the following interests of a promisee: (a) his "expectation interest", which is his interest in having the benefit of his bargain by being put in as good position as he would have been in had the contract been performed, (b) his "reliance interest", which is his interest in being reimbursed for loss caused by reliance on the contract by being put in as good a position as he would have been in had the contract not been made, or (c) his "restitution interest", which is his interest in having restored to him any benefit that he has conferred on the party".[33]

With regard to the meaning to be given to the expression "positive interest", translated by FULLER as the expression "expectation interest", this should be understood as the act of "providing to the obligee the benefit which the performance of the obligation should have afforded him". It corresponds exactly to the expression, more familiar to French jurists, of "*exécution par équivalent*" (equivalent performance). Strictly speaking, the equivalent performance refers to the damages calculated by reference to the benefit to the obligee derived from the performance of the obligation, as opposed to the damages calculated by reference to the benefit derived from the non-conclusion of the contract".[34] Therefore, the mere value of the service of goods which would have been provided to the obligee is not enough to constitute the positive interest. To this head of damages must be added the value of "the expected usefulness of the contract".[35] Therefore, the notion of positive interest covers both that of lost profits and loss sustained, as recognized by French law. The lost gain is "the increase in the value of his assets of which the obligee is deprived as the result of the failure to perform the contract"[36] whilst the loss sustained is characterized by the fact that "the assets of the obligee, after the event, have diminished in value".[37] However, it should be specified here that the positive interest does not consist of all the losses arising out of the failure to perform. It only covers "the decrease in value of the assets which would not have occurred had the contract been duly performed. Correlatively, those expenses which would have been incurred by the aggrieved obligee under the terms of the contract cannot be recovered under this head of damages".[38] The

30 Y.-M. LAITHIER, *Etude comparative des sanctions de l'inexécution*, Préf. H. Muir-Watt, LGDJ 2004, n° 106, p. 157.

31 See for example, E. McKENDRICK, *Contract Law*, Palgrave Macmillan Law Masters, 7th ed., Palgrave Macmillan, 2007, n° 20.1, p. 402.

32 The articles establishing the principles on this subject are those of FULLER and PERDUE in 1936. See L.L. FULLER, W. R. PERDUE, "The Reliance Interest in Contract Damages:1" [1936] 46 *Yale LJ* 52 and by the same authors, "The Reliance Interest in Contract Damages: 2" [1936] 46 *Yale LJ* 373.

33 See *infra* for the particularities of restitution interest.

34 Y.-M. LAITHIER, *op.cit.*, n° 112, p. 165; *adde*. Ph. REMY, "Observations sur le cumul de la résolution et des dommages et intérêts en cas d'inexécution du contrat", in: *La sanction du droit, Mélanges offerts à Pierre Couvrat*, PUF 2001, p. 121, esp. p. 122-124.

35 Y.-M. LAITHIER, *op.cit.*, n° 113, p. 166.

36 Y.-M. LAITHIER, *op. cit.*, n° 117, p. 172.

37 J. CARBONNIER, *Droit civil, t.4, Les obligations*, 22nd ed., PUF 2000, n° 206.

38 Y.-M. LAITHIER, *op.cit.*, n° 114, p. 167.

loss sustained may, it would appear, be divided into two sub-categories: the decrease in the value of the assets, on the one hand, and the increase in costs, on the other.

The diminution in value represents the fact the goods are missing, or wholly or partly destroyed, or the service provided is of an insufficient quality. Under this heading, the obligee will be entitled to claim damages calculated by reference to the monetary value or book value of the goods, referred to by common lawyers as difference in value, diminution in value or loss in value.[39] To this should be added (…) the cases of damage or depreciation caused by the delivered goods to other assets of the obligee, [as well as] any mental distress suffered by the obligee as a result of the failure to perform the contract.

The increase in costs can be defined as "the increase in the costs made necessary by the failure to perform an obligation. [In practice], it consists of all the expenses incurred by the obligee to limit, reduce or eliminate the damage",[40] whether costs of preservation, compensation, handling, carriage of the goods or even security. To these heads of damages should be added "the costs of correspondence, or recovery, expert fee, legal fees and more generally 'transaction costs', when these are incurred with a view to reducing the damage". Moreover, the obligee should be entitled to recover the expenses necessary for a substitute performance so long as these are reasonable. In the same way, the obligee may recover expenses necessary to repair the goods.

Conversely, the negative interest[41] is defined by JHERING as "the benefit derived from the contract not being entered into. (…) It refers more widely to compensation for the damage arising out of the reliance placed to no avail by the obligee on a contract which is not pursued, either because the contract is cancelled, or because the obligor has defaulted".[42] This negative interest, as it was named by JHERING, was translated by FULLER, as reliance interest. "The damages awarded under the head of reliance interest are particular in that they compensate the obligee for the damage sustained by acting in reliance on a promise, or if the expression is preferred, in reliance on a contract that was not performed, so that the obligee is placed in the situation in which he would have been had the contract not been entered into with a defaulting obligor".[43]

This negative interest therefore necessarily includes the expenses inherent in the conclusion of the contract (transport costs, stamp duty, registration fees …) and in the performance of the contract (purchase of goods, transport and moving costs, advertising costs, insurance costs…). It also includes the costs incurred after the failure to perform the contract, that is to say those intended to limit the damage. More controversial, but possible in theory, is the question of compensation for lost opportunity: the loss of a chance to enter into a contract with a third party, which contract may have been duly performed.[44]

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39 Y.-M. LAITHIER, *op.cit.*, n° 115, p. 167; E.A. FARNSWORTH, *op.cit.*, p. 764.

40 *Ibid.* n° 116, p. 170.

41 Y.-M. LAITHIER, *op.cit.*, n° 118, p. 173.

42 Y.-M. LAITHIER, *op.cit.*, n° 119, p. 174.

43 Y.-M. LAITHIER, *ibid.*

44 On the question as a whole, see Y.-M. LAITHIER, *op.cit.*, n° 124.

ii. The protection of the "status ad quem" under German law

The distinction between restoring the *status quo ante* and the *status ad quem* is fundamental in the assessment of recoverable damages and for the calculation of the sum awarded.

From a terminological point of view, German codified law does not expressly refer to these two categories, but the distinction is almost unanimously accepted by academics. However, the terms used vary somewhat: instead of "*status ad quem*", the expression used is "*Äquivalenzinteresse*" (equivalent interest – equivalence between the performance and the consideration), or "*Erfüllungsinteresse*" (the interest which the obligee has in the performance of the obligation) or "*positives interesse*" (positive interest), as for "*status quo*", the expression used is "*Integritätsinteresse*" (integrity interest) or "*negatives Interesse*" (negative interest), the latter sometimes referred to as "*Vertrauensschaden*" (reliance damage), in a slightly different context. In fact, the dichotomy between positive and negative interest has been most important and very useful with regard to German contract law, in particular concerning precontractual liability (*culpa in contrahendo* [§§ 311, para. 2, and 241, para. 2 of the BGB]), the liability of the *falsus procurator* (representative acting without a mandate, § 179 BGB) and in the event of a cancellation for lack of consent (§ 122 BGB). In all these cases, the distinction between positive interest and negative interest allows two different situations to be identified: either the obligee is entitled to be placed in the position he would have found himself had the contract been duly performed, and therefore to recover his lost gain (positive interest) – or he is entitled to be placed in the position he would be in, had he not relied on the existence of the contract, and therefore to recover only the costs engaged in view of the conclusion and performance of the contract, and possibly the lost opportunity to enter into another favourable contract which he could have concluded had he not placed his reliance upon the valid conclusion of the contract.[45]

German law marks the distinction between the protection of the *status quo* and of the *status ad quem*, to the extent that it provides for specific consequences, in particular with regard to the protection of the *status ad quem*. Indeed, in this case, the BGB distinguishes between two sub-categories of damage, with each one being subject to specific conditions: the damage "in lieu of performance" *("Schadensersatz statt der Leistung")* and the damage "for belated performance" *("Schadensersatz wegen Verzögerung der Leistung")*.

Regarding the damage "in lieu of performance", § 280, para. 3 of the BGB, specifies that damages are only recoverable in certain additional conditions set out in §§ 281, 282 and 283 of the BGB are met. If § 282 BGB, which is not of any practical interest, is ignored, the "additional conditions" of restitution amount to a requirement, in principle, that the obligee should impose a further delay for performance.[46]

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45 In fact, German law, together with Swiss law (see *infra*.) and American law (see *supra*.), was among the first to transpose the distinction made by JHERING. See in particular F. RANIERI, "Les sanctions de l'inexécution du contrat en droit allemand", in: *Les sanctions de l'inexécution des obligations contractuelles. Etudes de droit comparé*, M. FONTAINE, G. VINEY (sous la direction de), Bruylant, LGDJ 2001, n° 50, p. 828.

46 The practical effect of this requirement is the granting of a "second chance" which the obligee must give to the obligor in the event of non-performance or of defective performance, before he can claim damages "in lieu of performance". This second chance has an obvious economic

As for the very notion of damage "in lieu of performance", academics take the unanimous view that the recoverable damages consist of two elements: everything that provides the performance itself, the value of the goods or service to be provided, or the price which the obligee was obliged to pay elsewhere to obtain such goods or services (*"Substanzausfallschaden"* – damage in relation to loss of the substance); and any economic loss caused by the fact that the obligee did not have the benefit of the performance at the time when the obligor was under an obligation to provide it (normally, at the expiry of the specified delay), therefore, the lost gain in relation to the exploitation or resale of the goods or services (*"Ertragsausfallschaden"* – damage in relation to the loss of exploitation/use).[47] In this last sub-category, it is the intention of the obligee regarding what he wanted to do with the goods or services which determines the extent of the recoverable damages.

There are cases in which the damages recoverable in the case of damage "in lieu of performance" are not sufficient to satisfy the obligee. That is the case in particular in certain contracts, where neither the goods or services provided nor the use which was intended for them have a monetary value. A typical example, taken from German case law, is the case of a political party renting premises for a meeting, premises which the landlord finally refuses to provide. Obviously, the political party is not obliged to pay the rent; but it claims the costs incurred in vain for advertising and organising the meeting. With regard to contracts for profit, the courts had applied a "presumption of profitability" *("Rentabilitätsvermutung")* which consisted in treating the costs incurred in vain as a loss made by the business, by assuming that they would have been amortized by the use of the subject matter of the contract had the contract been performed. But for non-profit making contracts, this presumption was automatically disproved since an amortization in the economic sense was excluded.

It is to remedy this deficiency in contractual liability that the German legislator introduced, in 2002, § 284 of the BGB, which offers the obligee a choice between claiming damages for damage "in lieu of performance" and a claiming the reimbursement of costs incurred in vain, but without allowing a combination of the two. Moreover, this right is subject to the same conditions as the right to claim damages for damage "in lieu of performance".

From a terminological perspective, it is a right to *"Aufwendungsersatz"*, a term which is also used with regard to negotiorum gestio (the manager is entitled to the restitution of the costs incurred – *"Aufwendungsersatz"*, § 670 BGB), with regard to a few cases of unjust enrichment (*"Aufwendungskondiktion"*, § 812, para. 1, 1st sentence, BGB) and other cases, the main difference being, in relation to the notion of damages, that the restitution of expenses only includes costs voluntarily incurred, whilst the damages include both voluntary and involuntary expenses.

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objective: it favours the real performance (in kind) of the contract as opposed to the replacement of the obligation in question by a right to damages. §§ 281, para. 2, and 283 of the BGB contain several exceptions to this second chance principle: when the performance is impossible (§ 283), when the obligor with due consideration and definitively refuses such performance, and after considering the respective interests of the parties, it appears that the immediate transition to damages is justified (§ 281, para. 2), the obligee is not required to impose a delay before claiming damages "in lieu of performance".

47 V. H. C. GRIGOLEIT, Th. RIEHM, "Die Kategorien des Schadensersatzes im Leistungsstörungsrecht", *AcP* 203 (2003), S. 727-762.

Damages for "late performance" *("Schadensersatz wegen Verzögerung der Leistung")* are only recoverable under § 280, para. 2 of the BGB under certain additional conditions set out by § 286 of the BGB. These "additional conditions" amount to a requirement, in principle, that the obligee should make a formal demand to the obligor.[48]

The damage "for late performance" covers elements of the obligee's economic interest with regard to the performance required and which do not replace such performance. It is also referred to as "damage in addition to performance". The question to be asked is the following: would the award to damages remove the obligee's interest in the performance of the contract? If the response is positive, then the damage is "in lieu of performance", if not, it is a damage "in addition to performance" and therefore a damage "for late performance".

Typically, there are two categories of damage "for late performance":[49] The *temporary* loss of enjoyment of the goods or services to be provided (unlike the *permanent* loss of enjoyment in the event of a failure to perform, which is included in the damage "in lieu of performance"), and the costs incurred for the recovery of the debt (lawyers' costs, court fees, …). The loss of enjoyment of the goods or services can also include the payment of interest to a bank (for example if the account is overdrawn) which would not have been payable had the obligor performed his obligation. Moreover, the first category of damage "for late performance" can even include lost gains which the obligee would have made by speculating on the stock exchange with the monies owed (on the condition he can prove exactly what he would have done).[50]

iii. Swiss law and the distinction between "positive interest" and "negative interest"

As it is the case for German law, the Swiss legislation does not use the distinction established by JHERING but this is however central in legal theory.[51] Either the damages are intended to place the obligee "in the financial situation in which he would have

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48 § 286, para. 1 of the BGB requires a *"Mahnung"* (formal request) by the obligee, and damages "for delayed performance" can only be awarded on that condition. In principle, it is therefore not only the non-performance at the expiry of the delay for performance which is sufficient for the award of damages "for late performance", but the formal request must take place after such expiry.

The formal request is not necessary when the date of performance is specified in the contract; or at least if it can be determined by a particular event set out in the contract (for example 2 weeks after the delivery of the goods or services); when the obligor with due consideration and definitively refuses such performance, and after considering the respective interests of the parties, it appears that the immediate transition to damages is justified (§ 286, al. 2). In addition, following the transposition of directive 2000/35/EC into domestic law, the formal request is no longer necessary after 30 days from the receipt of an invoice. The formal request should not be confused with the requirement for delay: In particular, it is not necessarily followed by a delay for performance. The mere request is sufficient. It therefore imposes less pressure than the requirement for a delay.

49 For more details, see H.C. GRIGOLEIT, Th. RIEHM, *art. précit.*, p. 747-751.

50 BGH, 17 Feb. 2002, NJW 2002, 2553.

51 See generally, P. ENGEL, *Traité des obligations en droit suisse*, 2e ed., Staempfli Editions, 1997, n° 211; L. THEVENOZ, "Le contrat inexécuté en droit suisse", in: *Il contratto inadempiuto. Realtà*

found himself had the contract been performed"[52] (positive interest), or they are intended to place the obligee "in the financial situation in which he would have found himself had the contract never been entered into"[53] (negative interest).

In the first case (positive interest), the damages are intended to compensate for the loss sustained ("costs incurred unnecessarily with a view to performing the contract [but not entering into it], expenses incurred to supplement the performance, or debts contracted towards third parties because the obligee was unable to fulfill his own obligations") and the lost profits ("loss of productivity with regard to a productive asset or loss of benefit on the sale of an asset (in other words, the difference between the price fixed by the contract and the price which the buyer could normally have obtained from a sale, whether or not he would actually have sold the asset)"[54]). In other words, the claim for damages for a failure to perform appears to be especially useful to the obligee "when the performance is in relation to a productive asset or to an asset intended to be sold at a benefit, or to an asset which has increased in value since the contract was entered into".[55]

In the second case (negative interest), damages may not only be intended to compensate the obligee for the benefit which he would have derived from the non-conclusion of the contract, but also to cover the damage arising out of the trust placed in the obligor until the termination[56] ("*Vertrauensinteresse*" or reliance interest). These damages are general paid following the termination of the contract and consist of the loss sustained ("costs resulting from the conclusion of the contract, or expenses incurred unnecessarily with a view to the performance, or compensation owed to third parties on the basis that the obligee was not able to fulfill his own obligations, without taking into account the decrease in value of the asset which is the subject-matter of the contract"[57]) and of the lost profits ("loss of income resulting from not entering into other contracts which could have been profitable, but not the lost gain in relation to the case in question"[58]).

Such an approach has not been adopted by all the legal systems, and in particular, has not been adopted under French law, which in principle, only takes into account the positive interest.

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e tradizione del diritto contrattuale europeo, L. VACCA (dir.), Turin, G. Giapichelli, 1999, p. 173, esp. p. 196.

52 P. WESSNER, "Les sanctions de l'inexécution des contrats: questions choisies. Exposé du droit suisse et regard comparatif sur les droits belge et français", in*: Les sanctions de l'inexécution des obligations contractuelles. Études de droit comparé*, M. FONTAINE, G. VINEY (under the direction of), Bruylant, LGDJ 2001, n° 50, p. 908.

53 *Ibid*. n° 57, p. 910.

54 *Ibid*. n° 51, p. 908.

55 *Ibid*. n° 52, p. 908.

56 *Ibid*. n° 58, p. 911.

57 *Ibid*.

58 *Ibid*.

b) The deficiencies in certain legal systems regarding the evaluation of damages

Certain legal systems, including the French legal system, traditionally only recognize the principle of total compensation for loss, consisting of lost profits and loss sustained, such as to place the obligee in the situation in which he would have found himself had the contract been duly performed (**i**). It is therefore, going back to the distinction made by JHERING, the positive interest which is considered, and never (or almost never) the negative interest. Such an approach, however, leads to contradictory results, as illustrated by the issue of concurrent claims for termination for non-performance and for payment of damages (**ii**).

i. The principle of total reparation through the compensation for loss sustained and lost profits

The French approach[59] to the determination of the amount of damages to be awarded and to the damage which gives rise to compensation is perceived by anglo-saxon academics as being at a very early stage of development compared to the theory of damages which has developed under common law systems.[60] Academic attempts to transpose the system inherited from JHERING have failed.[61] French academics generally tend to rely on

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59 See P. JOURDAIN, "Les dommages-intérêts alloués par le juge. Rapport français", in: *Les sanctions de l'inexécution des obligations contractuelles. Etudes de droit comparé*, M. FONTAINE, G. VINEY (under the direction of), Bruylant, LGDJ 2001, p. 263; *adde*. G. VINEY, P. JOURDAIN, *Les effets de la responsabilité*, Traité de droit civil, 2nd ed., LGDJ 2001, n° 57, p. 111.

60 In support of this view, J. BELL, S. BOYRON, S. WHITTAKER, *Principles of French Law*, OUP 1998, p. 349; B. NICHOLAS, *The French Law of Contract*, 2nd ed., Oxford Clarendon Press 1992, p. 226; G.H. TREITEL, *Remedies for Breach of Contract. A comparative account*, Oxford Clarendon Press 1988, n° 89; these references are cited by Y.-M. LAITHIER, *op.cit.*, n° 107. The author agrees, in fact, with the observation by these English academics: *"Que la théorie des dommages-intérêts soit plus avancée en common law qu'en France ne fait aucun doute si l'on rappelle que l'analyse théorique de l'article 1149 du Code civil se résume à peu près à ceci: le créancier victime de l'inexécution doit obtenir la "réparation intégrale" du préjudice (perte subie et gain manqué) puisque le contrat a force obligatoire (article 1134 du Code civil) et l'évaluation, variable au gré des circonstances de chaque espèce, relève en grande partie de l'appréciation souveraine des juges du fond"* (There is no doubt that the theory of damages is more advanced under common law systems than it is in France, if one recalls that the theoretical analysis of article 1149 of the Civil Code can be summarized as follows: the obligee, victim of non-performance, must obtain "total compensation" for the loss (loss sustained and lost profits) because the contract is binding (article 1134 of the Civil Code) and the estimation, which varies depending on the circumstances of each case, is for a large part at the discretion of the judges.) *(ibid.)*. See also the observations of Ph. STOFFEL-MUNCK on the question of damages following an unlawful unilateral termination: "Le contrôle a posteriori de la résiliation unilatérale", *Droit et patrimoine*, May 2004, n° 126, p. 77.

61 It would appear that a number of academics have focussed on the negative interest. See R. SALEILLES, *Essai d'une théorie générale de l'obligation d'après le projet de Code civil allemand*, Paris, F. Pichon, 1890, n° 153, p. 158; E. GAUDEMET, *Théorie générale des obligations*, published

the indications found in article 1149 of the Civil Code, which provides: "Damages due to a creditor are, as a rule, for the loss which he has suffered and the profit which he has been deprived of, subject to the exceptions and modifications below".[62]

As noted by P. JOURDAIN: "although our courts do not distinguish between what is often referred to in other countries as positive damages and negative damages, they do not hesitate to award to a victim the compensation necessary to place such victim in the position in which he would have found himself had the contract been duly performed (positive interest) and do not limit themselves to placing the victim in the position in which he would have found himself had the contract not been entered into (negative interest)".[63] G. VINEY[64] recently pointed out that although French law does not recognize the notion of negative interest, it may not oppose so much resistance to its introduction. A recent decision, dealing albeit with tortious liability,[65] may, according to the author, open the door to future solutions, in particular in the cases of cancellation of the contract or termination for non-performance, when these mechanisms are combined with claims for damages.[66] The issue is that of deciding whether it is appropriate to compensate for the loss of the chance to enter into the contract. The Court refused such compensation on the basis that "a fault committed in exercising the right to terminate precontractual negotiations unilaterally did not cause the damage consisting of the loss of the chance to gain profits which the obligee hoped would arise from the conclusion of the contract".[67] However, it did not exclude the possible compensation for the loss of the chance to enter into an equivalent contract with a third party.[68]

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by H. DESBOIS, J. GAUDEMET, Paris, Sirey, [1937], 1965, p. 196.; C. GUELFUCCI-THIBIERGE, *Nullité, restitutions et responsabilité*, Préf. J. Ghestin, LGDJ 1992, n° 109. These references are cited by Y.-M. LAITHIER, *op.cit.*, n° 108, p. 160, note 429.

62 There is little organisation in France concerning the rules relating to the determination of the damage, this results largely from the specific powers held by the judge. See in particular G. VINEY, P. JOURDAIN, *Les effets de la responsabilité*, *op.cit.*, n° 61, p. 125.

63 P. JOURDAIN, *"si notre jurisprudence ne distingue pas entre ce que l'on nomme souvent à l'étranger les dommages-intérêts positifs et les dommages-intérêts négatifs, elle n'hésite cependant pas à allouer à la victime les indemnités nécessaires pour la replacer dans la situation qui aurait été la sienne si le contrat avait été correctement exécuté (intérêt positif) et ne se contente donc pas de la remettre dans l'état où elle se serait trouvé si le contrat n'avait pas été conclu (intérêt négatif)"* (Although our case law does not distinguish between what is referred to abroad as positive and negative damages, it does not hesitate in awarding to the victim the damages which are necessary for him to be placed in the position in which he would have found himself had the contract been duly performed (positive interest) and is not content merely to place him in the state in which he would have found himself had the contract not been entered into (negative interest).) "Les dommages-intérêts alloués par le juge. Rapport français", *op.cit.*, n° 10, p. 273 and 274.

64 G. VINEY, "L'appréciation du préjudice", *LPA* 19 May 2005, n° 99, p. 89.

65 Cass. com, 26 November 2003, *Bull. civ.* IV, n° 186, p. 206; *RTD civ.* 2004. 80, obs. J. MESTRE and B. FAGES; *JCP* G 2004, I. 163, n° 18 obs. G. VINEY; *RDC* 2004, p. 257 obs. D. MAZEAUD; *adde*. O. DESHAYES, "Le dommage précontractuel", *RTD com.* 2004. 187.

66 G. VINEY, *op.cit.*, p. 95.

67 Cass. civ. 3e, 28 June 2006, *Bull. civ.* III, n° 164, p. 136, *JCP* G 2006, II. 10130, note O. DESHAYES; *adde*. J. GHESTIN, "Les dommages réparables à la suite de la rupture abusive des pourparlers", *JCP* G2007, I. 157.

Under the law of Quebec, the terms of article 1621 of the Civil Code result in a total compensation approach, based on compensation for the loss sustained and lost profits. This refers to the positive interest as defined above, that is to say that the damages awarded are intended to place "the obligee in the position in which he would have found himself had the contract been duly executed".[69]

Belgian law adopts a similar position and the principle of total compensation is often deduced from article 1149 of the Civil Code. The principle is classically constituted by the same two elements as under French law: the *damnum emergens* and the *lucrum cessans*, the loss sustained and the lost profits. These two elements are interpreted in the same way as under French law and each cover the same situations. Under the head of *damnum emergens*, there will be compensation for "the expenses incurred by the obligee, which have been incurred in vain or become unnecessary because of the defective performance or non-performance".[70] The judges award, in this spirit, compensation for "storage costs, costs for the rental of means of transport …".[71] Under the head of *lucrum cessans*, Belgian tribunals have, for example, compensated an auditor *(commissaire-réviseur)* who had been improperly dismissed, by awarding damages amounting to the fees which he would have received had his mandate run its full term.[72] In the same way, judges have awarded compensation equal to "the benefit expected by the seller on the resale of the product, benefits expected from rental[73] (…)".

The award of damages here is intended, as is the case under French law but also along the same principles as under German and Swiss law, but also under common law systems, to compensate for what JHERING referred to as positive interest. It aims to "place the obligee in the position in which he would have found himself had the obligor fulfilled his obligation".[74] However, the sum awarded is not exclusively based on the value of the goods which were not delivered or services which were not performed, it even moves away from that value. For example, under French or Belgian law, damages will be awarded to compensate for all the losses arising out of the non-performance of the contract.

ii. The issue of concurrent claims for termination and damages in the event of non-performance

Under French law,[75] the deficiencies in the theoretical bases regarding the nature and functions of damages become apparent in the classic example of the case law on damages

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68 *Adde*. J. GHESTIN, *op.cit*., esp. n° 21.

69 J.-L. BAUDOUIN, P.-G. JOBIN, *Les obligations*, 5th edition, Les éditions Yvon Blais 1998, n° 814.

70 I. DURANT, N. VERHEYDEN-JEANMART, *op.cit*., n° 6, p. 311 and 312.

71 I. DURANT, N. VERHEYDEN-JEANMART, *op.cit*., n° 6, p. 311 and 312.

72 Liège, 23 November 1989, *R.P.S.*, 1990, p. 178, n° 6545, cited by I. DURANT, N. VERHEYDEN-JEANMART, n° 6, p. 312.

73 Bruxelles (4th ch.), 2 June 1992, *J. LM.B.*, 1994, p. 354 (somm.).

74 Cass. (1re ch.), 28 September 1995, *Pas*., 1995, I, p. 860.

75 Ph. RÉMY, "Observations sur le cumul de la résolution et des dommages-intérêts en cas d'inexécution du contrat" in: *La sanction du droit, Mélanges offerts à Pierre Couvrat*, PUF 2001, p. 121; P. ANCEL, "La responsabilité contractuelle", in: *Les concepts contractuels français à l'heure des*

following termination for non-performance. Indeed, as noted by Philippe REMY,[76] this solution, established by article 1184 of the Civil Code, is based on a paradox: "what justification can be found for the obligee being entitled to claim both the retroactive cancellation of the contract and at the same time damages on the basis of its non-performance?".[77] The comment appears particularly relevant, particularly in view of the fact that Swiss law clearly distinguishes positive and negative interests, depending on whether the damages are awarded on the basis of non-performance or of retroactive cancellation of a contract.[78] It would therefore seem that establishing a systematic distinction between positive and negative interests would bring back some coherence and reduce the ever increasing cost of the principle of total compensation.

The evalution of damages is not the only difficulty which arises with regard to the notion of damages. According to certain academics, the function of damages brings them closer to an equivalent performance.

2. Damages and their function of equivalent performance

Under both Belgian[79] and French[80] laws, the very notion of contractual responsibility is the subject of academic debate, which also affects the function of damages. Indeed, for a large number of academics, if a contracting party does not fulfill his obligation, "the other party, having failed to obtain satisfaction after his formal demand, may request a substitute performance. (…) What is customarily referred to as *"réparation"* (compensation), without too much consideration, is in fact a method of performing the contract, probably different from what had originally been provided (by equivalent) and often deferred, but a method of performance nonetheless, or method of payment (…)".[81] From this approach,

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Principes du droit européen des contrats, P. RÉMY-CORLAY, D. FENOUILLET (under the direction of), Dalloz 2003, p. 243.

76 Ph. RÉMY, "Observations sur le cumul de la résolution et des dommages-intérêts en cas d'inexécution du contrat", *ibid*.

77 P. ANCEL, *op.cit*., n° 10, p. 249.

78 V. *supra*.

79 V. I. DURANT, N. VERHEYDEN-JEANMART (under the direction of), "Les dommages et intérêts accordés au titre de la réparation d'un dommage contractuel", in: *Les sanctions de l'inexécution des obligations contractuelles. Études de droit comparé*, M. FONTAINE, G. VINEY (under the direction of), Bruylant, LGDJ 2001, n° 4, p. 310; M. COIPEL, *Éléments de théorie générale des contrats*, Diegem, Story-Scientia 1999, n° 170, p. 124.

80 Ph. RÉMY, "La responsabilité contractuelle: histoire d'un faux concept", *RTD civ*. 1997. 323; by the same author, "Critique du système français de responsabilité civile", *Droit et cultures* 1996/31, 31; D. TALLON, "L'inexécution du contrat: pour une autre présentation", *RTD civ*. 1994. 223; by the same author "Pourquoi parler de faute contractuelle?", in: *Droit civil, procédure, linguistique juridique, Écrits en hommage à Gérard Cornu*, PUF, 1994, p. 429; C. OPHELE, "Le droit à dommages-intérêts du créancier en cas d'inexécution contractuelle due à la démence du débiteur", *RGDA* 1997, p. 453; Ph. Le TOURNEAU, L. CADIET, *Droit de la responsabilité et des contrats*, Dalloz Action 2000/2001, n° 801, p. 196; *adde*. M. FAURE ABBAD, *Le fait générateur de la responsabilité contractuelle*, Préf. Ph. Rémy, LGDJ 2003.

81 Ph. LE TOURNEAU, L. CADIET, *op.cit*., n° 806.

it can be deduced that the proof of damage is indifferent to the payment of damages. Certain Belgian authors are in fact reluctant to use the term *"réparation"* (compensation) to refer to the obligation to indemnify imposed on the defaulting obligor. Conversely, the debate does not appear to have affected the law of Quebec, at least in terms of legislation. Indeed, the structure of the Civil Code of Quebec tends to highlight the historical parallel existing between the two types of liability.

These considerations should be read in the light of common law principles and more precisely of what is referred to as nominal damages.[82] The latter of defined as follows by the House of Lords:

"A technical phrase which means that you have negatived anything like real damage, but that you are affirming by your nominal damages that there is an infringement of a legal right which, though it gives you no right to any real damages at all, yet gives you the right to the verdict or judgment because your legal right has been infringed".[83]

These nominal damages are awarded as soon as a failure to perform, attributable to the obligor, is established. However, because the basis for calculation is the actual loss, in cases where the failure to perform does not cause any loss, the judge will hold the obligor liable to pay nominal damages, which traditionally amount to two pounds under English law and one dollar under American law. The value of the agreement entered into by the parties therefore appears to be null or almost null. Damages thus appear, in common law systems, as being the compensation for "a right which has been infringed",[84] so that although theoretically the proof of damage is not necessary to the award of damages, the amount of such damages will be in proportion with the loss suffered, which even under common law principles goes beyond the simple value of the performance required under the contract and includes various types of non-monetary loss.[85]

Under positive law, therefore, in order for an obligor to be liable in contract, there is a requirement for a loss, causation, and a failure to perform attributable to the obligor. Moreover, it is the principle of total compensation which will apply and not only the indemnification for the performance which could reasonably be expected.[86]

B. Damages for late performance[87]

Under French, Belgian and Quebec laws, the expression *"dommages et intérêts moratoires"* (damages for late performance) is used to describe the sum due to the obligee by reason of the delay in the performance of his obligation by the obligor. More specifically, the ex-

82 On this issue, see in particular Y.-M. LAITHIER, *op.cit.*, n° 83, p. 117; FARNSWORTH, *op.cit.*, p. 757.

83 *Owners of the Steamship 'Mediana' v. Owners, Master and Crew of the Lightship 'Comet'* [1900] AC 113, esp. p. 116.

84 *Ibid.*

85 See *supra*.

86 It is interesting in this respect to note that in the French Reform Proposals, it is the classical approach to contractual liability which was adopted.

87 "Moratory" (and "moratoire") comes from the latin "mora" which means "delay".

pression "*intérêts moratoires*" (interest for late payment)[88] refers to a type of "*dommages et intérêts moratoires*". They come into play in relation to a delay in the performance of a monetary obligation and are calculated in a particular way: by applying an interest rate – legal or contractual – to the sum which is due. Damages for late payment and interest for late payment therefore fulfill the same function, that of "compensating the obligee for the loss caused by the obligor's delay";[89] the difference between them relates both to the type and to the category. Interest for late payment is a type of damages, which is specific in that it does not apply "to all obligations which can be translated into monetary terms, but only to obligations which are *from the outset* expressed in monetary terms, or more precisely, to those which are not the monetary equivalent of a performance in kind (…)".[90] They are also specific in that they are due independently from evidence of any damage caused by the delay, so that under the terms of article 1153 paragraph 2 of the Belgian and French civil codes, the obligee is "not required to show evidence of any loss".[91]

It should be mentioned that the mere use of the term "interest" is enough to introduce some doubt as to the compensatory nature of the sum awarded. Indeed, the word is used both to refer to the remuneration paid to the lender of a sum of money for providing such money, and to refer to the compensation for a delay.[92] This is why the term "interest"

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88 See on this issue the recent thesis of F. GREAU, *Recherche sur les intérêts moratoires*, Préf. F. Chabas, Defrénois 2006, n° 7 and 8, p. 10 and 11; J. FLOUR, J.-L. AUBERT, Y. FLOUR, E. SAVAUX, *Droit civil. Les obligations. 3. Le rapport d'obligation*, 4th ed., Sirey 2006, n° 144, p. 103.

89 F. GREAU, *op.cit.*; *adde*. For example on the compensatory function of interest for late payment: G. VINEY, P. JOURDAIN, *Les effets de la responsabilité, op.cit.*, n° 334, p. 599.

90 F. GREAU, *op.cit.*, n° 15, p. 19. Along the same lines, under Belgian law: I. DURANT, N. VERHEYDEN-JEANMART (under the direction of), "Les dommages et intérêts accordés au titre de la réparation d'un dommage contractuel", in: *Les sanctions de l'inexécution des obligations contractuelles. Études de droit comparé*, M. FONTAINE, G. VINEY (under the direction of), Bruylant, LGDJ 2001, n° 34, p. 334. The authors note the terms of a previous decision of the Cour de Cassation, which had specified that: "*parmi les dettes dont le paiement s'effectue en monnaie ayant cours légal, une distinction est à observer entre celles qui ont pour objet une somme numérique invariablement fixée en vertu de la loi ou par la volonté des parties, et celles dont l'objet diffèrent dans le principe, consiste en une prestation, qui ne sera évaluée en monnaie que le cas échéant et ultérieurement*" (among the debts the payment of which must be paid in legal currency, a distinction should be made between those which concern a sum invariably fixed in accordance with the law or the will of the parties, and those which concern, and this is different in principle, a service which will only be evaluated in monetary times if required and at a later stage) (Cass. (1re ch.), 26 February 1931, *Pas.*, 1931, I, p. 94).

91 Art. 1617 of the Civil Code of Quebec provides in its paragraph 2 *in fine*: "The creditor is entitled to the damages from the date of default without having to prove that he has sustained any injury".
F. TERRÉ, Ph. SIMLER, Y. LEQUETTE, *Droit civil, Les obligations*, 9th ed., Dalloz 2005, n° 570, p. 558; n° 1090, p. 1047.

92 In this last meaning, DOMAT defined the "interest" as being exclusively "*le dédommagement, et le désintéressement dont un débiteur d'une somme d'argent peut être tenu envers son créancier, pour le dommage qu'il peut lui causer, faute de payer la somme qu'il doit*" (the compensation, and making good of a debt which the debtor owing a sum of money can be held liable for as regards the creditor, for the damage caused by the failure to pay the sum owed). J. DOMAT, *Les lois civiles*

should be qualified: In cases where they are intended to be the remuneration for a service, the interest could be referred to as *"rémunératoire"* (which remunerate)[93] in preference to other more problematic qualifiers, such as "compensatory" or "contractual".[94] And when they are intended as a compensation for late payment, they should be qualified as *"moratoires"* (moratory).

However, it has been noted by authors from both Quebec and France, that the distinction between *"dommages et intérêts compensatoires"* (compensatory damages) and *"dommages et intérêts moratoires"* (damages for late performance) was somewhat awkward in that these two types of indemnity have the objective of compensating for the loss sustained by the obligee.[95] However, although they share the same function, damages for late payment are governed by a specific legal regime, which may justify setting them apart from a terminological point of view, with simplification in mind.

Under German law, interest for late payment (*"Verzugszinsen"*, § 288 BGB), is not included from a terminological point of view in the categories of damage provided under § 280 of the BGB. This can be explained by the fact that it is considered as a minimal lump sum loss *("objektiver Mindestschaden")* which is not linked to the concrete loss of the obligee, but only to a delay in payment. In fact, the obligor is not entitled to claim that the actual loss of the obligee is less than the legal interest rate. Technically, the interest does not represent a compensation for a concrete and precise loss, but a lump sum consisting of legal interest, calculated at a rate set by the law (7,70% at the moment) which is awarded because the delay amounts for the obligee to an involuntary loan. The "loss for late performance" *("Verzugsschaden")* may be claimed in addition to interest for late payment, but only with regard to the second head of damage (costs incurred); with regard to the loss of enjoyment, the obligee may choose between interest for late payment (lump sum) or evidence of concrete loss.

Under Italian law,[96] damages for late performance, *"danni-interessi moratori"*,[97] are similar. From a terminological point of view, it should be noted that it is the only case in which the expression *"danni-interessi"* (*"dommages-intérêts"* in French, damages in English) can be rightly used: they do in fact represent interest *(interessi)* which fulfill the function of compensation for damage *(danni)*. With regard to the legal regime which is applicable, the amount of the compensation is the value of the legal interest accruing

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dans leur ordre naturel. Le droit public et legum delectus, t. 1, new ed., Paris, 1777, p. 259, cited by F. GREAU, *op.cit.*, n° 6, p. 8.

93 In support of this point, F. GREAU, *op.cit.*, n° 6, p. 10; Ch. BIQUET-MATHIEU, *Le sort des intérêts dans le droit du crédit. Actualité ou désuétude du Code civil?*, Coll. Scientifique de la Faculté de Droit de Liège, Préf. I. MOREAU-MARGREVE, 1998, n° 3; V. DAVID, *Les intérêts de sommes d'argent*, Préf. Ph. RÉMY, LGDJ 2005, n° 28.

94 For criticism of these qualifying adjectives, see under French law, F. GREAU, *op.cit.* n° 6, p. 9; under Belgian law, I. DURANT, N. VERHEYDEN-JEANMART (under the direction of), "Les dommages et intérêts accordés au titre de la réparation d'un dommage contractuel", in: *Les sanctions de l'inexécution des obligations contractuelles. Études de droit comparé*, M. FONTAINE, G. VINEY (under the direction of), Bruylant, LGDJ 2001, n° 31, p. 329.

95 F. GREAU, *op.cit.*; J.-L. BAUDOUIN, P. DESLAURIERS, *op.cit.*, n° 1321, p. 872.

96 V. A. MARI, in: *Principles of European Contract Law and Italian Law. A Commentary*, L. ANTONIOLLI, A. VENEZIANO (eds.), Kluwer Law International 2005, p. 465.

97 A. TRABUCCHI, *Istituzioni di diritto civile*, 41° edizione, Padova 2004, p. 689.

on cash sums and must be paid even if the obligee has suffered no loss: it is due merely on the basis of the delay. The obligee may, however, show evidence of a loss which is greater than this compensation and he may then be entitled to an additional compensation, except in the event that the evaluation of interest for late payment was provided for in the contract (art. 1224, 2nd para. of the Civil Code). A frequent form of additional loss is monetary devaluation, which before the delay is borne by the obligee, but becomes the liability of the obligor once he is late in payment.

Mention should be made, in addition, of the decree N° 231 of 9 October 2002 implementing Directive 2000/35/EC on combating late payment in commercial transactions: in accordance with this text, in the event of a delay in payment, the obligee is automatically entitled to the reimbursement of interest starting on the day following the end of the period for payment fixed in the contract (art. 3), except where the obligor can demonstrate that he is not responsible for the delay.[98]

In the event of termination for non-performance, the evaluation of damages follows the rules set out by the articles 1223 and following of the Civil Code. The majority of academics take the view that in the case of termination for non-performance, the damages take on a deterrent function and the obligation to compensate becomes a tool of persuasion regarding the due compliance by the obligor with his obligations.[99] The point which gives rise to most debate concerns the scope of the compensation, that is to say whether it should only cover positive or negative interest, or both. The majority view amongst academics is that the termination of the contract should only entitle the aggrieved party to claim for compensation regarding positive interest.[100]

English law has not, in the past, imposed an obligation, either by statute or at common law, to pay interest in the event of non-payment or late payment.[101] However, the Late Payment of Commercial Debts (Interest) Act 1998 provides for an implied term to pay interest for the late payment of a debt created by a contract for the supply of goods or services where the purchaser and the supplier are each acting in the course of a business. The parties may agree on the method of payment and calculation of interest so long as

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98 M. FARNETI, "La disciplina dei ritardi di pagamento nelle transazioni commerciali (d.lg. 9 ottobre 2002, n. 231)", in*: Le Nuove leggi civili commentate*, 2004, p. 652; R. CONTI, Il d. lgs. n. 231/2002 di trasposizione della direttiva sui ritardati pagamenti nelle transazioni commerciali, in Corr.giur., 2003 fasc. 1, p. 99; G. DI MARZIO, "Ritardi di pagamento nelle transazioni commerciali", in I Contr., 2002 fasc. 6, p. 628.

99 P. CENDON, I contratti in generale, XII, in: *Il diritto privato nella giurisprudenza*, Torino, 2000, p. 205.

100 P. CENDON, I contratti in generale, XII, in: *Il diritto privato nella giurisprudenza*, Torino, 2000, p. 206.

101 This is the solution as results from the decision *President of India v. Lips Maritime Corporation* [1988] AC 395; Generally, see E. McKENDRICK, *Contract Law. Text, Cases and Materials*, Second edition, OUP 2005, p. 434; O. MORETEAU, *Droit anglais des affaires*, 1st ed., Dalloz 2000, n° 703, p. 407. *Adde. Principes du droit européen du contrat*, SLC, 2003, Notes below art. 9:508, p. 417. The solution developed in the *President of India* decision is strongly criticized in England and goes against the proposals made by the Law Commission in its report, *Law of contract: Report on interest* n° 88, (Cmnd 7229), 1978 which put forward in particular "instating legal interest for contractual obligations to may monetary sums" (*Principes du droit européen du contrat, ibid.)*.

the obligation to pay interest is not excluded. Outside the scope of application of the act, the parties are free to agree upon the payment of interest for late payment. Moreover, the High Court[102] and County Courts[103] have been given the power to award interest.[104]

C. Punitive damages

Although the traditional function of damages is compensatory, it would appear that they are frequently required to fulfill another supplementary function: that of punishing a reprehensible behaviour, independently from the loss sustained. In this case, the French expression *"dommages et intérêts punitifs"* will generally be used. However, a review of French and Quebec wording used in such circumstances reveals some diversity: the expressions *"dommages-intérêts punitifs"*, *"dommages et intérêts punitifs"*, *"dommages punitifs"*, *"dommages exemplaires"*, *"dommages-intérêts exemplaires"* or *"dommages et intérêts exemplaires"* are used indifferently.[105] Similarly, in common law systems, reference is made indifferently to the notions of "punitive damages" and "exemplary damages".

It is because the principles of civil liability are not there to punish a particularly odious behaviour that the notion of punitive damages gives rise, intrinsically, to controversy. It should be added to this starting point that in contract especially, the fact of awarding punitive damages contravenes the idea of predictability and economic efficiency (**1**). The same issues arise in relation to the analysis of the notion of restitutionary damages, paid in the absence of any loss and based on the profit arising out of the breach of contract (**2**).

1. Punitive damages, a controversial notion in contract

If continental legal systems, in particular Italian, German[106] and French[107] laws, who are attached to the traditional compensatory function of damages, have not traditionally

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102 *Administration of Justice Act* 1982, s. 15 and annex 1 amending the *Supreme Court Act* 1981, s. 35A.

103 *County Courts* 1984, s. 69.

104 See also the recent report of the English Law Commission*: Pre-Judgment Interest on Debts and Damages*, n° 287, 2004. Under Scottish law, see the recent report of the Law Commission*: Report on Interest on Debt and Damages*, n° 203, 2006.

105 P. PRATTE, *op.cit.*, p. 495 and following; J.-L. BAUDOUIN, P. DESLAURIERS, *La responsabilité civile*, 6th ed., Les éditions Yvon Blais 2003, n° 338.

106 B. MARKESINIS, H. UNBERATH, A. JOHNSTON, *The German Law of Contract. A Comparative Treatise*, 2nd ed., entirely revised and updated, Hart Publishing, 2006, p. 443.

107 See however the works of: A. JAULT, *La notion de peine privée*, Préf. F. Chabas, LGDJ 2005; S. CARVAL, *La responsabilité civile dans sa fonction de peine privée*, Préf. G. Viney, LGDJ 1995; G. VINEY, P. JOURDAIN, *Les effets de la responsabilité*, Traité de droit civil, LGDJ, 2nd ed., 2001, n° 4; M. BEHAR-TOUCHAIS, "L'amende civile est-elle un substitut satisfaisant à l'absence de dommages et intérêts punitifs", *LPA* 20 November 2002, n° 232, p. 36. In addition, the French Proposals for Reform, in art. 1371 *"ouvre prudemment la voie à l'octroi de dommages-intérêts punitifs. [Il] soumet le prononcé de cette sanction à la preuve d'une 'faute délibérée, notamment d'une*

accepted that damages be given a punitive function, punitive or exemplary damages have found a more favourable terrain in common law systems.[108]

However, the acceptance of this function is controversial in contract, particularly under English law.

Indeed, under English law, unlike American law,[109] punitive or exemplary damages are not accepted per se in contract,[110] although they can be awarded in tort.[111] Although in current speech as well as from a scientific point of view, there is no difference between punitive and exemplary damages, preferences have been stated in favour of one or the other expression, the main argument being that the use of the word "punitive" does not carry the idea of dissuasion, whilst this is obvious in the term "exemplary".[112] However,

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faute lucrative', c'est-à-dire d'une faute dont les conséquences profitables pour son auteur ne seraient pas neutralisées par une simple réparation des dommages causés. Il exige également une motivation spéciale et impose au juge de distinguer les dommages-intérêts punitifs des dommages-intérêts compensatoires. Enfin, il interdit leur prise en charge par l'assurance, ce qui est indispensable pour donner à cette condamnation la portée punitive qui constitue sa raison d'être" (cautiously opens the door to the award of punitive damages. It subjects such an order to evidence of a "deliberate fault, in particular of a lucrative fault", that is to say a fault, the profitable consequences of which would not be neutralised by a mere award compensating for the damage suffered. It also requires special grounds and requires that the judge should distinguish punitive damages from compensatory damages. Finally, it forbids such damages to be covered by insurance, which is indispensable in order for such a sanction to carry the punitive function which is its raison d'être). (P. CATALA (under the direction of), *Avant-projet de réforme du droit des obligations et de la prescription*, La Documentation française, 2006, p. 168).

108 On the reasons for which common law forms a better terrain for the adoption of the principle of punitive damages, see C. JAUFFRET-SPINOSI, "Les dommages-intérêts punitifs dans les systèmes de droit étrangers", *LPA* 20 November 2002, n° 232, p. 8.

109 H. COLLINS, *The Law of Contract*, 4th ed., LexisNexis 2003, p. 423; Y.-M. LAITHIER, *op.cit.*, n° 330; *adde*. C. JAUFFRET-SPINOSI, *op.cit*.

110 G.H. TREITEL, *An Outline of the Law of Contract*, 6th ed., OUP 2004, p. 373; E. McKENDRICK, *Contract Law*, Palgrave Macmillan Law Masters, 7th ed., Palgrave Macmillan, p. 402; from the same author, *Contract Law, Text, Cases, and Materials*, OUP 2005, p. 1122; J. BEATSON, *Anson's Law of Contract*, 28th ed., OUP 2002, p. 592; H. COLLINS, *The Law of Contract*, 4th ed., LexisNexis 2003, p. 422; Y.-M. LAITHIER, *op.cit.*, n° 329, 409; *adde*. P. BENJAMIN, "Penalties, Liquidated Damages and Penal Clauses in Commercial Contracts: A Comparative Study of English and Continental Law" [1960] 9 *ICLQ* 600.

111 It should however be specified that in the United States, the obligee does not have the right to claim punitive damages in, but there are a few examples which arise on the limits of contractual and tortious liability: FARNSWORTH, *op.cit.*, p. 761; LINZER, "Rough justice: A Theory of Restitution and Reliance, Contracts and Torts", [2001] *Wis.L.Rev.*, 695.

112 Such was, for example, the approach adopted by the Ontario Law Reform Commission, *Report on Exemplary Damages*, Ontario, 1991: "*the use of the term 'exemplary', as opposed to the term 'punitive', suggests a deterrence, rather than a punitive purpose*, (OLRC, *op.cit.*, note 8, p. 35); *exemplary damages for the purpose of punishment […] should be referred to as 'punitive damages' […] in preference to the term 'exemplary damages', to emphasize the punitive rationale*" (OLRC, *op.cit.*, p. 38).

this argument was expressly rejected by the Law Commission which proposed that the use of the term "punitive" be preferred to the use of the term "exemplary".[113]

As is the case under Quebec law (see below), English law attributes a double function to punitive damages: both a punishment – for a reprehensible behaviour – and a deterrent – both with regard to the author of the reprehensible behaviour and to anybody who might want to imitate him. Moreover, it was considered that the award of punitive damages could also bring satisfaction to the victim, who might in this way be discouraged from taking the law into his own hands.[114]

The law of Quebec[115] is also one of the most advanced legal systems with regard to punitive damages. In addition to the traditional roles of prevention and deterrence, they also have the role of "civil" and personal reprobation of the perpetrator of the fault"[116] as well as being an incitement: "the award of this type of damages (or rather the prospect of being entitled to such damages) might actually incite the victim to bring a claim against the perpetrator of the fault and to seek redress before the courts. Indeed, the award of punitive damages compensates, even if only in part, the costs of an action which are not recoverable and therefore improves the balance (which is sometimes unfavourable) between the costs and the benefit of bringing a claim; this is particularly true when the loss suffered only entitles the victim to claim a minimal amount in compensation (or the reimbursement of the price)".[117]

The Charter for human rights and freedoms,[118] adopted in 1975, "contains one of the most important provisions on punitive damages in Quebec law, in particular because of its quasi-constitutional status and of the fundamental rights and freedoms which it protects".[119]

Article 1621 of the Quebec Civil Code provides that: "Where the awarding of punitive damages is provided for by law, the amount of such damages may not exceed what is sufficient to fulfill their preventive purpose (paragraph 1). Punitive damages are assessed in the light of all the appropriate circumstances, in particular the gravity of the debtor's fault, his patrimonial situation, the extent of the reparation for which he is already liable to the creditor and, where such is the case, the fact that the payment of the damages is wholly or partly assumed by a third person (paragraph 2)". The position of this provision seems to indicate that the award of punitive damages is not limited to tortious liability. In fact, the distinction of the source of the infringement giving rise to such damages – whether contractual or tortious – appears as indifferent on the basis that the award of punitive damages by the judge depends on the existence of specific law

113 *Law commission*, *op.cit.*, n° 1.39, p. 104.

114 *Law commission*, *op.cit.*, n° 1.85, p. 53.

115 P.-G. JOBIN, "Les dommages punitifs en droit québécois", in: *Études de droit de la consommation, Liber Amicorum Jean Calais-Auloy*, Dalloz 2004, p. 537; P. PRATTE, "Le rôle des dommages punitifs en droit québécois", (1999) 59 *R. du B.* 445; S. BEAULAC, "Les dommages-intérêts punitifs depuis l'affaire Whiten et les leçons à en tirer pour le droit civil québécois", (2002) 36 *R.J.T.* 637.

116 P.-G. JOBIN, *op.cit.*, p. 539.

117 *Ibid.*

118 *L.R.Q.*, ch. C-12.

119 P.-G. JOBIN, *op.cit.*, p. 547.

expressly allowing such award.[120] Indeed, article 49 paragraph 2 provides "[that in the] event of an illegal and intentional infringement, the court may impose on the infringing party the payment of punitive damages". On that basis, "within the limits set by the code and by a series of specific laws which allow such an award, certain contractual infringements give rise to the right to a compensation under this head".[121]

Canadian common law has also adopted a similar position. Indeed, although strongly influenced by the *Addis v. Gramophone Co Ltd*[122] case which excluded the award of punitive damages in the event of a breach of contract, Canadian judges have gradually accepted the possibility of awarding punitive damages in the case of contractual breaches "so long as there exists 'a cause of action which is distinct from the contractual relationship', 'a wrongdoing giving rise to a right of action'".[123] But the courts have recently allowed that "although an independent fault giving rise to a claim is required, such fault may arise out of the infringement of a separate contractual provision or of another obligation, such as a fiduciary obligation".[124]

2. The controversial acceptance of restitutionary damages[125]

Is it conceivable that a party who breaches his contractual obligations should be required by a judgment to restitute the amount of profits arising out of such breach to the aggrieved party, in the absence of any loss?

This question has not been resolved in the same way in the different legal systems.

Under French law, the main body of case law subjects the award of damages to the existence of a loss, on the basis of article 1149 of the Civil Code. This position could change, so that the award to restitutionary damages could become acceptable.[126] In one case, which for the moment remains isolated, it was held that the lessee of premises should compensate the lessor for the failure to perform some works without such compensation being subject to the performance of the works or to the proof of any loss.[127] Moreover, article L 442-6-III of the Commercial Code, brought into force by law

120 The first law which provided for such an award was a 1929 law, which concerned the protection of trees, L.Q. 1929, c. 71, which became the "la loi sur la protection des arbres", *L.R.Q.*, ch. P.-37. Note should also be made of "la Loi sur la protection du consommateur", *L.R.Q.*, ch. P-40.1, art. 272.

121 J.-L. BAUDOUIN, P. DESLAURIERS, *op.cit.*, n° 1332, p. 876 and 877. Various decisions can illustrate the principle *Barrou c. Micro-boutique éducative inc.*, [1999] *R.J.Q.* 2659 (C.S.); *Modern Tire Sales Ltd. c. Kumbo Tire Canada inc.*, *J.E.* 2000-1701 (C.S.); *adde*, references cited by J.-L. BAUDOUIN, P. DESLAURIERS, *ibid*, note 18.

122 [1909] AC 488.

123 *Vorvis c. Insurance Corporation of British Columbia* [1989] 1 *R.C.S.* 1085.

124 *Whitten c. Pilot Insurance Co*, 2002, CSC 18, para. 82. In this case, the "contractual provision" was an obligation to act in good faith.

125 Y.-M. LAITHIER, *op.cit.*, n° 437, p. 524; J. EDELMAN, "The Meaning of 'Damages': Common Law and Equity", in: The Law of Obligations: Connections and Boundaries, A. ROBERTSON (ed.), UCL Press 2004, p. 31; E. McKENDRICK, Contract Law, *op.cit.*, n° 20.4, p. 410.

126 B. FAUVARQUE-COSSON, obsv. on the English decisions, *RDC* 2005, n° 2, p. 54.

127 Civ. 3ème, 30 Jan. 2002, *D.* 2003, somm., p. 458, obsv. D. MAZEAUD.

n° 2001-420 on new economic regulations, provides for a new civil fine limited to a maximum of 2 million Euros, to sanction professionals who engage in anti-competitive practices and therefore deter them from committing lucrative faults.

Under English law, until very recently, damages were considered as being necessarily and exclusively compensatory: as under French law, the award of damages was subject to the existence of a loss.[128] But a succession of cases decided since 2001 show that English law is hesitant:[129] under certain conditions, it would appear that the party who is victim of a breach of contract may be entitled to claim restitutionary damages, that is to say, part of the profits made by the author of the breach and arising therefrom. Aside from the common law concept of restitutionary damages, the terminology gives rise to observations. Indeed, the case which is covered by this expression is sometimes criticized as a "misnomer"[130] or "unhappy":[131] the use of the term "damages", it is argued, is not applicable to a process which is specific to the law of restitution.[132] However, other authors take the view that the expression "restitutionary damages"[133] is perfectly suited to reflect the mechanism of restitution which occurs. Moreover, the use of such an expression, in lieu of the variety of words used to express the same idea of restitution following a wrongful act ("action for money had and received", "account of profits" and "restitutionary damages"), has the advantage of simplifying the terminology and reducing the historical separation between equity and common law, restitution being an equitable remedy and damages a common law one.[134] Finally, the expression "restitutionary damages" is frequently used instead of "disgorgement damages"; it should be mentioned that the two expressions refer in principle to two distinct situations. Restitutionary damages are intended to prevent the defendant from benefiting from the profits arising out of his behaviour, independently from any loss suffered by the claimant. Disgorgement damages are intended to re-establish a balance in a situation where there has been an unjustified transfer of assets from the obligee to the obligor.[135]

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128 *Wrotham Park Estate Co Ltd. v. Darkside Homes Ltd* [1974] 1 *WLR* 798.

129 *Esso Petroleum Co. Ltd. v. Niad Ltd.* [2001] *All ER* (D) 324; *Experience Hendrik LLC v. PPX Enterprises Inc.* [2003] *EWCA.* Civ. 323, [2003] *All ER* (D) 328; *Lane v. O'Brien Homes* [2004] *EWHC* 303 *(QB)*.

130 *Co-operative Insurance Society Ltd v. Argyll Stores (Holdings) Ltd* [1996] Ch 286, esp. p. 306, *per* Millet LJ.

131 *Attorney-General v. Blake* [2001] 1 AC 268, *per* Lord Nicholls of Birkenhead.

132 At common law, restitution means both compensation for a decrease in assets arising out of an increase is another person's assets, but also the restitution of unjust profits. This term therefore has a much wider meaning than in most continental legal systems.

133 The expression "gain-based damages" has even been put forward. V. E. McKENDRICK, *Contract Law*, *op.cit.*, p. 1118.

134 In support of this point, the Law Commission, *op.cit.*, p. 51, n° 1.82 *Adde*, on the historical error made at common law on the compensatory nature of the term "damages": J. EDELMAN, *ibid.*

135 In support of this point, A. PHANG, P.-W. LEE, "Rationalising Restitutionary Damages in Contract Law – An Elusive or Illusory Quest?", [2001] 17 *Journal of Contract Law* 240; *Contra* J. EDELMAN, "Restitutionary Damages and Disgorgement Damages for Breach of Contract" [2000] *RLR* 129; *adde*. "The Meaning of 'Damages': Common Law and Equity", *ibid.*

These "punitive restitutions"[136] mainly concern the obligor and the profits which he gained from the non-performance for which he is responsible. The central idea is not to compensate the victim but to sanction the obligor for his behaviour and dissuade any other person who might be tempted to proceed in the same way. Restitutionary damages are therefore fulfilling a punitive function. However, this sanction, which is so particular to common law systems,[137] raises the question of determining in which cases it should come into play. R.L. BIRMINGHAM notes that the courts, when they determine the amount of damages to be awarded to the obligee in the event of a breach of a contractual obligation, aim to compensate the loss suffered by the victim and not to incite the obligor to perform his obligation. On that basis, he takes the view that so-called lucrative breaches of contract should be encouraged. Indeed, the author considers that "by deriving a profit from the violation after having compensated the obligee, the obligor takes a step towards a distribution of resources which is economically optimal and socially desirable. The author thus approves of the existing sanctions for non-performance and warns academics against the introduction of penalties or moral considerations, which create, he argues, a rigidity which is harmful to the efficient operation of the market. (…) The performance of contractual obligations is no longer an objective per se. It is not fair by nature. The sanctions should therefore be there to steer the obligor, in his choice between performance or non-performance, towards adopting the behaviour which will have the most beneficial effects, socially and economically. *In other terms, contractual liability must be sufficiently heavy to prevent a violation which will reduce the assets of the obligee, but sufficiently limited to prevent an inefficient performance of the contract*,[138] so that the goods or services which are the subject matter of the contractual obligation always end up in the hands of the party who can give them most value, for an optimal cost".[139] It would therefore be contrary to the theory of efficient breach to introduce punitive damages or punitive restitution, which by nature are intended to make the payment of damages less attractive than the performance of the obligation. Damages and performance would no longer be treated equally. This is, in fact, one of the reasons which was invoked in the United Kingdom against the introduction of punitive damages in contract law:[140] "(…) the doctrine of efficient breach dictates that contracting parties should have available the option of breaking the contract and paying compensatory damages, if they are able to find a more remunerative use for the subject matter of the promise. To award exemplary damages would tend to discourage efficient breach".

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136 The translation is borrowed from Y.-M. LAITHIER, *op.cit.*, n° 438.

137 It should, however, be noted that under French law, and although the solutions adopted are very discrete, a seemingly similar approach is taken in the event of contractual non-performance. *"Le cas le plus fréquent est la condamnation du débiteur d'une obligation de non-concurrence à verser des dommages-intérêts, évalués en tenant compte du chiffre d'affaires qu'il a réalisé grâce à sa violation"* (The most frequent case is when the obligor under a non-compete obligation is ordered to pay damages, determined by reference to the turnover which he achieved though his breach). (Y.-M. LAITHIER, *op.cit.*, n° 448, p. 535 and 536). *Adde*. G. VINEY, P. JOURDAIN, *Les effets de la responsabilité*, *op.cit.*, n° 91.

138 Our emphasis.

139 Y.-M. LAITHIER, *op.cit.*, n° 407, p. 486.

140 *The Law Commission, Item 2 of the Sixth Programme of Law Reform: Damages*, Aggravated, Exemplary and Restitutionary Damages, 199, § 1.71, 1.72, p. 118.

However, "if an efficient breach supposes a lucrative breach, a creation of wealth which is an indicator of a better distribution of resources, however, a lucrative breach is not necessarily efficient".[141] Restitutionary damages will only be due in the event of an inefficient lucrative breach. The lucrative breach will be seen as inefficient where the obligor who profited from the deliberate breach of his obligations did so at the expense of the obligee, therefore, unfairly. "The profit of the obligor therefore arises, at least in part, from the loss of the obligee following the breach".[142] The amount of the restitution will therefore be calculated on the basis of the enrichment that the obligor will have derived from his non-performance, the latter being the upper limit.[143]

D. Penalty clauses and liquidated damages clauses

The penalty clause (or penal clause) exemplifies the difficulty in distinguishing the compensatory function of damages from their punitive function. Although widely accepted in a number of legal systems, it raises certain difficulties. Indeed, before the clause is applied, its function is mainly that of a deterrent: the indemnity is generally fixed independently from the loss which may be sustained. When the clause applies, the function of punishment seems to prevail. From this ambivalence results a terminological difficulty. Should the use of a generic term such as "indemnity" be preferred? Should this type of clause be seen as a category of punitive damages or compensatory damages? Should the use of specific terminology not be envisaged, such as "penalty" or "private fine"?

The way in which a penalty clause is understood varies depending on the role which it takes on: compensatory or repressive.[144] Indeed, the penalty clause can either be considered as a compensatory provision exclusively, so that "any clause which does not have as its aim or purpose to fix the compensation for the loss sustained by the obligee is void";[145] or the penalty clause can be understood in its repressive function, as a private fine.[146] There is, finally, a middle approach, also called dualist: the nature of the penalty clause is hybrid, compensatory for the party which corresponds to the actual value of the damage, and deterrent, even repressive, for the rest.

Belgian, Italian, English and American law see the penalty clause as clearly having a compensatory function. Anglo-american law operates a distinction between damages which are calculated by contract (liquidated damages) and penalty clauses.[147] Indeed, a liquidated damages clause is a "(…) clause [which] represents a genuine pre-estimate of

141 Y.-M. LAITHIER, *op.cit.*, n° 455. *Adde* concerning the inefficiency of a number of lucrative faults, see Y.-M. LAITHIER, *op.cit.*, n° 416.

142 Y.-M. LAITHIER, *op.cit.*, n° 457.

143 Y.-M. LAITHIER, *op.cit.*, n° 458.

144 It has been demonstrated that certain countries tend to give precedence to the repressive function over the compensatory function, without denying the existence of the latter, whilst other countries only considered the penalty clause as a purely private penalty, independent from any idea of compensation for the loss suffered.

145 D. MAZEAUD, *La notion de clause pénale*, Préf. F. Chabas, LGDJ 1992, n° 520.

146 The distinction is suggested by D. MAZEAUD, *op.cit.*, n° 517.

147 J. D. CALAMARI, J.M. PERILLO, *Contracts*, 3rd ed., *op.cit.*, § 14-31.

the loss which is likely to be occasioned by the breach".[148] It is valid in principle, whether the amount of the loss actually caused by the non-performance of the obligor is lower or higher than the amount provided under the contract. Conversely, if the parties did not intend, in drafting the clause, to evaluate in all good faith the potential loss which could result from a breach of contract, but simply to punish the obligor for his breach – or deter him from failing to perform his contract – then the clause in question will be qualified as a penalty clause. This type of clause is rejected by common law systems.[149] The distinction between liquidated damages, assessed in good faith, the amount of which is higher than the amount of the actual loss suffered and a penalty clause, which fixes an amount necessarily and much higher than the amount of the loss is complicated in practice. The qualification of such a clause is a matter of interpretation of the contract and of the clause in question. The courts have determined a few rules, in particular in the case of *Dunlop Pneumatic Tyre Company Ltd v. New Garage & Motor Co Ltd*,[150] in which Lord DUNEDIN declared that a clause would qualify as a penalty clause:

– "if the sum stipulated for is extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach".
– "if the breach consists only in not paying a sum of money, and the sum stipulated is a sum greater than the sum which ought to have been paid".
– "There is a presumption (but no more) that it is a penalty when 'a single lump sum is made payable by way of compensation, on the occurrence of one or more or all of several events, some of which may occasion serious and others but trifling damage'".
– "it is no obstacle to the sum stipulated being a genuine pre-estimate of damage, that the consequences of the breach are such as to make precise pre-estimation almost an impossibility. On the contrary, that is just the situation when it is probable that pre-estimated damage was the true bargain between the parties".

The principle remains, however, that a clause which fixes in advance the amount of damages due in the event of non-performance of the contract is a liquidated damages clause. However, exceptionally, when for example the amount fixed is extravagant so that it seems almost impossible that the parties have attempted in good faith to estimate the amount of the loss, this clause will be requalified as a penalty clause and will not be enforced by the judge, who will estimate and award as compensation the actual value of the loss suffered.

Belgian law[151] takes a similar approach. Indeed, ever since the 1970's, the Belgian Cour de Cassation has adopted a purely compensatory conception of the penalty clause. "On the basis of articles 1229 and 1152 of the Civil Code, the Belgian Cour de Cassation held, in two decisions,,[152] that, in order to qualify as a (valid) penalty clause, the sum determined by the parties to the contract should have as its sole purpose the compensation of the damage. In other words, the penalty clause either is compensatory or cannot

148 E. McKENDRICK, *Contract Law*, *op.cit.*, n° 21.5, p. 438.

149 In the United States, see UCC 2-718 and § 356 Rest.2nd. See the important legal precedent *Banta v. Stamford Motor Co.*, 92 A. 665, 667 (Conn. 1914).

150 [1915] AC 79, esp. p. 87, *per* Lord DUNEDIN.

151 R.-O. DALCQ, "Les clauses pénales et les clauses abusives. Rapport belge", in: *Les sanctions de l'inexécution des obligations contractuelles. Études de droit comparé*, M. FONTAINE, G. VINEY (under the direction of), Bruylant, LGDJ 2001, p. 435.

exist, or more exactly is totally void as contrary to the provisions of article 6 of the Civil Code. The idea of a private fine could not be more clearly or more firmly excluded!".[153] This approach was recently confirmed by the entry into force of the law of 23 November 1998, which clearly chooses the compensatory approach with regard to the penalty clause, defined as the clause under the terms of which "a person undertakes to pay, in the event of a failure to perform the contract, a lump sum compensation for the damage which may arise as a result of the said contract".[154]

The nature of the penalty clause is discussed under French law.[155] Although it is traditionally characterized by two aspects which are the pre-estimate of damages and the deterrent effect on the obligor,[156] academics are divided regarding its true nature. Some authors can only accept its compensatory function, others its repressive function, and others see it as having a dual nature, both compensatory and repressive.[157] It seems to emerge from contemporary studies, however, that the penalty clause should be understood as a "private fine":[158] it fulfills a dissuasive (or deterrent) function, depending on the angle, a punitive function (in that it does not depend upon the occurence or the measure of the loss sustained by the obligee, but rather on the non-performance[159]) and a compensatory function insofar as it allows compensation for the loss, when it exists, to be taken into account on a case by case basis.

Under German law, the penalty clause (*"Vertragsstrafe"* – contractual penalty) is governed by §§ 339 of the BGB. It is generally seen as a preventive tool which should incite the obligor to perform his obligations. In this sense, it has a deterrent function. Nevertheless, when it applies in the event of non-performance (as opposed to defective or delayed performance), it is treated by law as the minimum amount of damages which may be awarded ("in lieu of performance"):[160] on the one hand, the obligee may require

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152 Cass., 17 April 1970, *Pas.*, 1970, I, 7111; *RCJB*, 1972, p. 454, note I. MOREAU-MARGREVE; Cass. 24 November 1972, *Pas.* 1973, I, 297; *RCJB*, 1973, p. 303, note I. MOREAU-MARGREVE.

153 D. MAZEAUD, *op.cit.*, n° 520, p. 300. In support of this position, R.-O. DALCQ, *op.cit.*, n° 4, p. 437. This author specifies that the contested case was subsequently confirmed, see esp. n° 4, p. 437, note 8.

154 For an analysis of this law, see R.-O. DALCQ, *op.cit.*, n° 7.

155 Generally, see D. MAZEAUD, *op.cit.*; Ph. DELEBECQUE, D. MAZEAUD, "Les clauses de responsabilité: clauses de non responsabilité, clauses limitatives de réparation, clauses pénales", in: *Les sanctions de l'inexécution des obligations contractuelles. Études de droit comparé*, M. FONTAINE, G. VINEY (under the direction of), Bruylant, LGDJ 2001, p. 361; G. VINEY, P. JOURDAIN, *Les effets de la responsabilité*, Traité de droit civil, LGDJ 2001, n° 229, p. 441; A. JAULT, *La notion de peine privée*, Préf. F. Chabas, LGDJ 2005, n° 211, p. 130.

156 G. VINEY, P. JOURDAIN, *Les effets de la responsabilité*, *op.cit.*, n° 229, p. 443.

157 For a summary of academic proposals, see D. MAZEAUD, *op.cit.*, n° 529.

158 In support of this point, D. MAZEAUD, *op.cit.*, n° 555; A. JAULT, *op.cit.*, n° 211.

159 See recently Cass. civ. 3ème., 20 December 2006, *Bull. civ.* III, n° 256: "(…) *alors que la clause pénale, sanction du manquement d'une partie à ses obligations, s'applique du seul fait de cette inexécution, la Cour d'appel a violé les textes (…)*" (whereas the penalty clause, which sanctions a breach by one party of his obligations, applies on the sole basis of this breach, the Court of Appeal contravened the texts (…))

160 § 340, para. 2 BGB.

its application without having to show evidence of any loss, on the other hand, when the obligee is able to show a loss which is of a greater amount than the penalty fixed at the outset, the penalty will be deducted from that amount.[161] Despite the European law developments which treat the penalty clause in the same way as liquidated damages, German law continues to operate a distinction between the two. For instance, the special regime set out in §§ 339 and following of the BGB as well as the power given to the judge to reduce the amount provided in § 343 of the BGB only apply to penalty clauses in the narrow sense of the term. Furthermore, § 309 of the BGB – a general provision prohibiting certain general commercial terms (pre-drafted clauses, introduced by one party without individual negotiation and intended for frequent use) – makes a distinction between clauses which provide for liquidated damages (§ 309 n°5 requires that the sum payable as liquidated damages should correspond to the average foreseeable damage, and that the obligor must be entitled to adduce evidence of a lesser damage) and penalty clauses (§ 309 n° 6 prohibits any penalty clause applying to cases of non-acceptance or late acceptance of the service/goods, of delay in payment or for termination of the contract). Regarding contracts entered into between two professionals, only the first provision (liquidated damages) applies and in a less stringent way (the proof of lesser damage is not required to be *expressly* permitted). The distinction between the two types of clause, which are very close, is operated by the interpretation of the disputed clause. When the lump sum amount is obviously higher than the average foreseeable damage, the clause is a penalty clause (notwithstanding its title), because the parties have obviously not sought to anticipate the damage. In other cases, the question is whether the parties wished to facilitate the estimation of the loss rather than impose a sanction.

Under Italian law, the parties are also able to determine in advance, by contract, the amount of the loss to be compensated.[162] The existence of a contractual relationship allows the parties to provide, either by a contractual clause or by an addendum to the contract, the amount which will be payable by a party if it defaults. The "*clausola penale*", penalty clause (art. 1382 c.c.), which fixes the amount intended for compensation, is the main type of clause enabling the determination of the amount of the loss. If the penalty clause is obviously excessive or if the main obligation has been performed in part, the judge may reduce the sum equitably (art. 1384 c.c.), even without a party requesting it. The Italian Supreme Court justified this form of judicial control of the content of the contract by the general principle of substantial justice between the contracting parties,[163]

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161 This provision is mandatory: BGH, 27 Nov. 1974, BGHZ 63, 256.

162 U. BRECCIA, L. BRUSCUGLIA, F.D. BUSNELLI, F. GIARDINA, A. GIUSTI, M.L. LOI, E. NAVARRETTA, M. PALADINI, D. POLETTI, M. ZANA, *Diritto privato*, Parte II, Torino 2003, p. 480.

163 The Cour de Cassation recently held in favour of this position: Cass., Sez. II, 28 November 2006, n. 21066. C. MEDICI, *Controllo sulla clausola penale "manifestamente eccessiva" ed equilibrio degli scm, bi contrattuali*, *Danno e resp.*, 2006, p. 416; U. PERFETTI, *Riducibilità d'ufficio ed interesse oggettivo dell'ordinamento: un rapporto da chiarire*, *Nuova giur. civ.comm.*, 2006, p. 187; G. SCHIAVONE, *Funzione della clausola penale e potere di riduzione da parte del giudice*, *Resp.civ. e prev.*, 2006, p. 61.

and referred to what it considers to be the fundamental function of the penalty clause, the expression of contractual freedom.[164]

II. The Indemnity, a Term with an Uncertain Use and an Uncertain Legal Regime

Since numerous national legal systems use the term "indemnity" as a term of convenience, it is not surprising to discover that it occurs in the most varied of situations. Because the notion has not been defined, even in the broadest of terms, it often appears difficult to understand what distinguishes it from, in particular, damages or remuneration. However, it is striking that the term "indemnity" is used systematically, whether this is correct or not, in certain contexts, even for a certain purpose.

References are made in French, Belgian and Swiss law to the" *indemnité d'éviction*" (indemnity for an eviction), the" *indemnité de non-concurrence*" (non-competition indemnity), the "*indemnité de clientèle*" (indemnity for loss of clients), the "*indemnité de congés payés*" (holiday pay), the "*indemnité légale de licenciement*" (termination or redundancy payment), the "*indemnités journalières*" (sick pay), the "*indemnités d'occupation*" (payment for the occupation of premises after termination of the lease), the "*indemnités d'immobilisation*" (non refundable deposit on the purchase of property) …

It seems to emerge from the study of certain legal systems that the term "indemnity" is a generic term: it covers all of the monetary payments made to a person, whether it be the compensation of a loss suffered or a sum intended to reimburse the costs arising or the conclusion or the performance of a contract in order to avoid the unjust enrichment of one party. This is the case under Italian law, where the legislation mentions "*indennità*" ou "*indennizzo*" in a number of cases. These terms do not refer to a constant and uniform notion,[165] but it is possible to make out the existence of general conditions which enable the notion to apply.[166] From this point of view, under Italian law, the indemnity is the instrument which is used to guarantee compensation in the event of a loss, without the subjective element of fault being taken into consideration. This is the case in relation to expenses incurred in good faith during the period of formation of the contract, in the event that the offer is then revoked (art. 1328 c.c.) or damage caused by a person acting out of necessity (art. 2045 c.c.), or in the case of the indemnity sometimes provided in a labour relationship. An indemnity is also provided under article 2582 of the Civil Code in favour of the purchasers of the rights to reproduce a work, when the author has withdrawn such work from the market.[167]

The term "*indemnità*" is sometimes used as a synonym of "*risarcimento*" (compensation): it is only recently that a technical meaning was given to the term "*indemnità*"[168] (even if this meaning is not yet well defined). Instead of referring to "*risarcimento*", the

164 A. GALLARATI, "La clausola penale tra funzione deterrente e risarcitoria", *Giur.it*, 2003, p. 450; L. BOZZI, "La clausola penale tra risarcimento e sanzione: lineamenti funzionali e limiti dell'autonomia privata", *Eur.dir.priv.*, 2005, p. 1087.

165 S. CICCARELLO, *V° "indennità"*, *Enc. Dir.*, XI, p. 99.

166 See, in support of this point, under Italian law, S. Ciccarello, *op.cit.*, p. 105.

167 F. MASTROPAOLO, *V° "Danno III"*, *Enc.giur.*, p. 14.

168 S. CICCARELLO, *op.cit.*, p. 105.

Code uses the notion of "*indemnità*" for which the damage is considered from an economic point of view, to refer to cases of forced property transfer, for which the legislator wishes to compensate (art. 834, 43, 924, 925, 1032, 1038, 1047, 1053 c.c.).[169]

Finally, a convergence appears to be emerging out of French,[170] German and English law, regarding the use of the term "indemnity", in that it appears to represent the monetary compensation for loss without cause, independently from the compensation for any damage caused.

Such an approach is adopted, it would seem, by **German law**. The notion of indemnity *("Entschädigung")* is often used as a general notion covering both the damages in the narrow sense of the term and other mechanisms of restitution.

What is specific about indemnities, which do not double up as damages, seems to be that the amount of the indemnity is not strictly linked to an actual loss (understood as the difference between the position in which the victim finds himself today and the state he would have found himself in had the wrongful act not occurred, see § 249, para. 1 BGB). The amount is determined more liberally: sometimes it only amounts to the value of lost goods – and not the lost profits associated with those goods. In any event, the indemnity is not intended to compensate a victim in totality, nor even to compensate him intrinsically.

English law does not conceptualize the notion of indemnity either. It is not used very frequently and the notion should not be confused with that of damages.[171] The notion of indemnity is mostly found in the context of the consequences of misrepresentation, as an element of rescission, when this has a retroactive effect and when the misrepresentation is innocent. This indemnity is intended to place the misrepresentee in the position he held before the contract was entered into: it is a case of returning to the *status quo ante* rather than to the *status ad quem*.

The indemnity only covers the sums expended for the direct performance of the contract.[172] It was in the case of *Newbigging v. Adam*[173] that the two opposing theories regarding the determination of the amount of the indemnity, rather than its principle, were discussed. Indeed, in FRY LJ's view, the misrepresentee "is entitled to an indemnity in respect of all obligations entered into under the contract when those obligations are within the necessary or reasonable expectation of both of the contracting parties at the time they made the contract".[174] However it was argued that such an approach did not differ from that taken for the determination of damages. On that basis, a more rigourous and precise test was required, such as that put forward by BOWEN LJ, who took the view that the misrepresentee "is not to be replaced in exactly the same position in all respects,

169 F. MASTROPAOLO, *op.cit.*, p. 14. The indemnity is also found in relation to expropriations on the grounds of public interest. On the nature of the terms *indennità/indennizzo* with regard to expropriation, see D. Bonamore, "Equivalenza semantica ed equipollenza giuridica di 'indennità, indennizzo, risarcimento' quale corrispettivo nelle espropriazioni per fini pubblici", *Giust. civ.*, 1998, I, p. 3243.

170 C. LE GALLOU, *La notion d'indemnité en droit français*, LGDJ 2007, préf. A Sériaux, n° 755, p. 680.

171 J. BEATSON, *Anson's Law of Contract*, 28th ed., OUP 2002, p. 251.

172 G.H. TREITEL, *An Outline of the Law of Contract*, 6th ed., OUP 2004, p. 162.

173 [1886] 34 *Ch. D.* 582.

174 *Newbigging v. Adam* [1886] 34 *Ch. D.* 582., esp. p. 596.

otherwise he would be entitled to recover damages, but he is to be replaced in his position so far as regards the rights and obligations which have been created by the contract into which he has been induced to enter".[175]

The case of *Whittington v. Seale-Hayne*[176] illustrates the application of the theory defended by BOWEN LJ regarding the determination of the amount of an indemnity. The case involved breeders of poultry who had entered into a lease. They were the victims of an innocent misrepresentation made by the defendant who had represented that the premises were in a thoroughly sanitary. This was not in fact the case. Because the water supply was poisoned, one of the breeders fell ill and the poultry died. The breeders claimed to rescind the lease, and also claimed an indemnity covering the value of stock lost, the loss of profit on sales, the loss of breading season, the medical expenses of the manager, taxes, rent, and expenses incurred for the erection of outbuildings … They were also required by the urban district council to replace the drains, and these amounts were included in the amount of the indemnity claimed. The Court allowed the claim for rescission. However, in determining the amount of the indemnity, it only included the losses directly linked to the performance of the lease or necessarily arising out of the occupation of the premises. It followed the theory developed by BOWEN LJ in *Newbigging v. Adam* which only allows compensation for the "expenses created by the contract. On that basis, the Court only allowed for the reimbursement of the rent, taxes and for the repair of the drains. The other expenses were not recoverable because this would have amounted to awarding damages, in the sense that these expenses did not arise directly out of the breeding of poultry on the leased premises.[177]

The legal basis for this solution relies on restitution in order to avoid any case of unjust enrichment. It is therefore not surprising that this indemnity is in fact almost identical to a personal restitutionary claim.[178]

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175 *Newbigging v. Adam* [1886] 34 *Ch. D.* 582., esp. p. 593.

176 [1900] 82 *L.T.* 49.

177 See generally, J. BEATSON, *op.cit.*, p. 251.

178 E. McKENDRICK, *Contract Law, Text, Cases and Materials*, Second edition, OUP 2005, p. 710.

Chapter 9:
Anéantissement/Destruction
[of a Contract or of a Contractual Clause]

(Nullity, Supervening Nullity, Inexistence, Dissolution, Termination, Ineffectiveness, Clauses deemed unwritten/struck out)

Main Concerns

1. No matter what language is used, the terminology adopted needs to be sufficiently rich to describe in a precise manner the different hypotheses of contractual destruction.

Therefore, it appears preferable to avoid terms that are purely descriptive, such as 'ineffectiveness'. This term denotes a situation of fact but does not at all refer to the relevant judicial sanction. Thus, it serves to obscure terminology.

In addition, simple oppositions could be retained, such as those which distinguish between sanctions relating to formation and those relating to non-performance. However, the use of this opposition by way of binary terms such as nullity and termination can prove to be insufficient. These terms can be kept, provided that they can be further supplemented and clarified. Their frequent use must not overlook certain terminological subtleties, closely linked to the particular regimes, envisaged for each of these institutions.

2. Regarding 'the sanctions in relation to formation, three remarks deserve to be noted.

Firstly, the term 'nullity' is in common usage not only in Acquis Communautaire and Acquis International but also in the majority of the systems studied. This term does not however have the same meaning in each of the different legal orders. In certain systems, nullity denotes the collection of hypotheses of invalidity, and is a term which signifies the process through which a contract is rendered invalid; others reserve this term for automatic nullity, as opposed to voidability which can be implemented by the parties.

Secondly, it would be possible to specify, in the context of each usage of the term, the characteristics of invalidity. Thus, the type of invalidity could be classified as judicial or extrajudicial, as retroactive or de prospective, or as absolute or relative.

Thirdly, the study of Acquis Communautaire and Acquis International, together with the study of comparative law leads to the following observation: certain specific terms are employed to take into account different a anomalies which can mar the formation or the contents of a contract. The terms 'supervening nullity' or 'inexistence' could be useful in this perspective.

3. The term *'résolution'*/dissolution can be retained: it enables the description of scenarios where validly formed contracts are destroyed, mainly for non-performance. However,

it would appear opportune, as with nullity, to couple it with the same descriptors (retroactive or prospective, judicial or extra-judicial).

4. The term '*résiliation*' presents a further specificity. Certain legal systems reserve the term '*résiliation*' for instances of unilateral destruction for the future of contract by instalments. Others have a much larger interpretation which also encompasses cases of unilateral and conventional *résiliation*.

5. The term '*rétractation*'/revocation appears to have a precise and consistent utilisation in the field of consumer protection stemming from Community law.

Acquis Communautaire and Acquis International

In studying Acquis Communautaire and Acquis International, a diversity of terms can be seen in use. 'Nullity', '*résolution*'/dissolution, '*résiliation*'/termination', '*rétractation*'/'revocation', 'ineffectiveness', '*caducité*'/'supervening nullity', 'inexistence' and 'unopposability' are all terms encountered when studying legal texts, just as much in positive law texts as in those stemming from proposals for codification.

Must this multiplicity of terms be accepted?

First and foremost, one could muse upon some simple classifications: sanctions relevant to conditions of contract formation as opposed to those associated with non-performance or defective performance of contracts; sanctions with retroactive effect being differentiated from those which operate solely with respect to the future; sanctions which affect the contract in its entirety being contrasted with those which only affect it partially; sanctions which require judicial intervention being isolated from those which are instigated by the parties; and sanctions which can be sought by any interested party being distinguished from those which can only be invoked by certain categories of people.

However, the study of Acquis Communautaire and Acquis International lends itself quite poorly to these reasoned categories. Without a doubt, the terms 'nullity' and '*résolution*'/dissolution, both being in common usage, delineate a fairly clear boundary between, on the one hand, the destruction of a contract on the grounds of the disregard for the conditions of validity and on the other hand, destruction provoked by the non-performance or poor performance of contractual obligations by one or other of the contracting parties. These terms are nonetheless incapable of being boiled down to the classifications just outlined. From one text to another, they neither fulfil common purposes nor any coherent and univocal regime. Moreover, the terminological wavering is accentuated by the fact that the texts and case law show that recourse is had to other terms entirely, greater or lesser in number depending on which text is being examined, ranging from '*caducité*'/'supervening nullity', to 'inexistence' and passing through 'ineffectiveness', '*résiliation*' or even 'non-binding' clauses or those 'deemed unwritten/struck out'. This is complicated terminology and does not lend itself easily to being classified or organised.

Thus, we will study firstly the terms 'nullity' and '*résolution*' (dissolution), those terms most often encountered. In spite of this frequent usage, the systems governing these terms

remains equivocal (**I**). Secondly, we will draw up an inventory of other terms used, those we would qualify as 'complementary' – in the manner in which they appear according to legal texts and in case law – in order to determine whether it is possible to detect zones of terminological stability despite cluttered appearances (**II**).

I. The Equivocal Character of 'Nullity' and 'Résolution'

Nullity and *résolution* enable the delineation of two large categories of causes of contractual destruction. The diverse scenarios in which these terms are used must however be further defined, which means that it will be necessary, first of all, to list them (**A**). This exercise in turn will enable it to be seen that these terms are in common use. One could imagine this leading to a single, unified system of application for both terms. However, the opposite will be seen to be the case: the recurrence of the terms has not led to uniform characteristics being found. From a terminological point of view, one cannot talk, in the context of Acquis Communautaire and Acquis International, of one single nullity or of one single form of dissolution, but rather of multiple nullities and dissolutions which are applied in a specific manner. The regime attaching to each of these terms in the different texts analysed is not unified; this diversity is a reflection of the terminology itself, treating as equivocal the notions expressed by the different terms. (**B**).

A. The situations in which to use the terms 'nullity' and 'dissolution'

Nullity and dissolution of contract both appear in certain international conventions and texts on codification, European and international, in an obvious and direct manner (**1**). It is however, necessary to highlight the instances in which nullity and dissolution of contract are invoked in an indirect manner, with a view to resolving a different key question. In these situations, the question posed comes down to asking not what nullity and dissolution are, in and of themselves, but rather what influence they have on the contract. From a terminological standpoint, it is therefore a question of verifying whether nullity and dissolution are understood in the same way as in situations where the question of nullity or dissolution arises directly (**2**).

1. The situations of direct usage

The terms 'nullity' and 'dissolution' are first and foremost defined by the different scenarios in which such sanctions can be applied. Nullity appears to be a sanction applicable to the formation of the contract (**a**), while dissolution is presented as a sanction applicable in cases of non-performance or poor performance of the contract (**b**).

a) Nullity, sanction applicable to defects in contract formation

The term 'nullity' features in Community texts and case law concerning international trade just as much as it does is European or international proposals for codification.

Certain Community or international texts which seek to provide for uniformity of rules to apply in cases of conflict of laws, make reference to nullity or to the validity of the contract to define the domain of the law applicable. These texts, taking account of their very objectives, do not strive to define nullity. It is nonetheless interesting, in the context of this present study, to take note of the terms used. Thus, Article 8 of the Rome Convention of 19 June 1980 concerning the determination of applicable law in matters of contractual obligations makes reference to *existence*[1] and to *validité* (existence and validity) of the contract or of a contractual provision: these questions are subject to the same law as would apply if the contract were valid. Article 10.1.e of this same text provides that the consequences of *'la nullité'* (nullity) also come from the law that would be applicable.[2] Article 8 of the Hague Convention of 14 March 1978 on the law applicable to contracts of agency or intermediary contracts, without using the term 'nullity', states notably that the applicable law will regulate *'la formation et la validité'* (the formation and validity) of the relationship of agency/representation as well as the consequences of the non-performance of obligations flowing from this relationship.

Article 81§ 2 of the EC Treaty outlines that agreements or decisions which constitute an arrangement, as prohibited under the provisions of Article 81§ 1 are *'nuls de plein droit'* (automatically void). The type of nullity envisaged by this text aims to assure effective competition necessary for a market economy, to which Article 4§ 1 of the EC Treaty expressly refers.[3] The text does not specify any particular regime of nullity. The elements of this regime, which could be deemed to be of a strict Community nature, are limited.[4]

International trade law also furnishes us with examples of the use of the term 'nullity'. For example, the sanction of nullity would be incurred by any contract deemed contrary to international ordre public.[5] French case law illustrates this trend. For example, the Court of Appeal of Paris declared a contract for the sale of arms, null and void on the grounds that this contract sought to organise dealings that were *'contraire à l'ordre public international'* ('contrary to international ordre public').[6] This same court ruled that a contract *'ayant pour cause et pour object l'exercice d'un traffic d'influence par le versement de pots de vin est contraire à l'ordre public international français ainsi qu' à l'ethique des affaires intenationales tell que conçue par la plus grande partie des Etats de la communauté internatio-*

1 On this term, see the observations under heading II, developed in greater detail.

2 The proposed *Regulation* of 15 December 2005 on the law applicable to contractual obligations (Rome I) does not modify the formulation used by the Rome Convention (COM (2005) 650 final).

3 On the nature of ordre public in competition matters, see C. LUCAS DE LEYSSAC et G. PARLEANI, 'L'atteinte à la concurrence, cause de nullité de contrat', in: *Le contrat au début du XXIè siècle, etudes offertes à J. GHESTIN*, LGDJ 2001, p. 601, and especially pp. 602 and 603.

4 See above, the observations under heading B.

5 On the academic/jurisprudential debates concerning the use of the notion of international ordre public or of police law by the arbitration tribunal, see Ph. FOUCHARD, E. GAILLARD and B. GOLDMAN, *Traité de l'arbitrage commercial international*, Litec 1996, pp. 859 and following, paragraph numbers 1515 and following.

6 Paris, 9 February 1966, *Rev. crit.* 1966.264, note P. LOUIS-LUCAS. For a more nuanced stance, see Paris, 29 January 1991, *JDI* 1991.690, note B. OPPETIT et *Rev. crit.* 1991.731, note V. HEUZE.

nale', ('whose very reason and objective is the carrying out of influence peddling by way of the payment of backhanders is contrary to the French ordre public, as well as to the principles of ethics in international business as recognised by the great majority of States in the international community.')[7] Moreover, certain commentators perceive nullity to be a transnational rule, at the very least in cases where it would be impossible to get specific performance of the contract tainted by corruption.[8] International arbitration law furnishes us with a unique usage of nullity in the context of arbitration clauses: '*nullité manifeste*'/'manifest nullity' of a clause is an expression encountered notably in French case law relating to the articulation of the competence of the arbitration tribunal and of the national judge acting as arbitrator. French case law, extending the positive effect of the principle whereby arbitration tribunals take recognition of their own competence, maintains that if the arbitration tribunal is already seized, the national courts may not take over the case on the grounds of the manifest nullity of the arbitration clause; if the arbitration tribunal has not yet been seized, the national judges may only entertain the hearing in the instance of manifest nullity of the arbitration clause. It must however be pointed out that this position does not have the support of the majority in international arbitration law.[9]

In the Principles of European Contract Law (PECL), the European Contract Code (Academy of European Private Lawyers – Pavia, the Pavia Project) and the UNIDROIT Principles relating to international commercial contracts 2004 (UNIDROIT Principles), *la nullité* ('avoidance' in the English-language version) is the sanction for the invalidity of a contract which can potentially flow from cases where the contract is tainted with initial impossibility, defects of consent, or contractual inequality.

Chapter 4 of PECL discusses the 'validity' of contracts. The various articles in this section demonstrate the different scenarios of 'invalidity', with such scenarios giving rise to partial or complete nullity of the contract ('avoid the contract', 'avoidance'). These provisions outline the different hypotheses as follows: the invalidity of a contract which does not flow systematically from initial impossibility (Article 4.102), contractual nullity on the grounds of mistake (Article 4:103), fraud (Article 4:107), duress (Article 4:108) or excessive benefit or unfair advantage (Article 4:109). Unfair terms which have not been individually negotiated, can be avoided by a contracting party, under certain conditions (Article 4:110).

The term 'nullity' appears in many provisions of the Pavia Project. It is paired with the word 'voidability'. The Pavia Project seeks to establish a terminological distinction between the two terms.

There are three principal instances where nullity appears in the Project.

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7 Paris, 30 September 1993, *RTD civ.* 1994.96, note J. MESTRE.

8 E. GAILLARD, 'Trente ans de Lex mercatoria', JDI 1995.5, especially p. 11. See also, on these sanctions, R. KOERING-JOULIN et A. HUET, 'La lutte contre l'illicite – l'élaboration de normes spécifiques – les politiques nationales: le droit français', in: *L'illicite dans le commerce international*, Ph. KAHN et C. KESSEDJIAN (Directors), Litec 1996, p. 347. For an example of a contractual clause xing such a principle, see F. DE LY, 'Les clauses mettant fin aux contrats internationaux', in: 'Les clauses derésiliation dans les contrats internationaux', *Rev. Dr. Aff. Intern.* 1997, n° 7.

9 Ph. FOUCHARD, E. GAILLARD, B. GOLDMAN, *op.cit.* n° 671 and following, pp. 420 and following.

Firstly, nullity is used in Title IV, which is devoted to the form of a contract. Article 24, subsection 1 envisages that the parties must respect special rules pertaining to form, or else the sanction will be nullity. Article 35 obliges contracting parties to have, as a rule, a written document as evidence of the contract in certain limited instances: contracts for the transfer of property, for the transfer or creation of property rights over real property, and gifts.

Secondly, exoneration clauses and clauses that attempt to limit potential liability will be deemed null and void where the contract is tainted with fraud, or where there has been a serious error on the part of the debtor (article 106). This measure does not however indicate what the consequences such nullity would have for the contract or for the liability of the debtor.

Lastly, nullity is the subject the provisions in Articles 140 to 146, included in Title XI which is devoted to '*autres anomalies du contrat et remèdes*', ('other anomalies of contracts and remedies'). The instances of nullity are diverse. However, the regime which governs is common to all instances. Nullity is incurred in many scenarios, set out in Article 140: these hypotheses are varied because some of them concern the disregarding of imperative rules, while others, more of a mixed batch, relate to the absence of essential elements (agreement between the parties, content and form when the latter is obligatory), all the other hypotheses envisioned in the Pavia Project, or in Community or national law, or to nullity resulting from a criminal prohibition, or even where an apparently valid contract is annulled on the grounds that it '*inséré dans une activité illicte*', ('forms part of an illicit activity'). Depending on the different hypotheses outlined in Article 140, nullity does not always follow the same regime. The provisions following that article (Article 140 subsection 1) seek to treat as separate the instance of nullity flowing from the contract being deemed contrary to ordre public, contrary to good moral standards, contrary to an imperative rule of general interest or contrary to the protection of '*de situations d'importance social primaire*', ('situations of primary social importance').[10] 'Voidability' is treated in Article 146 of the Pavia Project. It can only be invoked by the party whose interest the law seeks to protect. Article 146, subsection 2 lists the instances of voidability, amongst which feature, in keeping with classical approaches, incapacity and defects of consent.

The term nullity can also be seen in Chapter 3 of the UNIDROIT Principles, devoted to validity. The initial impossibility of the contract, stemming from one of the parties to the contract or from the assets to which the contract relates, will not in and of itself affect the validity of the contract (Article 3.3). Nullity can be invoked in cases of mistake (Article 3.5 to 3.7), fraud (Article 3.8), duress (Article 3.9) or gross disparity (Article 3.10).

The proposal of the Organisation for the Harmonisation of Business Law in Africa (OHADA), May 2006, on the subject of contracts is largely inspired by the UNIDROIT Principles.[11] As far as nullity is concerned, Article 3.12 provides that '*tout contrat qui n'est pas conforme aux conditions nécessaires à sa formation peut être frappé de nullité*', ('any contract which is does not conform to the conditions necessary to its formation can be tainted with nullity').

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10 See the observations above relating to the system that applies.

11 M. FONTAINE, 'Le projet d'Acte uniforme OHADA sur les contrats et les UNIDROIT Principles relatifs auxcontrats du commerce international', *Rev. de droit uniforme* 2004-2.

The term *résolution*/(dissolution) is, following the example of 'nullity', used just as frequently in positive law as it is in the proposals for codification outlined above.

b) Résolution, a sanction applicable to the non-performance or the improper performance of the contract

Résolution ('avoidance') appears as such in the Convention of Vienna, 11 April 1980, on the international sale of goods (CVIM).[12] It is perceived as a remedy of last resort; the texts stresses that where possible, the performance of the contract for sale should be encouraged for practical reasons.[13] Each party is entitled to demand performance where the other party has fundamentally breached his obligations under the contract or where there has been a failure to fulfil certain obligations assumed by each party who was privy to the terms of the contract of sale (Article 49 for *résolution* (dissolution) demanded by the purchaser, and Article 64 of *résolution* (dissolution) invoked by the vendor). *Résolution* can also be used preventatively: this form of anticipatory *résolution*, mentioned in Article 72, allows each party to call for the *résolution* 'so long as, before the date of contract performance, it is manifestly obvious (that the other) party will commit a fundamental breach.'

Likewise, the OHADA Uniform Act of 17 April 1997, concerning general commercial law[14] envisages that every party to a commercial contract of sale has a right to demand the '*résolution*' of the contract if the other party does not perform his obligations and if this failure amounts to a fundamental failure (Article 254 concerning the purchaser and Article 259 concerning the vendor). Article 254 adds that the purchaser is entitled to demand '*résolution*' of the contract if the vendor fails to deliver the correct goods within the supplementary time limit that would be granted in each case. By the same token, under the terms of Article 259, the vendor has the right to request the '*résolution*' of the contract if the purchaser refuses to take delivery of the goods within the supplementary time limit that would be expected to be granted.

Certain Community Directives hold *résolution* to be a subsidiary sanction for the contracts concerned. Directive 1999/44/CE of the 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees[15] grants the consumer the right to insist, where the product delivered to the consumer lacks in conformity, that the goods be brought into conformity, that the price be reduced appropriately, or as a last resort, the consumer can demand the *résolution* of the contract (Article 3.2).[16] Recourse may not be had to *résolution* if the lack of conformity is minor (Article 3.6). The Directive does not

12 The CISG excludes from its remit all questions associated with the validiy of contracts (Article 4.a). On the application of the rule on the Conflict of Laws in this matter, see the observations of V. HEUZE, *La vente internationale de marchandises*, LGDJ 2000, n° 88, pp. 83 to 86.

13 V. HEUZE, *op.cit.*, n° 425, p. 375.

14 JO OHADA, n° 1, 1 October 1997, p. 1. Full text available on the website of OHADA: www.ohada.com.

15 JOCE L 171, 7 July 1999.

16 On the susbsidiary nature of résolution, see C. AUBERT DE VINCELLES, J. ROCHFELD (Director) *L'acquis communautaire – les sanctions de l'inexécution du contrat*, Economica 2006, spéc. n° 60, p. 26.

specify the nature of the sanction. The French term, *la résolution*, implies the retroactive destruction of the contract. The versions produced in other languages also use terms which imply retroactive effects: '*Auflösung*' in German, 'rescind' in English (even though this term can lead to confusion – see the observations under Section II) or '*resoluzione*' in Italian. The methods for implementing *résolution* are not expressly set out in the Directive: these remain to be decided by each Member State, especially in relation to whether or not *résolution* will be treated as a judicial sanction. One can liken the provisions of Article 7.2 of the European Directive, (97/7/CE of 20 May 1997) on consumer protection in distance selling[17] to *résolution*, in the sense of a retroactive destruction of the contract. This Article provides that the sums already paid by the consumer can be reimbursed where a default in the performance of the contract results from the unavailability of the product or of the service ordered.

However, derived Community law does not seem to have adopted a uniform terminology as far as the sanction of non-performance of a contractual obligation is concerned. In reality, in the area of relations between consumers and professionals, certain provisions particular to relations between professions use a different terminology. Although regulation 1475/95 of 28 June 1995 concerning agreements for the distribution of motor vehicles[18] and regulation 1400/2002 of 31 July 2002 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices in the motor vehicle sector,[19] testify to a uniformity in the usage of the term '*résiliation*' with regard to the termination of contracts of indeterminate duration, the regulation also adopts – as does the ECJ – the same term '*résiliation*' as an alternative term to that of '*resolution*' to characterise the sanction of non-performance of contract. Although, in contrast to regulation 1475/95, regulation 1400/2002 does not make provision for the possibility to '*résilier*' (terminate) the contract for inexecution, a notable recent decision of the ECJ on the 18 of January 2007[20] has specified that no provision of the regulation' forbids to the parties to a contract falling within the scope of that regulation, from including an express termination clause under which such an agreement can be terminated by the supplier as of right and without notice in the event of a breach by the distributor of one of the contractual obligations referred to in that clause (…). However, when a supplier terminates an agreement for the distribution of motor vehicles by virtue of an express termination clause, respect for the conditions for application of exemption by categories, instituted by regulation 1400/202 requires not only that the distributor indicate in writing the reasons for this termination, but also that an independent expert, arbitrator or national judge, to whom the distributor has the right of recourse to contest the validity of this termination by virtue of article 3, paragraph 6 of the said regulation, will be in the position to exercise an effective control on the reasons for this termination'.[21] Elsewhere, article 5, paragraph 3, second point of regulation 1475/96 uses an

17 *OJ* L 144 of 4 June 1997.

18 *JO* L 145 of 26 June 1995, p. 25-34.

19 *OJ* L 203 of 1 August 2002, p. 30-41.

20 ECJ 18 January. 2007, *City Motors Groep*, aff. C-421/05, (unreported), *Europe* 2007, comm. 100, note L. IDOT; *JCP* G 2007, I. 172, n° 11 obs. A. LECOURT.

21 Comp. C.J.C.E., 7 sept. 2006 *VW Audi*, aff. C-125/05, Rec. p. I-07637; *JCP* G 2007, I. 104, n° 1 obs. M. CHAGNY; *JCP* G 2007, I. 172, n° 11, obs. A. LECOURT. *Adde*. On the implementation of the terms of article 5 § 3 bullet point one, of regulation 1475/95, C.J.C.E., 30 novembre

other term, specifying that: "The conditions for exemption laid down in (1) and (2) shall not affect; (…) the right of one party to terminate the agreement for cause where the other party fails to perform one of its basic obligations." (*"[l]es conditions d'exemption prévues aux paragraphes 1 et 2 ne préjugent pas: (…) du droit d'une partie d'exercer la résiliation extraordinaire de l'accord en raison d'un manquement de l'autre partie à une de ses obligations essentielles"*). The use of the term *"résiliation"* (termination) in place of that of "resolution" does not seem to be unintentional to the extent that the English translation ("termination"), German translation (*"kundigung"*) and even the Italian translation (*"recesso"*) use an equivalent term.

In PECL, the Pavia Project and the UNIDROIT Principles, *résolution* ('termination' in the English-language version) is used to punish a notable failure of one of the contracting parties to fulfil his contractual obligations.

Chapter 9 of PECL is entitled 'Particular Remedies for Non-Performance'. Notably, the creditor can 'terminate' the contract if he is aware of fundamental non-performance, already realised or clearly foreseeable (Articles 9:301 and 9:304).

According to the terms of Article 114 of the Pavia Project, *résolution* can be implemented by the creditor where there is considerable non-performance. Partial *résolution* is possible: Article 114.4 provides that if the debtor does not perform the totality of his obligation(s), the creditor is entitled to reduce the price to be paid, which amounts to accepting as payment that which he has already received.

Chapter 7 of the UNIDROIT Principles, which concerns performance, also makes use of the term *résolution*, (termination). Section 3 of Chapter 7 (in particular Articles 7.3.1 to 7.3.6) details how *résolution* (termination) operates. *Résolution* can be implemented for 'fundamental non-performance' (Article 7.3.1). It can be invoked where this breach has already occurred before the date for performance of the contract (Article 7.3.3).

The proposal of the Organisation for the Harmonisation of Business Law in Africa (OHADA) mentioned above provides in Article 7.13 that a party may terminate or dissolve the contract on the grounds of the other party's fundamental non-performance, whether this non-performance has already occurred of is manifestly foreseeable (Article 7.15).

The terms '*nullité*' (nullity) and '*résolution*' (dissolution) are also used indirectly when considering the impact they have on a contract, or on certain contractual provisions.

2. Instances of indirect usage

The question concerning the effects of the nullity or inexistence of a contract has been asked raised in the context of the implementation of rules relating to the regulation of legal disputes. For this study, the issue that will be studied is not so much concerned with the content, but rather with determining whether the nullity or inexistence of a contract is understood to have a meaning that is consistent with that evoked in the instances of direct usage.

2006, *A. Brünsteiner GmbH et Autohaus Hilgert GmbH contre Bayerische Motorenwerke AG (BMW)*, aff. C-376/05 et C-377/05, Rec. p. I-11383. see generally; H. AUBRY, *L'influence du droit communautaire sur le droit français des contrats*, Préf. A. Ghozi, PUAM 2002, n° 169 and following, p. 199 and following.

First and foremost, so far as State competence is concerned, the question must be posed concerning the ability of the contract to regulate itself in its own terms as seen in Article 5.1 of Regulation 44/2001 of 22 December 2000.[22] If a judge from a Member State can be designated on the basis of this provision in order to pronounce on the consequences of the non-performance of a contract, whatever the nature of the possible sanction arising from such non-performance may be, is it also true that he is competent on the same basis to proclaim the nullity of the contract. Or does inexistence fall to be decided in the context of the contractual dispute, in the meaning given in the Regulation? The European Court of Justice (ECJ) held that an applicant can enjoy the option made available in Article 5.1 even if the dispute concerns the formation of the contract. This decision is based on the idea that the judge must appraise his own competence, even if in so doing he must examine the constituent elements of the contract.[23] However, in this case the ECJ was pronouncing on nullity invoked in support of a defence of incompetence: the case's principal question was not concerned with nullity *per se*. The French *Cour de cassation* deemed that such a case was indeed a matter for contract law to decide, within the meaning of Article 5.1 cited above.[24] The consequences of nullity or of inexistence are to be evaluated by this single judge.[25]

Furthermore, a question arises in the context of the implementation of arbitration clauses, namely the question of assessing nullity or inexistence of a contract containing such a clause. The answer, no matter what source one considers, resides in the validity of the arbitration clause: such a clause is not affected by the calling into question of the validity, or even of the proper formation of the contract in which it has been inserted. The validity of the arbitration clause does not depend of the validity of the underlying contract and thus the absence of a concluded agreement, nullity, dissolution, or even termination of the contract itself will not affect it. No matter what causes such circumstances (nullity, *résolution* etc.) and no matter what system applies to each of them, the arbitration clause enjoys an independent source of life. From this perspective, the terminology used to describe the circumstances or event which prevents the contract from legally surviving is devoid of interest. Illustrations of this independence – drawn from various sources – can be cited. Article 8 of the arbitration Regulation of the International Chamber of Commerce (ICC) provides that, '*sauf stipulation contraire, la prétendue* nullité *ou inexistence alléguée du contrat n'entraîne pas l'incompétence de l'arbitre s'il retient la validité de la convention d'arbitrage. Il reste compétent, même en cas d'inexistence ou de nullité du contrat pour déterminer les droits respectifs des parties et statuer sur leurs demandes et conclusions.*' ('save where it is stipulated to the contrary, the alleged *nullity* or inexistence of a contract will not lead to the arbitrator being deemed incompetent if he is satisfied as to the validity of the arbitration agreement. He remains competent, even in instances where the contract is affected by nullity or inexistence, to determine the respective

22 *JOCE* L 12, 16 January 2001.

23 ECJ 4 March 1982, aff. 38/81, Rec. I, p. 825, *Rev. crit.* 1982.573, note H. GAUDEMET-TALLON; *JDI* 1982.473, note A. HUET.

24 Civ. 1ère, 27 juin 2000, *JDI* 2001.137 note A. HUET; *Rev. crit.* 2001.148, note M.-E. ANCEL.

25 In this sense, see the observation of H. GAUDEMET-TALLON, *Compétence et exécution des jugements en Europe*, LGDJ 3ème éd. 2002, n° 180, pp. 135 et 136.

rights of the parties and to pronounce on their demands and conclusions.')[26] In this vein, national laws concerning international commercial arbitration have also enshrined the principle of the autonomy of arbitration clauses: thus, Article 178 subsection 3 of the Swiss Act on international private law from 18 December 1987 states that *'la validité d'une convention d'arbitage ne peut pas être contestée pour le motif que le contrat primcipal ne serait pas valable.'* ('the validity of an arbitration agreement cannot be contested on the grounds that the principal contract would not itself be valid.' The draft law from the UNCITRAL, on international commercial arbitration, of 1985, also enshrines this principle of autonomy, by providing that nullity does not by right lead to the nullity of the arbitration clause. Case law, both from arbitration tribunals and national courts, has adopted given wide acceptance to the principle of the autonomy of arbitration clauses.[27] A decision of the French *Cour de cassation* of 25 October 2005 is symbolic of this tendency: the court ruled that, in international matters, *'en application du principe de validité de la convention d'arbitrage et de son autonomie en matière internationale, la nullité non plus que inexistence du contrat que l'inexistence du contrat qui la contient ne l'affectent'*. ('by application of the principle of the validity of arbitration agreements, and of their autonomy in international affairs, neither nullity nor inexistence of the contract in which they are contained will affect them.')[28] It is to be remarked that this formulation places nullity and inexistence of contract on the same footing in relation to a contract which contains an arbitration clause. Certain commentators, although in the minority, propose that cases of inexistence should be treated differently, and that inexistence should have an effect on the implementation of an arbitration clause.[29] It is also to be noted that case law respects the competence of the arbitrator; all the same, if the arbitrator is of the opinion *'qu'aucune convention principale n'existe; il devra nécessairement s'abstenir de tirer les consequences juridiques éventuelles de cette inexistence, les parties ne pouvant par essence avoir consenti à l'arbitrage'*, ('that no principal contract exists, necessarily he must abstain from drawing possible legal consequences from this inexistence, the parties in essence not having had the ability to consent to the arbitration clause.'[30]

An analysis of the regime applicable to international commitments by signature also facilitates the appreciation of the effects that a finding of nullity of basic commercial

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26 In this sense, even though it doesn't concern the nullity of the principal contract see article 21 of the reglation on arbitration of UNCITRAL, Ph. FOUCHARD, E. GAILLARD, B. GOLDMAN, *op.cit.*, n° 395, p. 217.

27 See the references cited in Ph. FOUCHARD, E. GAILLARD, B. GOLDMAN, *op.cit.*, n° 104, p. 221.

28 D. 2005, IR p. 2822; Rev. arb. 2006.103, note J.-B. RACINE; JCP G 2005, Act. 617, et IV. 3522. This decision is a turnaround and allows the alignement of the international arbitration regime with the internal arbitration regime (for earlier case law on the international aspect see Cass. 1re civ., 10 July 1990, n° 88-13.877, RTD com.1991, p. 578, obsv. J.-C. DUBARRY and E. LOQUIN; JDI 1992, p. 168, note E. LOQUIN; Rev. arb. 1990, p. 851, 1re esp., note J.-H. MOITRY et C. VERGNE. Part of French doctrine has criticized this solution (Ph. FOUCHARD, E. GAILLARD, B. GOLDMAN, *op.cit.*, esp. n° 411 and n° 593-598).) Confirming this about-turn see Civ 1ère, 11 July 2006, P. CALLE, 'Application par la Cour de cassation des principes de validité de la clause compromissoire et de compétence-compétence', JCP. G 2006, II. 10182.

29 P. SANDERS, 'L'autonomie de la clause compromissoire', in: *Etudes Eisemann*, p. 31.

30 P. CALLE, *op.cit.*

contracts has on the implementation of the credit. The general principle affirmed (in the case law of majority of States and arbitration decisions as well as in the majority of professional rules and guidelines such as the Uniform Customs and Practice for Documentary Credits of the ICC (UCP)) acknowledges the autonomy of commitments by signature in relation to the underlying commercial contract.[31] A finding of nullity, dissolution or termination of the underlying contract has no effect, in principle. The same terminological indifference can be seen here as was seen in relation to arbitration clauses. The independent nature of the bank's engagement is ignored in instances of fraud or manifest abuse. Certain commentators feel, however, that when the nullity of the underlying contract is caused by a serious upset to the ordre public, such a species of nullity could be invoked in order to paralyse the bank's engagement.[32] This particular approach to nullity results from the fact that the transaction with the financial institution would otherwise allow for the carrying out of an illicit act, contrary to international ordre public. Such would be the case for financial engagements providing for the production or the sale of narcotics, or for the construction of a factory producing nuclear matter in contravention of an international non-proliferation treaty. Case law has occasionally deemed that such illegality will constitute an exception to the financial institution's duty to pay: for example, the House of Lords held that performance of a letter of credit could be refused where it was contrary to the *Bretton Woods* agreements.[33]

Simply because it is true that the terms 'nullity' and 'dissolution' are frequently used, it does not follow that the systems governing them are fixed in a uniform and consistent manner in the different sources referred to.

B. The inconsistency of the systems attaching to the terms 'nullity' and 'dissolution'

An examination of Acquis International and Acquis Communautaire, insofar as the systems governing 'nullity' and 'dissolution' are concerned, reveals that the various elements are not defined in a uniform and consistent fashion. From this perspective, nullity nonetheless appears to present a greater degree of terminological consistency (**1**) than dissolution (**2**).

1. The relatively consistent system governing nullity

In the sources studied, two common points are seen to be characteristic of the regime attaching to nullity. Firstly, nullity has retroactive effect and secondly, it arises out of the bare fact that its constituent elements are all present. However, notable exceptions exist. A notification can be demanded, the details of which may differ. Moreover, the other aspects of the detailed system governing nullity are not regulated in a uniform manner.

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31 J. BEGUIN, M. MENJUCQ (sous la dir. de), *Droit du commerce international*, Litec 2005, n° 1650, p. 574.

32 In this regard see, M. VASSEUR, *Rép. com. Dalloz*, V° Garantie indépendante, n° 84.

33 *United City Merchants v. Royal Bank of Canada* [1982] 2 *Lloyd's Rep*.1 *H.L.*

The regime applicable to nullity in Community law, as provided for in Article 81§ 2 of the EC Treaty has been clarified by case law and remains, in any case, quite limited. Nullity can be requested by any interested/affected person, whether on not they are party to the agreement or the dispute: case law has affirmed that nullity is absolute.[34] Case law has also indicated that nullity extends to all provisions which are contrary to Community rules.[35] Lastly, case law has shown that nullity is retroactive.[36] However, it is up to national law to determine the other elements of the system that will govern nullity: the prescription period that will apply; the scope of a finding of nullity in relation to the entirety of the contract or other agreements associated with the affected contract; and restitution.[37]

The regime that governs the application of nullity is scarcely referred to in PECL or in the UNIDROIT Principles.

In PECL,[38] the avoidance of a contract does not require the intervention of the courts or of an arbitrator. Avoidance occurs through the act of one of the parties, in notifying the other party (Article 4:112). Article 4:115 further clarifies that avoidance confers a right on each party to demand restitution of anything they have supplied or received in carrying out the contract. If restitution cannot be made in kind, a reasonable sum must be paid. Avoidance, as envisaged in the UNIDROIT Principles, may be invoked any one of the parties and this right is exercised by notice to the other party (Article 3.14). It can be either total or partial (Article 3.16). Article 3.17 provides that avoidance has retroactive effect and that restitution, by each party, of that which has been supplied to the other party, must be made in kind, or in value if the latter possibility is not available.

In the Pavia Project, the system governing nullity is given a more detailed treatment. In effect, a distinction is drawn between total or absolute nullity and relative nullity, which can be partial. In the case where a contract is contrary to ordre public, morality, or a mandatory rule adopted for the protection of general interest or situations of primary importance for society (Article 140 paragraph 1), nullity is total and cannot be overridden by confirmation of the contract. In the other instances envisaged in Article 140, nullity can be either total or partial (Article 144) and may be validated (Article 143). Partial nullity can only be declared, in principle, if the remaining contract, purged of the offending clause, can autonomously exist and '*de manière raisonnable le but poursuivi par les parties*,' ('reasonably realize the purpose of the parties,' Article 144 paragraph 1). However, no matter what type of nullity is found to exist, there are common side-effects and these are outlined in Article 141: nullity acts retrospectively, necessitates that restitutions be made (the regime for such is set out in Article 161), and can lead to each party

34 ECJ 6 February 1973, case 48-72, *Brasseries de Haecht*, *Rec*. I, p. 77; ECJ 13 July 2006, case C. 295 to 298/4, *Manfredi*.

35 CJE 13 July 1966, case C. 56 et 58/64, *Grundig-Consten*, *Rec*. I, p. 429; CJCE 10 November 1993, case C. 39/92, *Petroleos de Portugal*, Rec. I, p. 5659.

36 *Ibid*.

37 CJCE 18 December 1986, *VAG France*, Rec. 4071. On the difficulties posed by these restitutions see C. LUCAS DE LEYSSAC and G. PARLEANI, *op.cit*.

38 D. HOUTCIEFF, 'Les sanctions de la formation du contrat', in: *Les concepts contractuels à l'heure des principes de droit européen des contrats*, P. REMY-CORLAY, D. FENOUILLET (sous la direction de), Dalloz 2003, p. 115, esp. p. 119, n° 10.

being held responsible for damages caused by their behaviour to third parties who have '*compté sur l'apparence du contrat créé*', ('in good faith relied on the appearance of the contract.') Nullity, whatever its cause, comes about by the bare fact that its necessary conditions are present. The Pavia Project indicates the time limits in which notifications must be made: the party who intends to avail himself of it must let the other party know of the nullity by sending him a declaration before the expiry of ten years after the contract was made (this time limit applies for absolute nullity, running from the date of the conclusion of the contract, and is reduced to three years in the case of partial nullity). In accordance with the terms relating to time limits set out in Article 141, the party availing himself of the nullity can demand a judicial declatation to that effect. This contracting party must let the other know of the nullity, within a three-year time limit running from the day when the incapacity ceased to exist, when the mistake was discovered or, in other cases, running from the date of the conclusion of the contract. An annulment can be avoided by a ratification, the workings of which are set out in Article 149. If nullity is implemented, it will lead to the destruction of the contract with retroactive effect and the parties are bound to make reciprocal restitutions, and possibly a payment of damages where the aggrieved party has suffered harm as a result of the other party's behaviour (Article 147); however, the annulment will only produce effects starting from the moment when the declaration is received where restitution is impossible or '*excessivement onéreuses*' ('too onerous,' Article 147.2).

The aforementioned Organization for Harmonisation of Business Law in Africa (OHADA) Uniform Act on Contract Law proposes a relatively elaborate system to regulate the operation of nullity. Following the example of the texts cited above, it provides that the right of a party to avoid the contract is exercised by notice to the other party (Article 3.16), and that avoidance takes effect retroactively (Article 3.19). The text also proposes that a distinction be drawn between absolute and relative nullity, depending on the nature of the condition of formation it is being used to punish: if nullity is being imposed in order to protect the general interest, then it is absolute (Article 3.13) – whereas, if the protection of an individual interest is at stake, then it is relative (Article 3.14). Different systems govern the application of the two types of nullity. In a classic fashion, absolute nullity can be invoked by any person with an interest in the contract, or by any court at its own motion, and cannot be ratified. Relative nullity can only be invoked by the protected person, cannot be invoked by the court at its own motion, and may be ratified, either expressly or implicitly. In every instance, nullity may only be deemed partial, unless it would be unreasonable to uphold the remaining contract once the affected clauses have been amputated (Article 3.18). In the terms of Article 3.17, notice of avoidance must be given within a reasonable time (having regard to the circumstances) after the avoiding party knew or could not have been unaware of the relevant facts or became capable of acting freely. In the different texts analysed, the system governing the application of *resolution* (dissolution) is less certain than that of nullity.

2. The marked uncertainties of the system applying to dissolution

In the majority of texts studied, dissolution is not treated as a judicial remedy. Moreover, differences can be seen in relation to its effect: the retroactivity of its application is not always affirmed in a clear and coherent fashion.

Within the context of the CISG, *resolution* (dissolution) is not a judicial remedy. In principle, *résolution* is total. In exceptional circumstances, it can be partial when the contract of sale is to be performed by way of instalments, or where the goods delivered only conform in part to the stipulations of the contract. *Résolution* serves to free the parties for the future, but in certain respects it can also have retroactive effect. The contractual obligations that have not yet been fulfilled by the date of the dissolution are, in effect, extinguished (Article 81). That being so, the CISG stipulates that the creditor has the right to demand damages (the method of calculation for which is set out in Articles 74 and 77) and that certain clauses may survive (those in relation to the regulating of disputes as well as those, obviously, which detail the consequences of dissolution). Moreover, the party who has completely or partially performed his obligations under the contract can demand restitution of what he as supplied (Article 81§ 2). As regards contracts to be performed by instalments – and subject to certain conditions – Article 73 paragraph 1 provides for the right of the creditor to declare *'la résolution du contrat pour l'avenir'* (that the 'contract [be] dissolved for the future') affecting the entire contract by reason of the debtor's non-performance of one of his obligations in relation to a single instalment/delivery: this *'résolution pour l'avenir'* resembles more in French terminology *'la résiliation'*, even if the French-language version of this uses the word *'résolution'*.

The OHADA Uniform Act in relation to General Commercial Law sets itself apart in that either the buyer or the seller must petition the competent court for dissolution (Articles 254 and 259); thus the Act maintains a judicial control *a priori* over the invoked dissolution. Dissolution *'libère les deux parties de leurs obligations*,' ('releases both parties of their obligations'). The parties can be held to make a payment of damages, and dissolution has no effect on clauses relating to the settlement of disputes nor on any other term of the contract which is to operate even after dissolution. Article 270 provides that the party who has performed the contract in whole or in part may claim from the other party refund of what he has supplied or paid.

The system governing dissolution is itself quite uncertain in the various proposals for codification.

The Pavia Project does not specify clearly the effects that dissolution will produce. Article 114.3 indicates that the creditor cannot demand any more and can refuse performance of the contract and the debtor is not bound any more to perform it. Article 114.5 specifies that if non-performance occurs during the course of a contract for periodic or continuous performance, the effect of dissolution does not extend to performance already made. Must it be deduced from this last provision that dissolution is in principle retroactive except where the contract is one involving ongoing obligations, fulfilled by instalments? Dissolution entails reciprocal restitutions and the possibility to demand damages (Article 115).

The UNIDROIT principles foresee that dissolution can be demanded by either of the parties simply by way of notice to the other party. The effects of disolution are provided for in Articles 7.3.5 and 7.3.6. The principle is simple: dissolution operates solely in respect of the future. However, it has no effect on the contract's clauses relating to the settlement of disputes nor on any other clause destined to produce effects after the dissolution of the contract (such as, according to the comments appearing under Article 7.3.5, certain confidentiality clauses). Each party can, however, request the restitution of what he has supplied, in kind or in value. If the contract is one which requires ongoing

performance (by instalments, for example), restitution will only relate to the period after dissolution.

Dissolution, as envisaged in PECL, does not require the intervention of the courts nor an arbitrator: it operates by way of notice between the parties (Article 9:03). The effects of dissolution are defined in Article 9:05: dissolution operates only with future effect and does not affect the rights and liabilities that have accrued up to the time of termination. Comments on this provision[39] justify the non-retroactivity of dissolution by making practical arguments: the creditor must be able to retain the right to recover damages, and any clauses concerning the settlement of disputes possibly arising must be allowed to produce their effects. It is therefore necessary that the contract not be destroyed retrospectively.

The OHADA Uniform Act on Contract Law, mentioned above, provides that dissolution is exercised by way of notice made to the other party, within a reasonable time limit (once this limit is passed, the creditor loses his right to avail of dissolution in the terms of Article 7.14). Article 7.17 states that the dissolution of the contract *'libère pour l'avenir les parties de leurs obligations respectives*,' ('releases both parties from their obligation to effect and to receive future performance.') It leaves intact any clause relating to the settlement of disputes, or any clause which sets out the relationship that is to exist between the parties subsequent to the dissolution. Each party has the right to demand restitution from the other, and this can be in kind or – if necessary – in value (Article 7.18). For contracts to be performed by instalments (Article 7.18 refers to the contracts the performance of which has extended over a period of time, and which are divisible), restitution can only be claimed for the period after termination has taken effect.

Moreover, the terminological complexity is increased by the fact that terms other than 'nullity' and 'dissolution' are employed.

II. The Disorder of Complementary Terms

The different sources studied in the course of the present study use other terms to describe instances where a contract[40] does not produce, or will no longer produce, legal effects. These terms do not lend themselves well to a coherent presentation by reason of their sheer abundance: we will therefore strive first of all to identify these terms (**A**). Even if it is true that some of these terms are common to various sources, the systems which govern their application do not adhere to a coherent and uniform framework (**B**). All the same, an attempt at a uniform system has been outlined in the context of Community law as regards the implementation of the right of revocation, terminology which is widely used in Directives, concerning consumer protection (**C**).

39 *Principes du droit européen du contrat* SLC 2003, p. 383, esp. II.

40 A similar vocabulary is sometimes used to characterise the specific situation of an offer which disappears (see for example, article 17 of the CISG). The regime for an offer will not be subjected to a detailed analysis within the framework of the current study.

A. The abundance of complementary terms

Certain complementary terms are used in relation to international contracts. For example, the French *Cour de cassation* ruled that, in an international employment contract, an arbitration clause cannot be enforced against an employee who has initiated a case before the competent French courts, irrespective of the law applicable to the contract of employment.[41] The *Chambre sociale* of the *Cour de cassation* also deemed that a clause providing for the granting of jurisdiction in the context of an international employment contract should be 'struck out', with the result that the French courts became competent to judge the case under the rules relating to the conflict of jurisdiction.[42]

We will turn our attention to the complementary terms that are principally used in the proposals for codification, both European and international.[43]

In PECL, the Pavia Project and the UNIDROIT Principles, terms other than 'dissolution' and 'nullity' are employed. Our treatment will focus on those which best illustrate the diversity and the ambiguity of the terminology.[44] PECL provide for *'l'inefficacité'* ('ineffectiveness') of the contract when the latter is illicit (**1**); the UNIDROIT Principles foresee that in certain cases, one of the parties will not be able to *'se prévaloir'* ('invoke') an exoneration clause (**2**); the Pavia Project is, from this perspective, the richest source since it proposes a multitude of supplementary terms: *résiliation, inefficacité, inexistence* and *inopposabilité* (**3**). Lastly, in contrasting the three texts mentioned, we can attempt to measure the degree of terminological wavering as regards the outcome of the contract in cases of a change of circumstances (**4**).

1. 'L'inefficacité' (Ineffectiveness) of contract (PECL)

Chapter 15 of PECL, concerning illegality, employs terminology that is distinct from that which applies to nullity: an illegal contract is *'privé de tout effet,'* ('void of all effect') either totally or in part. The comment appearing under Article 15:101[45] stresses that this expression was deliberately chosen in order to distance itself from national concepts, and

41 Cass. soc. 16 February and 4 May 1999, *Rev. crit.* 1999.745, note F. JAULT-SESEKE; *Rev. Arb* 1999.290, note M.-A MOREAU; Cass. soc. 9 October 2001, *Rev. arb.* 2002.347, note Th. CLAY.

42 Cass. soc. 7 May 1987, *Rev. crit.* 1988.78, note H. GAUDEMET-TALLON.

43 The research has been limited, within the framework of the current study, to sources relating to contract law. Certain ideas uses in a contractual context are also used in other areas of law. For example, the notion of inexistence is taken up, in a exceptional fashion, by public international law (Cour internationale de justice, 12 November 1991, Rec. 1991, p. 155). The ECJ has equally developed a case law on the inexistence of Community acts that are tainted with an irregularity of which the gravity is obvious. (CJCE 26 February 1987, case 15/85, *Consorzio cooperative d'Abruzzo c. Commission*, Rec. II, p. 3654 – M.-C. BERGERES 'La théorie de l'inexistence en droit communautaire', *RTD eur.* 1989, p. 393 and 647).

44 Some terms will be mentioned for information. For example, article 6:109 of PECL states that a contract of indeterminate duration can be 'ended' by either of the parties by means of reasonable notice. The applicable regime and the effects of this 'ending' are not detailed further.

45 *Principes du droit européen du contrat*, SLC 2003, p. 559, esp. p. 560, comm. III.

to adopt a broader term which could encompass terms such as nullity, voidability and the impossibility of obtaining judicial enforcement of the contract'. Two distinct hypotheses of illegality, and therefore of 'ineffectiveness' also, are envisaged. The first concerns the instance where a contract is contrary to principles recognised as being fundamental by the law of Member States (Article 15:01). In this instance, the contract will be ineffective, and '*privé totalement de ses effets*,' ('the contract is of no effect'). If the contract runs counter to mandatory rules (Article 15:102), then the effects of such a violation will be determined by the violated rule or, failing that, by PECL.

Article 6:11 (relating to changes of circumstances) provides that where no agreement has been reached by the parties within a reasonable timeframe, as to how they will adapt the contract in light of the changed circumstances, the courts can '*mettre fin*' ('put an end') to the contract whenever and subject to whatever conditions it sees fit. The comments appearing under this text refer to '*résolution*' of contracts; the fine workings of this procedure (and notably as regards its retroactive effect) are to be adjusted by the courts with reference to how far the parties have gone in performing the contract.[46]

2. The ban on the invocation of a clause (UNIDROIT principles)

According to Article 7.1.6 of the UNIDROIT Principles, a party may not invoke a clause which limits or precludes his own responsibility or a clause that would allow him to '*fournir une prestation substantiellement différente de celle à laquelle peut raisonnablement s'attendre l'autre partie [s'il est] eu égard au but du contrat, (…) manifestement inéquitable de le faire*,' ('render performance [that is] substantially different from what the other party reasonably expected if it would be grossly unfair to do so, having regard to the purpose of the contract.') The comment appearing underneath this provision recalls the fact that in principle, such clauses are valid; a moderating power is given to the courts or to the arbitrator, based on fairness. If such a power is exercised, then the party who is invoking the clause, 'may not invoke the clause' and must accept the entirety of his liability.

3. The extension of the terminological register by the Pavia Project

The Pavia Project warrants special attention by virtue of the multitude of terms used, apart from nullity and dissolution. Following the order of the discussion under Title XI of the proposals ('*autres anomalies du contrat et remèdes*,'/'Other Contractual Anomalies and Remedies'), contracts can be tainted with inexistence (Articles 137 and 138), with *caducité*/'supervening nullity' (Article 142), with *inefficacité*/'ineffectiveness' (Article 153), with *inopposabilité*/'non-opposability' (Article 154), can give rise to a case of *rescision pour lésion*/'rescission for lesion' (Article 156) or can be repudiated in the case of contracts concluded with consumers (Article 159). Article 139 also alludes to contractual terms which are 'deemed unwritten'/struck out. Each one of these terms corresponds to a specific/individual cause of action. However, the systems attaching to each can be viewed as being uniform to a certain degree.[47]

46 See also the observations below.

47 See the observation on point B below.

Non-existence is discussed in Article 137. This provision does not seek to define non-existence. It provides (non-exhaustive) examples of situations where *'la notion sociale de contrat*,' ('the social notion of agreement') is absent (Article 137.1). Article 137.2 (a) sets out the case of the absence of legal capacity of the addressee of the offer or declaration, while Article 137.2 (b) refers to the case of absence of an object of the offer or declaration. Subsections (c) and (d) envisage scenarios in which acceptance (whether this consists of an act, a fact, a declaration, or a situation) exists, but is incapable of bringing about legal relations; the acceptance does not correspond with the offer because of the equivocal nature of the latter or the situation is incomplete.[48] Article 137 *in fine* further stipulates that in case of doubt, the contract shall be considered null rather than non-existent. Supervening nullity (*'la caducité'*) cited in Article 142 is a subspecies of nullity. It relates to a specific situation: an essential element is found to be lacking, independently of the intentions of the parties, subsequent to the formation of the contract.

Ineffectiveness *(l'inefficacité)* is defined by Article 153 as describing the situation where a validly formed contract temporarily or permanently fails to have the legal effects at which it was aimed. This can be brought about by agreement of the parties or by operation of law. The intention of the contracting parties can render their contract ineffective within the meaning of this provision if contract is 'illusory',[49] if it contains 'suspensive or resolutory conditions' or time limits, or if the parties have agreed that it is subject to prior authorisation. Ineffectiveness can occur by operation of law. Three instances are foreseen in Article 153.4: the case of a contract or declaration made without the parties being aware that it is an act with legal effect; the case of contracts which require the issue of a permit from a public authority or approval from an individual; and lastly, the cases where Community law or that of the Member State deems that the contract is without effect.

Article 154 concerns the 'inopposability' of contracts. A contract does not affect third parties or certain third parties in various scenarios, such as that of illusory contracts, or contracts knowingly entered into with a view to defrauding the creditors of one of the contracting parties. Inopposability occurs upon the uniting of its conditions, but any interested party who wishes to invoke it (notably, the creditor in the example just outlined) must convey notice to the two contracting parties before the expiry of limitation of three years after the contract was made, or alternatively he may request a judicial determination on the subject (again, this must be before the limitation period runs out).

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48 One author has recently put emphasis on the somewhat extensive approach to the concept of non-existence in the body of the Pavia Project (Cl. WITZ, "La consécration de l'inexistence par plusieurs instruments d'uniformisation du droit", in: *Etudes offertes au Doyen Philippe Simler*, Dalloz, Litec 2006, p. 729). The author also puts the presence of inexistence in the CISG, UNIDROIT Principles and PECL into the spotlight. However, the formulation outlined by different texts is not *in extenso* that of non-existence but is translated, "According to a neutral formula in order to avoid the inauspicious associations in the memories of French jurists" (*op.cit.*, p. 741), by the "non-formation" of the contract. However, with the exception of the Pavia Project (art. 138), the regime governing such a concept is never specified.

49 A non-illusory contract is therefore defined as one which takes effect according to the conditions laid down in article 155 of the Pavia Project.

According to Article 161, third parties may recover damages incurred in relying in good faith on the appearance of the contract.

Article 156, inserted in Section 2 of Title XI is devoted to *'la rescision pour lésion'* ('rescission for lesion') arising in the instances laid out in Article 30.3: *'Est rescindable, comme il est prévu à l'art.156, tout contrat par lequel une des parties, abusant de la situation de danger, de nécessité, d'incapacité de comprendre et de vouloir, d'inexperience, d'assujettissement économique ou moral de l'autre partie, fait promettre ou fournir à elle-même ou à des tiers un prestation ou d'autre avantages patrimoniaux manifestement disproportionnés par rapport à la contrepartie qu'elle a fournie ou promise'*. ('As provided for in Article 156, any contract is rescindable through which one of the parties, abusing the situation of the other's danger, need, incapacity to understand or intend, inexperience, economic or moral subjection, gets the other to promise or deliver to the former or to a third party a performance or other patrimonial advantages which are clearly disproportionate to what said party has given or promised in exchange.')

'Withdrawal by consumer' (*'résiliation effectuée par un consommateur'*) features in Article 159. *Résiliation* can be invoked by the consumer in relation 'to the contract or the contractual offer' in the case of transactions concluded off commercial premises (Article 9). Article 159 indicates that the parties are discharged from their respective obligations upon receipt of the consumer's notice.

4. The destruction of the contract in cases of a change in circumstances

The different proposals for codification suggest wording in relation to what the outcome should be in cases of a change in circumstances.[50] The various wordings are quite close to one another in substance as, they all require the parties to negotiate and, where these discussions fail, they offer the courts the possibility of adapting the contract or pronouncing its destruction. That being so, the choice of wording is not identical.

According to Article 6:11 of PECL, the parties are bound to enter into negotiations with a view to adapting the contract or 'ending' it where there has been a change of circumstances in accordance with the conditions laid down in the text. If the parties do not succeed in reaching an agreement within a reasonable time limit, the court sees itself as having the possibility of *'mettre fin au contrat à la date et aux conditions qu'il fixe'* ('end[ing] the contract at a date and on terms to be determined by the court' (Article 6:11.3.b).) The explanatory comment on this text[51] in relation to the judicial the exercise of power uses the term *'résoudre'*/'to resolve': the expression *'mettre fin au contrat'*/ 'end the contract' is therefore taken to mean that this is the judicial announcement of the dissolution of the contract. This announcement would be optional and should intervene as a remedy of last resort (even though no hierarchy is instituted in the text itself) because according to the explanation given in the comments, the aim of the provision is to save the contract. If the court pronounces the dissolution of the contract, the judge must take into account (again, according to the explanatory comments) the entirety of

50 See also on the matter of international arbitration, Ph. FOUCHARD, E. GAILLARD and B. GOLDMAN, *op.cit.*, n° 33 and following pp. 26 and following.

51 *Principes du droit européen du contrat*, SLC, 2003, p. 284 and following.

circumstances – notably, how far along the parties are in terms of performance – in order to set the date from which the dissolution is deemed to become effective; this date will facilitate the determining of what restitutions have to be made. It is therefore not always the case that dissolution will necessarily destroy the contract with retroactive effect. The court is empowered to attach conditions to its decision, including – most notably – grants of compensatory indemnification. The remarks appearing under this same provision[52] make reference to '*résiliation*' without clarifying what system is to govern its application.

The UNIDROIT Principles also contain provisions concerning the outcome/future of the contract in cases of changes in circumstances. The provisions of Article 6.2.3 also foresee, in instances where open negotiations following the onset of *hardship* have failed, that the courts have the power to '*mettre fin au contrat*' ('end the contract') where the court considers it reasonable to do so. In this case, the court sets the date and the conditions of what the comment appearing under the text calls '*résolution*'.[53] The comment specifies that in this specific instance, since the sanction that is imposed by the court does not flow from the non-performance or improper performance of the contract, the system that is to govern its application cannot entirely be equated with that applying to dissolution in general.

Article 157.5 of the Pavia Project also confers upon the court the right to declare the *résiliation* of a contract affected by a change in circumstances, where the parties' negotiations with a view to altering or terminating the contract have failed: this text provides, '*The judge, après avoir évalué les circonstances et compte tenu des intérêts et des requêtes des parties, peut, en faisant éventuellement recours à une expertise, modifier ou résilier le contrat dans son ensemble ou dans sa partie inexécutée, et, s'il y a lieu et que cela soit requis, ordonner les restitutions et condamner à la reparation du dommage*'. ('After evaluating the circumstances and taking into consideration the interests and requests of the parties, the court, with possible expert assistance, can alter or dissolve the contract as a whole or in its non-performed part and, if required, and it is the case, order restitution and award damages for loss.' The term '*résilier*' is translated in the English-language version as 'dissolve'. The text is not clear as to what effects this *résiliation* will have: the contract appears to be destroyed for the future, while allowing for the possibility of restitutions, depending on the circumstances.

This last example demonstrates that the terminological faltering is reflected not only in the terms chosen but also in the system that should apply to each term.

B. The uncertainty of systems allocated to complementary terms

The same term used in various texts will not necessarily be governed by a consistent and unequivocal system or regime. This uncertainty is reflected in the content but also on a terminological level: depending on the context in which it is used, a term will not systematically have the same meaning. A comparative reading of PECL and the Pavia Project illustrates this instability particularly well.

52 *Op.cit.*, p. 288 and following.

53 UNIDROIT Principles, éd. UNIDROIT 2004, p. 191.

In PECL, if ineffectiveness is established, it will be up to the court or to an arbitrator to adapt the applicable sanction by taking into consideration various factors listed in the provisions: total ineffectiveness or 'partial ineffectiveness', limited in time, on condition (the English-language version of the text uses the word 'effect': 'no effect,' 'some effect,' 'full effect'). Equally, the court or an arbitrator can decide that the illegality of a contract will not affect it in any way, thus allowing it to produce its full effect. Ineffectiveness is translated into restitutions (Article 15:04). A party to a contract which is devoid of effect can also claim damages: this compensation seeks to place the party back in the position he would have been in had the contract not been concluded, to the extent that the other party knew or ought to have known the cause of the ultimate ineffectiveness which resulted in the failure of the contract. The court or the arbitrator will have some margin to manoeuvre in order to assess the amount of such damages (by reference to the same factors as those which are mentioned in Article 15:02 mentioned above).

In the Pavia Project, restitutions to be made on foot of various scenarios set out in the text are subject to a somewhat unified system, provided for in Article 160. To a certain extent, this ensures consistency in relation to the consequences brought about by these different scenarios. However, each scenario that is envisaged has its own unique characteristics as regards the implementation of the sanctions set out.

Inexistence implies an absence of effect on a contractual level (Article 138). Nonetheless, obligations to make restitutions can be imposed as well as liability in damages for harm caused to third parties. Inexistence occurs without any declaration or mandatory judicial intervention and is not subject to any time limit (Article 138.2). Any interested party can avail itself of it. According to Article 139, every clause 'deemed unwritten' or struck out is subject to the system that applies to inexistence as defined in Article 138.

Caducité or 'supervening nullity' envisaged by the Pavia Project is a subspecies of nullity. However, in this specific instance, nullity is devoid of any retroactive effect.

In the Pavia Project, 'ineffectiveness' occurs without any judicial intervention. It can be declared by any interested/affected party and is subject to a time limit of three years. No further clarification is given on the system that is to regulate ineffectiveness. However, Article 160 concerning restitutions encompasses restitutions to be made following the ineffectiveness of a contract.

Article 156 of the Pavia Project is quite limited as regards its provisions relating to *rescision*/rescission. It merely indicates how the party seeking to rely on the rescission should proceed. On the other hand, however, no indication whatsoever is given in this provision as regards the effects such a declaration will have on the contract. The contract which is rescindable cannot be ratified and rescission is subject to a time limit of one year, running from the date of the conclusion of the contract. However, Article 160 mentioned above stipulates that the parties to a rescinded contract will be obliged to make restitutions.

In the context of Article 159, in cases of *résiliation*, the parties must make reciprocal restitution and the consumer can claim damages for any harm or loss caused to him by the item delivered to him.

C. Towards a unified system for the right of revocation?

In the field of harmonisation of contract law in the Member States, Community law makes use of sanctions, the terminology of which varies considerably. It is in consumer law, a favourite in terms of harmonisation, that this variety is most readily noticeable.

In a Communication of the Commission of 2003, on European contract law, a number of inconsistencies – peculiar to Community legislation in the area of contacts – were raised. *'L'accent a été mis sur le problème des exigences et des conséquences divergentes résultant de certaines directives applicables à la même situation commerciale'*. ('The emphasis was placed on the problem of diverging requirements and consequences stemming from multiple Directives applicable to a single commercial situation.')[54]

The Directives concerned provide, with a view to protecting that consumer, three principal types of rights for the benefit of consumers, which can affect the 'life' of a contract:[55] the right of revocation, the right of *résiliation* and the right not to be bound by certain clauses.[56] Dissolution also features, as a sanction of last resort.[57]

As brought to light by the Commission, this classification is not always implemented in a consistent manner, from a terminological perspective, by the texts of derived law (**1**). However, the right of revocation seems to be at the heart of the mechanism created by these texts and could, following the impetus given by case law, flow into the mould of a system already in the process of unification (**2**).

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54 Communication from the Commission to the Parliament and the Council – a more coherent European law of contracts – a plan of action, *OJ* C 63 of 15 March 2003, p. 1. This difficulty was already underlined in the Commuication of 2001 from the Commission to the Council and Parliamnet concerning the European law of contracts (COM/2001/0398 final): *'Par exemple, dans certaines circonstances, il est possible d'appliquer à la fois les directives sur le démarchage à domicile et la directive sur l'utilisation à temps partiel de biens immobiliers. Ces deux directives donnent au consommateur un droit de rétractation; néanmoins, le délai pendant lequel le consommateur peut exercer ce droit est différent. Même si de tels cas de conflit entre des règles sont exceptionnels, la Commission aimerait disposer d'informations sur les problèmes découlant d'éventuelles incohérences entre des règles communautaires*'. (For example, in certain circumstances, it is possible to apply the directives on door to door selling and the directive on the right to use immovable property on a time share basis. These two directives give the consumer the right of revocation; however, the time limit during which the consumer can exercise the right is different. Even if such cases of conflict between the rules are exceptional, the Commission would like to outline information on the problems cause by the possible incoherence between the Community rules.)

55 On this analysis, see. E. POILLOT, *Droit européen de la consommation et uniformisation du droit des contrats*, Préf. P. de Vareilles-Sommières, LGDJ 2006, n° 207 and following pp. 114 and following.

56 Article 6 of the Directive of 5 April 1993 on Unfair Terms in Consumer Contracts envisages that unfair terms in the sense of the Directive do not bind the consumer to the condition fixed by national laws. The contract remains obligatory for the parties according to the same terms, if it can continue to exist without the incriminated clauses. On the nature of this sanction see: C. AUBERT DE VINCELLES, J ROCHFELD, *op.cit.*, n° 40 and following., pp. 20 and following; S. LE GAC-PECH, *La proportionnalité en droit privé des contrats*, Préf. H. Muir-Watt, LGDJ 20000, n° 208 and following.

57 See the observations under point I below.

1. The confusion of community terminology

Sometimes, the right of revocation is equated with *résiliation* (**a**); and sometimes, the two terms are distinguished (**b**).

a) The right of revocation, synonym for the résiliation of contract

Certain texts maintain that the right of revocation or the right to reflect results in the *résiliation*/termination of the contract: the terms are thus interchangeable. However, this *résiliation* is not always understood to entail the destruction of the contract for the future, without retroactive effect.

For example, Directive 85/577/EEC of 20 December 1985 relating to consumer protection in the context of contracts negotiated away from business premises[58] cites, in disposition number 5 of its preamble, the right of the consumer to cancel ('*résilier*') the contract, called a 'period of reflection' ('*droit de réflexion*') in the following disposition.[59] According to Article 5 of this text, the consumer shall have the right to renounce the effects of his undertaking within a period specified by the Directive. The consumer is thus released from all obligations and it is up to national law to determine what system will govern the legal effects of this renunciation. In the same way, Article 6 of the Directive of 20 May 1997 referred to above, concerning the protection of consumers in respect of distance contracts provides for a a right of revocation for the consumer. This right can be exercised within a minimum time limit of seven days, without penalty and without giving any reason; it can also be exercised if the supplier has not sent a certain amount of obligatory information, within three months. Article 6 adds that the only expenses to be paid by the consumer in such circumstances are the direct costs in returning the goods and that the supplier is obliged to reimburse the consumer any sums paid, without deducting expenses. If the right of revocation is implemented, the credit agreement granted to the consumer by the supplier, or by a third party on the basis of a contract concluded with the supplier, is automatically cancelled without penalty.

The right of withdrawal or the right to a period of reflection can terminate a contract without these two Directives ever stating clearly that such a contract is destroyed in respect of the future only. The system governing this *résiliation* is to be dealt with under national law. Community law, however, clarifies certain elements relating to the implementation of this right, as regards limitation periods and the rules relating to notice. It also indicates that the consumer will obtain restitution of sums paid, which, in principle, subtly alters the effects of *résiliation* in respect of the future. Lastly, it provides that a credit agreement attached to the contract of sale and concluded with the consumer is automatically cancelled ('*résilié*').

The unique specificity of *résiliation*/cancellation in Community law appears in Directive 90/134/EEC of 13 June 1990 on package travel, package holidays and package

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58 *OJ* L 372 of 31 December 1985.

59 On this terminological wavering see the observations of E. POILLOT, *op.cit.* n° 244 and following, pp. 127 and following. See further, H. AUBRY, *L'influence du droit communautaire sur le droit français descontrats*, Préf. A. Ghozi, PUAM 2002, p. 62, n° 58.

tours.[60] Article 4§ 5 allows the organiser to modify essential elements of the contract before departure, notably including the price. In this instance, he must notify the consumer as quickly as possible. The latter can then withdraw from ('*résilier*') the contract without penalty or accept a rider to the contract specifying the alterations made. Where he opts for withdrawal ('*résiliation*'), the consumer is entitled to be repaid all sums paid by him under the contract, or entitled to another package holiday. This withdrawal ('*résiliation*') thus leads to the retroactive destruction of the contract. However, upon a close examination of the different-language versions of the text, no term would seem to reflect this meaning. In French, the term '*résiliation*' applies in principle to the destruction of a contract without retroactive effect. The Italian term, '*recedere*' denotes the right to withdraw, as does the English term '*withdraw*' which refers to the right of one party to revoke before the acceptance of the agreement. The German term, '*Zurücktreten*' seems closest to the French term '*résiliation*' in its meaning in this Community text.

b) The rights of revocation and of cancellation: distinct terms

Other texts envisage a right of revocation ('*rétractation*') and a separate right of cancellation ('*résiliation*'), and the systems governing each seem to be more neatly distinguishable from one another. For example, Directive 94/47/EC of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis[61] distinguished between a right of revocation ('*rétractation*') and a right of cancellation ('*résiliation*'). Article 5 of this Directive provides in effect that the purchaser shall have the right to withdraw ('*se rétracter*') within ten calendar days of both parties' signing the contract or of both parties' signing a binding preliminary contract, without having to supply any reason. In addition, the purchaser can cancel ('*résilier*') the contract within three months of the signing of the contract if the contract does not include certain obligatory information; if the information is supplied within this three month window, the purchaser still retains the right to withdraw ('*rétracter*') as outlined above. The right of cancellation ('*résiliation*') is not implemented and if, upon the expiry of three months, the contract is still missing certain obligatory information, the purchaser retains the right of revocation. Where this right is being exercised, the purchaser is only obliged to repay the costs occasioned by the withdrawal. Cancellation ('*résiliation*') is carried out without penalty and without any repayment. Moreover, Article 7 provides that a credit agreement granted by the vendor or by a third party on the basis of the contract concluded with between the vendor and this third party with a view to facilitating the transaction, is automatically cancelled with penalty where the purchaser exercises his right of withdrawal or of cancellation.

Directive 2002/65/EC of 23 September 2002 concerning the distance marketing of consumer financial services[62] also contains a distinction between the right of withdrawal ('*rétractation*') and other sanctions for which Member States can provide. Article 6 provides for a right of withdrawal for the benefit of the consumer from the day of the conclusion of the distance contract or from the day the consumer receives the contrac-

60 *OJ* L 158 of 23 June 1990.

61 *OJ* L 280 of 29 October 1994.

62 *OJ* L 271 of 9 October 2002.

tual terms and conditions, and information set out in the Directive if this date is later than that of the conclusion. Certain financial services are excluded from the right to withdrawal. Notice of withdrawal must be given by the consumer in accordance with the conditions set out in the Directive. Article 7 of the text adds that the consumer is obliged to pay for the service actually provided before the withdrawal if he was duly informed of the amount payable; he must return to the supplier any sum or any good that he received. The supplier, on the other hand, must return to the customer any sum received (allowing for the deduction of the sum received as payment by the consumer for the service actually provided).

2. The judicial efforts at harmonising the right of revocation

In a series of judgments, the ECJ has contributed to outlining a unified system to govern the application of the right of revocation.[63]

In effect, as has been seen, the right of revocation (*'rétractation'*) follows a different system of application depending on which Directive is concerned: the possibility to withdraw or not to withdraw, without giving any reason, the time limits, and even the starting point from which the latter begins to run – these are all elements which are given isolated and independent definitions in each Directive. Moreover, the various national transpositions of these Directives add to this diversity: each Member State transposes the Community text while trying to reconcile the system governing the right of revocation with existing national institutions, which most often leads to a hybrid system being adopted. For example, in German law, the system governing *'Widerruf'* (*'rétractation'*; literally, 'revocation') is based on the system of *'Rücktritt'* (*'résolution'*) (see § 357 section 1 BGB which refers to §§ 346 and following BGB). It is therefore a question of avoiding the consequences of a legal document by way of a unilateral declaration (*'Gestaltungserklärung'*). According to the letter of § 355 section 1 BGB, the consumer 'is no longer bound by his declaration of intent' when he has gone so far as to *'widerruft'* it. Certain commentators therefore speak of a *'schwebende Wirksamkeit'* (validity in suspense) in parallel to *'schwebende Unwirksamkeit'*. The system outlined in §§ 355 and following of the BGB constitutes a general system of application which groups together all the rights of withdrawal (*'rétractation'*), revocation (*'révocation'*) or 'renunciation' (*'renonciation'*) provided for in the various Community Directives on consumer law and extending to other domains (door-to-door selling, contracts for the distance marketing of financial services, time-sharing, consumer credit). The period for reflection is set at fourteen days, running from the date of the passing on of the information relating to the inexistence of a right of withdrawal (and, sometimes, other information or even the handing over of the goods purchased). It is extended (sometimes even *ad infinitum*) where a professional has failed in his duty to inform. The consequences of *'Widerruf'* are quite close to those of *'Rücktritt'*: the consist essentially of making restitution of the payments/goods supplied

63 L. BERNARDEAU, 'Le droit de rétractation du consommateur, un pas de plus vers une doctrine d'ensemble – à propos de l'arrêt CJCE 22 avril 1999, Travel Vac', JCP G, 2000, I. 218 and 'Le droit de rétractation du consommateur, un pas de plus vers une doctrine d'ensemble – à propos de l'arrêt CJCE 13 décembre 2001, Heininger', JCP G, 2002, I. 168.

along with the profits derived therefrom. But the responsibility of the consumer for wear and tear is eased in comparison with that applying to '*Rücktritt*' (§ 357 section 3 BGB).

In the majority of Directives, the more detailed conditions attaching to the right of revocation, as well as the circumstances in which it will operate, are left to national law.[64] Two important decisions of the ECJ have set about achieving Community harmonisation, which could ultimately lead to a European system that would govern the right of withdrawal, founded on the need to protect the consumer.

The ECJ gave an insight into the basis of this Community-wide system in a decision of 22 April 1999, *Travel Vac v. Sanchis* (the *Travel Vac* case).[65] The 1985 Directive mentioned above, relating to contracts negotiated away from business premises, was at issue in this case. Among the questions posed, the ECJ was asked to clarify (where the derived legal instrument was silent on the matter) whether the Directive required any formal conditions before the right of revocation can be exercised, and whether the right of revocation could be exercised without having to show proof of fraudulent behaviour on the part of the professional. The ECJ, driven by a marked desire to protect the consumer, held firstly that no condition relating to the form of the contract is required so long as the consumer allowed his certain intention be known to the professional, within the permitted timeframe and in an unequivocal manner,[66] and secondly, that the right of revocation is discretionary and must be exercised without penalty.

This 'filling the gaps' approach to the uncertainties left by Community texts was followed with another decision of 13 December 2001, *G. et H. Heininger v. Bayerische Hypo und Vereinsbank AG*, (the *Heininger* case).[67] Central to the debate was a discussion of the same Directive as in the *Travel Vac* case. Notably, the ECJ was consulted on the question of whether the national legislator could, in the context of transposing the Directive, attach a prescription period to the right of revocation. Article 5.1 of the Directive of 1985 provides that the consumer has a right of renunciation by which he can renounce the effects of his agreement within a time limit of seven days running from the date of receipt of the information with the professional was obliged to supply to him in relation to his right to cancel the contract. The ECJ held that the national legislator could not impose an upper limit of one year on the time limit running from the date of the conclusion of the contract in the instance where the consumer had not been supplied with the information required by the Directive. It must of course be added that certain Directives contain prescriptive time limits; all things considered, however, these are not

64 See for example, article 5.1 of the Directive of 20 December 1985 concerning relating to consumer protection in the context of contracts negotiated away from business premises, referred to above, which reverts '*aux modalités et conditions prescrites par la législation nationale*'. (the methods and conditions prescribed by national legislation.)

65 Case C-423/97, Rec. I, p; 2995. See the observations of L. BERNARDEAU as cited above and E. POILLOT, *op.cit.*, n° 218 and following, pp. 118 and following.

66 However this does not prevent the Commuity legislator from being more precise and compelling. See for example article 6 § 6 de la Directive du 23 septembre 2002 concerning the distance marketing of consumer financial services mentioned above.

67 CJCE 13 December 2001, case C-482/99, *Rec.* 2001, I, p. 9945. On this decision see the observations of L. BERNARDEAU *op.cit.*; E. POILLOT, *op.cit.*, n° 230 and following, pp. 122 and following.

defined in a uniform way in the various texts. Consequently, the sweep of the *Heininger* decision should be limited to cases in which the Community text does not itself provide for a sanction in relation to the failure to comply with the duty to provide the consumer with information. In such cases, the ECJ deems that a prescriptive time limit may not be imposed.

This solution has not met with unanimous support: certain commentators feel that it allows 'an excessive doubt concerning the outcome of the contract,' ('*un doute excessif sur le sort du contrat*'),[68] to persist, while others approve of the approach taken by the ECJ in that they prioritise, 'the argument for protecting consumers over that of providing for the smooth operation of the Single Market,' ('*l'argument de protection du consommateur sur celui de bon fonctionnement du marché unique*').[69] This indicates that the case law of the ECJ on the system governing the right of revocation also reflects back on the question concerning the very nature of this right. The ECJ has not had to pronounce directly upon this delicate qualification. None the less, the court has indicated that the 1985 Directive obliged the consumer relying on the right of withdrawal to repay the amount of the load granten and to pay interest at the rate charged on the market:[70] these decisions seem to consider that the contract has already been performed, even if the ECJ states that the effects of revocation fall to be determined by the law of the Member States. The Directives themselves are indecisive in their terminology in respect of the nature of the right of revocation: the 1997 Directive on distance selling illustrates this wavering, using as it does in its various different-language versions terminology drawn from contract formation ('right of withdrawal' or '*widderufsrecht*') while in other languages using a vocabulary that relates to the exercising of a right after the conclusion of a contact ('*droit de rétractation*' r '*diritto di recesso*'). Academic writing is for the most part, of the opinion that the right of revocation as set out in the Directives relates to the effects of the contract because it takes place, and therefore produces its consequences, subsequent to the conclusion of the contract.[71] These differences in terminology, which have an effect on the content of the Directives, are most certainly not settled, despite the efforts of the ECJ. The draft Consumer Credit Directive of 7 Octobre 2005 demonstrates these difficulties. Article 13 of this text concerns the right of revocation ('*rétractation*'), a term which is not the same in the other various language versions: for example, '*withdrawal*' in English, '*Widerrufsrecht*' in German and '*diritto di recesso*' in Italian law; terms which, as has already been seen, do not refer to a single and consistent notion. Article 13.1 provides that the consumer enjoys a time limit of fourteen days in which to go back on his agreement, with the time limit running from the date of the conclusion of the consumer credit agreement or from the date of its receipt by the consumer. Article 13.2 gives the consumer, before he exercises his right of withdrawal, the possibility to inform the creditor of his intention to withdraw from the credit agreement ('*son intention de renoncer au contrat de crédit*'). This information shall be given within a period of seven calendar days

68 L. BERNARDEAU, *op.cit.*, n° 23.

69 E. POILLOT, *op.cit.*, n° 241, p. 126.

70 CJCE 25 October 2005, case C-350/03, Rec. I, p. 9215 *E. et W. Schulte c. Deutsche Bauparkasse Badenia AG* and CJCE 25 October 2005, case C-229/04, *Crailsheimer Volksbank eG c. Klaus Conrads, Frank Schulzke et Petra Shulzke-Lösche et Joachim Nitschke*, Rec. I, p. 9273.

71 For a deep exploration of the debate see, E. POILLOT, *op.cit.* n° 242 and following, pp. 126 and following. See also the observations in the part of this work concerning comparative law.

after the beginning of the period of withdrawal; this expression is not translated by a separate term in the various different-language versions. The text, in the most recent edition or the proposals, sets out the system that shall govern restitutions.

Comparative Law

The analysis of comparative law is delicate because the different terminologies used by most of the systems are both diverse and uncertain.

Certain terms uses appear neutral in their formulation, to the extent that they are limited to describing the situation of termination of a contract or a clause, without bring a qualification to this scenario in themselves: '*le contrat est sans effet*' (the contract is without effect), the clause is '*inefficace*' (ineffective), '*mise en échec*' (defeated) or '*privée d'effet*' (deprived of effect), such are the expressions that are frequently encountered. These terms take into account of the absence of the anticipated effect of the act or the invalidated clause independently of any procedure employed.

Consequently, even though these terms do not present a real interest in the search for a precise terminology, it must be admitted that they are largely used for convenience of language. Many examples are given to this effect. Thus American law qualifies contracts or 'ineffective' clauses: the contract is ineffective after it has been rescinded[72] and a clause can equally be ineffective when it is not concluded personally between the parties or if it does not fulfill the criteria of 'fairness'.[73] In Italian law, the term '*inefficacia*' is used almost generally to describe scenarios in which the efforts to contract have not succeeded.[74] This term, thus understood in a general sense, describes an incident or event arising during the course of the life of the contract which impacts on the practical realisation of the interests which represent the contract for each of the parties.[75] In German Law, in legal agreement, a clause is '*wirkunglos*' when it gives rise to no effect: this would happen, for example, in the case of a contract with no subject-matter or moreover a clause stipulating the professional capacity of the co-contracting client in order to avoid the application of consumer law, to the extent that this qualification was not left up to the will of the parties. This term is employed by certain legal provisions, including, for example, article 1131 of the French Civil Code.[76] However, the legislators sometimes search to specify that this inefficacity, in the greater sense, has a precise impact on the effects of the contract: Article 26 of the Italian Consumer Code, the result of the transposition of the directive of 5 April 1993 on Unfair Terms, which laid out that unfair terms have no effect, has been modified and now makes provision that such clauses be

72 E.A. FARNSWORTH, *Contracts*, Fourth Edition, Aspen Publishers, 2004, p. 291.

73 J.D. CALAMARI, J.M. PERILLO, *The Law of Contracts*, Fourth edition 1998, p. 392.

74 A. GENTILI, "Nullità, annullanibità, inefficacia (nella prospettiva del diritto europeo)", *I contratti*, n° 2, 2003, p. 200.

75 E. BETTI, "Teoria generale del negozio giuridico", in: *Trattato di diritto civile*, Torino 1995, p. 468.

76 *'L'obligation sans cause ou sur une fausse cause, ou sur une cause illicite, ne peut avoir aucun effet,'* ('An obligation without reason or based on a false reason, cannot have any effect').

declared void *(nullité de protection)*. Effectiveness or ineffectiveness remain the necessary terms to describe a situation in fact: the absence of the anticipated effect of the act, clause or contract. On can refer to a decision by the second chamber of the French *Cour de cassation* which outlines, in a traditional manner, that an arbitration clause cannot be affected by the ineffectiveness of the overall contract in which it is contained: the decision infers from the principle of contractual autonomy that the nullity of a sub-contract is indifferent to the compensation clause which the sub-contract stipulates.[77] Therefore ineffectiveness is not understood in this case as a sanction in itself: it is understood as a situation of fact which follows the nullity which is itself understood as a judicially invoked sanction.

Other terms arise from this descriptive approach. In effect, quite a large consensus seems to withdraw to distinguish, on the one hand, the termination of a contract of a contractual clause as a sanction for a defect of validity **(I)** and on the other hand, the termination of a contract which results from non-performance **(II)**. These two categories call for the usage of distinct terms in the majority of the systems studied. However, apart form the idea of a sanction, termination equally characterises the exercise of liberty **(III)**.

I. Termination as a Sanction for a Defect of Validity of a Contract or Clause

The term the most frequently used to describe the termination of a contract of a clause under this theory is that of 'avoidance': avoidance is incurred *'chaque fois qu'une des conditions légales de formation du contrat, telles qu'elles ont été précédemment déterminées, fait défaut'*[78] ('each time that one of the legal conditions of formation of contract, such as has already been determined, is lacking'). This term seems to have sufficiently solid historical foundation to claim a generic character **(A).** Historical analysis shows however that the deep roots of the term have been misconstrued, revealing little by little the lack of completeness and homogeneity of this categorisation. However, other terms have appeared; their regime links them, in a more or less coherent fashion, to the system of nullities: thus nullity unfolds according to the terms forged for specific applications **(B).**

A. The use of the term 'avoidance' (nullity) as a generic term

Historic evolution has greatly contributed to the imposition of the term 'avoidance' as a generic term, although it is enamelled with contradictions **(1).** The contempory integration of this term has shown the limit of a solidly forged self-styled concept, even if there does not exist today a unique and well-determined category, but nullities with different adoptions and legal regimes **(2).**

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77 Civ. 2ème, 4 April 2002, n° 00-18009, Bull. civ. II, n° 68, p. 57.

78 J. FLOUR, J.-L. AUBERT, E. SAVAUX, *Droit civil. Les obligations. 1. L'acte juridique*, 12th Edition, Sirey 2006, no. 323.

1. The ancient roots of the term

Historical evolution, only the main points of which will be alluded to here,[79] reveals a tortuous journey for the term '*nullité*/nullity'. This chaotic path explains in part that in spite of the fact that the use of the term remains very frequent, the original sense of the term has been greatly adapted, and even deformed, over the course of the centuries.

The term '*nullité*/nullity' is absent from Roman law. In Roman law, characterised in fact by its formalism, nullity was merged with ineffectiveness: any act which did not fulfil the conditions fixed by the law did not product any effect *'L'acte est ou il n'est pas,'* ('The act either exists or it does not').[80] However, certain Roman institutions leave it open to wonder whether this binary distinction must be put into perspective. In particular, the Praetor instituted mechanisms[81] by which the contract, although fully effective in regards to the *ius civile*, could be paralysed in its effects if the Praetor so ordered, on the demand of a victim of fraud, duress or unequal bargaining power.

Those who were interpreting Roman law in the Middle Ages relied on these mechanisms, somewhat deforming them. In this way they arrived at the concept whereby an act could be void in law, but could also be could also be only voidable in certain circumstances, therefore creating an intermediary state between the radical ineffectiveness of Roman law and absolute inexistence. This distinction, sketched out between nullity and voidability rested, during this era, on the nature of the interest protected by the violated rule of formation: the violation of a rule of formation designed to protect the public interest led to the contract being declared void with retroactive effect, whereas disregard for a rule of formation designed to protect a particular interest only gave rise to an ineffectiveness of the contract at the request of the protected party (voidable).

Ancien Droit consolidated this distinction and adopted a new terminology: absolute nullity (contracts that were void) was distinguished from relative nullity (contracts that were voidable). This classification was not however totally enlightening due to the existence of letters of rescission, which (like not long before in Roman law) could judicially paralyse the effects of an act tainted with such causes of nullity comparable to those invoked before and known to the Roman Praetor. An action in rescission was very strictly delineated from an action in nullity, as much by the sources of such an action as its limitation period.[82] '*Ainsi, lorsque le plaideur invoquait une nullité tirée du droit romain, il disposait, après obtention d'une autorisation royale, d'une action en rescision qui se prescrivait par dix ans. Les autres nullités relatives, fondées sur les ordonnances et les coutumes, ouvraient, sans formalité préalable, une action en nullité se prescrivant par trente ans*'.[83] ('Thus, when the applicant invoked a cause of nullity drawn from Roman law, he possessed a right, after gaining Royal assent, to institute an action in recission which had a limitation period of 30 years.')

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79 For a very detailed description, see. S. GAUDET, 'Inexistence, nullité et annulabilité du contrat, essai de synthèse', [1995] 40 Mac Gill L.J.291.

80 S. GAUDET, *op.cit.*, p. 297.

81 These consisted of *exceptio doli*, the *exceptio metus* and *restitutio in integrum*.

82 J. FLOUR, J.-L. AUBERT, E. SAVAUX, ibid.; Y. PICOD, *ibid.*; H. et L. MAZEAUD, J. MAZEAUD, F. CHABAS, *Leçons de droit civil*, Tome II/*Premier volume, Obligations. Théorie générale*, 9th Edition, Montchrestien 1998, no. 294.

83 Y. PICOD, *ibid.*

These letters of rescission, which gave rise to the category of rescindable acts, had an obscure status, difficult to distinguish from that of acts tainted as voidable (relative nullity). It seems that these acts were deprived of effect to the extent that certain conditions, although not essential, were lacking. One can catch a glimpse here of a new distinction regarding the sources of ineffectiveness founded on *'l'idée que certaines conditions sont essentielles à la formation [du contrat] alors que d'autres ne sont nécessaires que pour son efficacité,'*[84] ('the idea that certain conditions are essential to the formation [of a contract] while others are only necessary for the contract to be effective).

The distinctions remained fluid, especially in French Law after the Napoleonic codification. The historic sense of the distinction between nullity and rescission was not retained in the French Civil Code, since all nullities found their source in the law. But the term *'rescision'* appeared: some articles used the terms rescission and nullity indifferently, as the title to Section IV suggests: *'De l'action en nullité ou en rescision des conventions'* ('Regarding actions for the nullity or rescission of contract').[85]

In the framework which is commonly referred to as the classical theory of nullities, the anthropomorphic approach has been chosen to explain and articulate the proposed distinctions between relative and absolute nullity, sometimes even adding another category-inexistence. Schematically, the proposed distinction can be encapsulated in the following manner: the contract is *'quelquefois malade mais guérissable (susceptible de confirmation dans le cas de la nullité relative), quelquefois gravement atteint jusqu'au pronostic vital (en cas de nullité absolue) et quelquefois mort-né (inexistant)'*,[86] ('Sometimes sick but curable (eligible for affirmation in the case of relative nullity), sometimes gravely injured with a fatal diagnosis (in the case of absolute nullity) and sometimes still-born (inexistent)').

Relative nullity seems not to have posed any real problems: the contract existed even though it was affected by a weakness, as long as a judge did not pronounce a declaration of nullity. The act was only 'voidable'. Moreover, relative nullity could only be invoked by the person whom the law intended to protect. Finally, relative nullity could be expunged through the medium of ratification or a five-year prescription period.[87]

The acute difficulty resided in the field of absolute nullities – also called automatic nullity – or to be more precise in the distinction between absolute nullity and inexis-

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84 S. GAUDET, *op.cit.*, p. 308.

85 Even today the term 'rescission' recognised a particular usage in the case of relative nullity for unequal bargaining power. (Articles 887, 892, 1305 and 1674): *'rescision pour lésion'* is referred to. On *lésion*, the recent thesis of G. CHANTEPIE, *La lésion*, Préf. G. Viney, LGDJ. 2006, Tome 467. If it seems proven that rescission is not referred to in French law except in the context of lesion, it remains generally admitted that relative nullity and rescission are synonyms *'la particularité terminologique étant considérée comme un legs de l'histoire'* (the particularity of the terminology being resigned to the sands of time' G. CHANTEPIE, *op.cit.*, no. 566 and following, and the references cited in no. 224.

86 H. ADIDA-CANAC, 'Actualité de l'inexistence des actes juridiques', *Rapport annuel de la Cour de cassation*, 2004, 2ème partie, p. 619 and following; also C. GUELFUCCI-THIBIERGE, *Nullité, restitutions et responsabilité*, Préf. J. Ghestin, LGDJ 1992, no. 350 and following, p. 205 and following.

87 See for example J. FLOUR, J.-L. AUBERT, E. SAVAUX, *op.cit.*, no. 326.

tence. The category of absolute nullities was progressively eroded of substance to such a degree that the necessity of retaining a distinction between absolute nullity and inexistence must be questioned.

There were numerous criticisms of the classical theory. The absence of historical criteria for inexistence, the superficiality of the notions of '*acte-organisme*' (whereby a legal agreement is seen as a living thing) and '*nullité-état*' (whereby nullity is perceived as a 'state' of being), as well as the arbitrariness of the distinction between the condition of existence and validity were all ideas put forward in a haphazard fashion. DROGOUL and then JAPIOT proposed to reconstruct the law of nullity, first and foremost in consideration of nullity as a sanction and not as a status of an act. JAPIOT furthered the analysis by suggesting that nullities be seen as containing a right of criticism against the effects of the act.[88] JAPIOT's successors retained a judicial conception of nullity: *'l'exercice de l'action en nullité – dérivée du droit de critique de JAPIOT – permettait d'anéantir l'acte illicite. L'acte, quoique atteint d'une cause de nullité, produit effet; il crée des effets juridiques sur lesquels l'exercice, en justice, de l'action en nullité permet de revenir,'*[89] ('the instituting of nullity proceedings – derived from JAPIOT's right to criticise – allowed for the destruction of an illicit act. The act, although tainted with the grounds for nullity, had effect: it created legal effects which could be reversed by way of instituting of judicial proceedings for nullity').

These debates on the historical evolution of the notion of nullity enable the best understanding of the current reality: there exists not just *one* form of nullity but *many* forms of nullity.

2. The complexity of contemporary diversification

A new criterion of distinction has been proposed: *'c'est le fondement de la règle transgressée qui doit commander le caractère de la sanction,'* ('it is the justification for the broken rule which should determine the character of the sanction'),[90] distinguishing between the protection of society's interests (the purpose of absolute nullity) and the protection of private interests (the function of relative nullity). Different legal systems reflect this distinction in the terminology employed **(a).** It must be noted, however, that this distinction does not allow us to understand completely the difficulties posed **(b),** even if the regimes that come into force for each of these terms seem to be convergent **(c).**

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88 R. JAPIOT, *Des nullités en matière d'actes juridiques; essai d'une théorie nouvelle*, Paris, 1909 pp. 284 and 285 *'La nullité n'est point une manière d'être de l'acte; ce n'est pas dans l'acte qu'elle réside; ce n'est pas de ce côté que l'on doit porter ses regards si l'on veut la voir sous une forme moins abstraite'*; elle consiste en *'un droit de critique dirigé contre les effets de l'acte.'* (Nullity is not a state of existence of an act, it is not in the act that it exists, it is not from this perspective that one must search if one wishes to see it in a less abstract form. It consists of 'a right to criticise directed against the effects of the act').

89 S. GAUDEMET, *op.cit.*, no. 124.

90 J. FLOUR, J.-L. AUBERT, E. SAVAUX, *op.cit.*, no. 328.

a) The recognition of the distinction between absolute nullity and relative nullity

Without doubt it would be a mockery to contrast the *civil law* systems with those of the *common law*. The majority of the former have definitely adopted the distinction between relative and absolute nullity. The common law systems seem to have a more pragmatic approach, stubbornly resistant to the categories which are considered too abstract, even if these last categories show the common characteristics of relative and absolute nullity.

Some civil law systems have recourse to different distinctions. Thus Swiss law sets out in article 20 of its Code of Obligations that *'le contrat est nul s'il a pour objet une chose impossible, illicite ou contraire aux mœurs'* ('a contract is void if it has an impossible, illicit or immoral purpose'). The qualification of this sort of nullity is not referred to. Moreover, article 23 of the same code provides that *'le contrat n'oblige pas celle des parties qui, au moment de le conclure, était dans une erreur essentielle'*[91] ('The contract does not bind a party who at the moment of the conclusion of the contract was mistaken as to an essential quality of the contract'). The sanction found in this provision is analogous to those seen in certain European Community directives relative to clauses which do not bind a consumer.[92]

The majority of the civil law systems, or systems based on the civil law make reference to the distinction between absolute nullity and relative nullity, in a direct or indirect way.

In this way, in French and Belgian law, the Civil Code refers to nullity without further explanation of the term. Article 1117 states that *'la convention contractée par erreur, violence ou dol n'est point nulle de plein droit; elle donne seulement lieu à une action en nullité ou en rescision, (…),'* ('an agreement contracted by mistake, under duress or fraud is not void at law; it only gives rise to an action in nullity or rescission'). Article 1131 states, for its part, that *'l'obligation sans cause ou sur une fausse cause, ou sur une cause illicite ne peut avoir aucun effet,'* ('an obligation without purpose or based on an illicit purpose can have no effect'). On the basis of these provisions, it is admitted by academic legal commentators and in case law that problems with consent, rescission for unequal bargaining power or even incapacity to contract are clearly part of the protection of private interests and lead to cases of relative nullity; contracts that are contrary to the public interest either because of their object or purpose are stricken with absolute nullity. The proposal to reform the law of obligations and periods of prescription *(The French Reform Proposals)*,[93] proposes to use the terms *'nullité relative'*/'relative nullity' and *'nullité absolue'*/'absolute nullity': Article 1129 of the proposal expressly states the distinction between relative nullity (*'de protection'*/'relating to protection') and absolute nullity (*'d'ordre public'*/'relating to ordre public').

In the law of Quebec, reflecting contemporary French law, the ancient adage *'pas de nullité sans texte'* ('no nullity without a provision') is not applied. In effect, *'il serait illogique, et illégitime, de traiter comme valide une convention qui viole une disposition légale relative à sa formation sous prétexte que cette disposition ne prévoit pas en toutes lettres l'annulation du contrat en cas de violation,'* ('it would be illogical and illegitimate to treat a contract as valid which violated a legal provision relative to the formation of contract on

91 The same wording it used in Article 28 regarding fraud.

92 See the observations below.

93 *La Documentation française 2006.*

the pretext that that particular provision did not state the contract must be declared void in all cases in which it was not complied with).[94] The new Article 1416 of the Civil Code of Quebec expressly states, to this effect, that *'tout contrat qui n'est pas conforme aux conditions nécessaires à sa formation peut être frappé de nullité,'* ('any contract that does not conform to the necessary conditions of contract formation can be declared void'). Moreover, there is a complete contrast between absolute and relative nullity. The distinction is based on the values protected which are the same as those of French law, to which the wording of Articles 1417[95] and 1419 of the Civil Code attests.[96] Qualifying nullity as either absolute or relative can be tricky. However, the Civil Code has come to simplify this question a little by stating in Article 1421 *'à moins que la loi n'indique clairement le caractère de la nullité, le contrat qui n'est pas conforme aux conditions nécessaires à sa formation est présumé n'être frappé que de nullité relative,'* ('unless the law clearly indicates the character of nullity to be imposed, the contract which does not conform to the necessary conditions of contract formation will be presumed to be subjected to relative nullity).

Italian and German law adopt an original approach to the question. These two systems tend to distinguish on one hand, the qualities of the legal agreement concerned; and on the other, the determination of the sanction, legal or private, is left to the initiative of one of the parties, in order to state the qualities of sanctions or their absence. It follows from this approach that the term *'nullité'*/'nullity' is not used in the same sense as is understood in the French system. Relative nullity, for example, refers, in the two systems, to a situation in which the contract is valid for one party alone. Nevertheless, it can be observed that these ideas, as specific as they are, lead to very similar regimes.

In Italian law,[97] a contract is *'invalide'*/'invalid' when, in the absence of an essential element, it is defective, sick or flawed.[98] The category of *'invalidités'*/'invalidity'[99] includes nullity, voidability and rescission of contract.[100] The traditional theory links nullity to an attack on the public interest, by contrast to voidability which relates to the protection of a particular interest of one of the contractants[101] and is designed to punish the breach of a subjective condition of formation of contract. *'Nullità'* refers to the general form of invalidity. Where the law is silent as to which sanction is applicable, the troubling of

94 J.-L. BAUDOUIN, P.-G. JOBIN, N. VEZINA (avec la collaboration de), *Les obligations*, 6th Edition, éditions Yvon Blais 2005, no. 399.

95 *'La nullité d'un contrat est absolue lorsque la condition de formation qu'elle sanctionne s'impose pour la protection de l'intérêt general,'* ('Nullity of contract is absolute when the condition of formation breached, which the nullity sanctions, is imposed for the protection of the general interest.')

96 *'La nullité d'un contrat est relative lorsque la condition de formation qu'elle sanctionne s'impose pour la protection d'intérêts particuliers (…),'* ('Nullity is relative when the condition of formation which is the subject of the sanction is imposed to protect the interests of the parties').

97 This academic elaboration has its roots in German legal academic discussion. F. GAZZONI, *Manuale di diritto privato*, Napoli 2003, p. 961.

98 A. TORRENTE, P. SCHLESINGER, *Manuale di diritto privato*, 17th Edition, Milano, 2004, p. 249.

99 R. SACCO, G. DE NOVA, *Il contratto, in Trattato di diritto civile*, 3rd Edition, Torino, 2004, p. 493.

100 Includono: C.M. BIANCA, *Il contratto*, p. 681; R. SACCO, G. DE NOVA, 'Il contratto', in: *Trattato di diritto civile*, 3rd Edition, Torino, 2004; V. ROPPO, *Il contratto*, Milano, 2001.

101 A. DI MAJO, 'Il linguaggio dei rimedi', in: *Eur.dir.priv.*, 2005, p. 355.

imperative norms and structural deficiency of the agreement are causes of nullity (Article 1418 of the Civil Code). '*Annullabilità*' is prescribed by the Civil Code to punish the incapacity to act of one of the parties, defects in consent and certain other cases outlined by law.[102] No new sanction of voidability has been created by the legislation for the last twenty years,[103] except in the area of insurance.[104]

Still, in Italian law, '*rescissione*' is a sanction exclusive to contracts which involve reciprocal performance. This means that, on the basis of absence of purpose, the law will punish an inequality between the respective performance envisaged for each party if such an inequality is so great as to be unfair (contracts concluded in a state of danger, Article 1447 of the Civil Code) or if it is a remarkable one (*ultra dimidum*: this consists of a general action in rescission for inequality of bargaining power, Article 1448 of the Civil Code).[105] The nature of this sanction is debated. The majority of the academic legal commentators class it in the category of 'invalidities'.[106] If the conditions required are fulfilled, the contract can be '*rescindé*'/'rescinded' Articles 1447 and 1478 of the Civil Code) at the request of the obligated party.[107] The cocontractant can avoid the rescission of the contract by proposing a modification of the contract that would bring it back up to an acceptable threshold of fairness (Article 1450 of the Civil Code). Finally, it must be observed that the distinction between absolute and relative nullity is all the more present in actual Italian law since it results from the transposition of certain European Community texts.[108] Examples can be found in the area of contracts negotiated away from business premises (Article 10 d.lgs. 92/50), contracts regarding time-share ownership of properties (Article 9 d.lgs 98/427), distance selling contracts (Article 11 d.lgs 99/185), banking contracts and consumer credit contracts (Articles 117, 124, 127 d.lgs 93/385). In the cases laid down by Articles 1469 *quinquies* and 1519 *octies*, only the protected person has the interest to act, but the flaw can be taken into account by a court on its own motion. These articles have recently been transposed into the Consumer Code.

In German law, the idea of '*Nichtigkeit*' can be approximated with absolute nullity to a certain extent. When an agreement is '*nichtig*', it does not produce any effect. The law states that '*Nichtigkeit*' is incurred in order to punish the greatest flaws in capacity (§ 104 BGB), the disregard for legal form (§ 125 BGB), violation of a legal prohibition (§ 134 BGB), an immoral agreement (§ 138), or an illusory agreement (§ 116 BGB). '*Anfechtung*' allows the injured party to unilaterally declare the contract void, within a certain time period. In the absence of a declaration within the given period, the contract will

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102 Such as, for example, a conflict of interest of the salesman or the conclusion of a contract of the salesman with himself.

103 A. GENTILI, 'Nullità, annullabilità, inefficacia (nella prospettiva del diritto europeo)', *I contratti*, n. 2, 2003, p. 200.

104 A. BALZANO, 'Il contratto di assicurazione', in: *Diritto privato europeo*, a cura di N. Lipari, Padova 1997, II, p. 851. Cfr. Art. 63, comma 1, d.lgs. 17 marzo 1995, n. 174, di attuazione della irettiva 92/96 CEE e art. 74, comma 1, d.lgs. 17 marzo 1995, n. 175 di attuazione della direttiva 92/49 CEE.

105 A. TORRENTE, P. SCHLESINGER, *Manuale di diritto privato*, 17th Edition, Milano 2004, p. 208.

106 F. GAZZONI, *Manuale di diritto privato*, Napoli, 2003, p. 979. Contrast: R. SACCO, G. DE NOVA, 'Il contratto', in: *Trattato di diritto civile*, 3rd Edition, Torino, 2004, p. 542; V. ROPPO, *Il contratto*, Milano 2001.

107 R. SACCO, G. DE NOVA, 'Il contratto', in: *Trattato di diritto civile*, 3rd Edition, Torino 2004.

108 R. QUADRI, 'Nullità e tutela del contraente debole', in: *C.e I*, 2001, p. 1143.

remain valid. A party can choose to make this declaration ('*Gestaltungserklärung*') in a situation where his consent was flawed by mistake (as is defined by § 199 BGB), duress or fraud (§ 123 BGB). '*Nichtigkeit*' and nullity resulting from an '*Anfechtung*' can be invoked by any person, including the protected party, with the exception of the party who caused the nullity through his own fault (an application of the adage *nemo auditur*).

In American Law and English Law, a terminology cannot be identified which corresponds exactly with the results of the distinction between absolute and relative nullity.[109] The American system is based on a procedural approach, i.e. a pragmatic approach based on the actions attributed to the parties. It is thus difficult to seek to undertake, as is possible in French law, an abstract organisation of the sanctions. As a consequence, the terminology does not correspond to a systematic framework.

'Enforceablility' is the central idea of American law. A contract which meets all the conditions of validity is 'enforceable'[110] if the law provides an action by which performance can be demanded and obtained. This term refers to the executory nature of an obligation. If the right to demand the performance of the contract is not recognised, the contract will be deemed 'unenforceable'.[111] Certain contracts are considered as illegal, but they are not void or voidable: they are merely deemed to be 'unenforceable'.[112]

The common law principally refers to nullity (absolute nullity) or even voidability (relative nullity) in the matter of validity of contracts, whereas Equity has developed more specific remedies, defined by the courts. These sanctions are accorded more on the basis of the behaviour of the parties than on the types of flaws capable of affecting a contract.[113] The classic examples of this approach are the restrictions on capacity of specific categories of persons, like minors and the disabled. The power to contract has been limited in order to protect these people from the harmful consequences of a contract concluded in an imprudent manner. An analysis of the parties' behaviour during the contractual negotiations allows, moreover, one party to annul the contract by reason of a flaw in consent which was caused by 'misrepresentation' or 'duress'.

A contract is 'void' when it produces no legal effect.[114] A void contract, according to American law corresponds better, perhaps, to the idea of inexistence elaborated in French law or in Italian law.[115] However, the ambiguity of this terminology is obvious: if a contract is void, it cannot be considered to be a contract, because the law gives no remedy in case of breach nor does it recognise an obligation to perform. Paragraph 7 of the Second *Restate-*

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109 In the civil law of Louisiana, the same expressions are used as in French law. The notion of absolute nullity as opposed to relative nullity is thus found. (Articles 11 and 12 LCC); A. LEVASSEUR, *Précis in Conventional obligations. A civil code analysis*, Charlottesville, 1980.

110 'When a promise is entitled to either a money judgment, an injunction or specific performance because of the breach, the contract is said to be enforceable': J. D. CALAMARI, J.M. PERILLO, *The Law of Contracts*, 4th Edition, 1998, p. 20.

111 § 7 2nd Rest. *Unenforceable contracts: An unenforceable contract is one for the breach of which neither the remedy of damages nor the remedy of specific performance is available, but which is recognized in some other way as creating a duty to performance, though there has been no ratification.*

112 § 8 2nd Rest.

113 E. A. FARNSWORTH, W.F. YOUNG, C. SANGER, *Contracts. Cases and Materials*, 6th Edition, New York, 2001, p. 299.

114 R. A. LORD, *Willinston on Contracts*, 4th Edition, New York, 1990, p. 49.

115 See the observation which follows.

ment[116] clearly agrees with this interpretation. Many situations where a contract will be considered as 'void' can be identified, it being noted that the terminology seems to use the terms 'unenforceable' and 'void' indiscriminately. It is stated that an illicit contract is 'unenforceable'[117] and often 'void':[118] when the courts refuse to grant performance of the contract by reason of harm to ordre public, they consider the contract as 'void',[119] but they sometimes prefer to state simply that the contract is 'unenforceable' on the part of one of the parties or even both parties.[120] An exchange of promises, which is not supported by 'consideration' is often considered as a void contract, even if it would be more correct to consider, in such a case, that no contract exists.[121] Another example treats a bilateral contract as void because there was no 'mutuality of consideration'.[122] This condition is borne out where the promise made by one of the parties, or even by both parties, is illusory or vague. In regard to the latter case, legal academic discussion has been able to support the idea that this is not a case of nullity,[123] because in the case of non-performance of one of the promises it would be possible to '*donner une nouvelle vie* (give a new life)' to this promise by considering it as merely a unilateral contract. Finally, although this situation is less common, a contract resulting from the exercise of physical violence on one of the parties is void,[124] as paragraph 174 subsection 2 of the Second *Restatement*[125] attests.

A contract is 'voidable' or 'legally unenforceable',[126] if one or many parties have the power to demand the termination of the legal effects created by the contract or indeed the power to destroy this power by ratification.[127] This power to annul or ratify is given to minors and to persons who have contracted in the case of fraud, mistake or duress.[128] These situations which are indifferently referred to as 'voidable' or 'unenforceable' are approximate to the situations that are treated by relative nullity in other systems. In effect, the term 'voidable' is used in a similar sense, in the situation where a party entitled to demand that the contract be annulled must act within a determined period, manifesting his desire to annul or ratify the contract. Voidablity is often found in cases which

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116 § 7 *2nd Rest. Void contract: a promise for breach of which the law neither gives a remedy nor otherwise recognizes a duty of performance by the promissor is often called a void contract.*
Under § 1, however, such a promise is not a contract at all; it is the 'promise' or 'agreement' that is void of legal effect. If the term 'contract' were defined to refer to the acts of the parties without regard to their legal effect, a contract could without inconsistency be referred to as 'void'.

117 § 178 *2nd Rest.*

118 J. D. CALAMARI, J.M. PERILLO, *The Law of Contracts*, 4th Edition, 1998, p. 820.

119 See. *Holman v. Johnson* [1775] 98 E.R.1120, esp. p.1121, *per* L. MANSFIED.

120 E.A. FARNSWORTH, *op.cit.*, p. 315.

121 J. D. CALAMARI, J.M. PERILLO, *op.cit.*, p. 20.

122 J. D. CALAMARI, J.M. PERILLO, *op.cit.*, p. 201.

123 J. D. CALAMARI, J.M. PERILLO, *op.cit.*, p. 210.

124 E.A. FARNSWORTH, *op.cit.*, p. 255: as contract is defined in terms of enforceable promise, a void contract is not a contract at all.

125 J. D. CALAMARI, J.M. PERILLO, *op.cit.*, p. 320.

126 C.D. ROHWER, A.M. SKROCRI, *Contracts*, 2001, St. Paul, p.159.

127 § 7 *Voidable contracts: a voidable contract is one where one or more parties have the power, by a manifestation of election to do so, to avoid the legal relations created by the contract, or by ratification of the contract to extinguish the power of avoidance.*

128 J. D. CALAMARI, J.M. PERILLO, *op.cit.*, p. 20.

involve the incapacity of a party,[129] fraud, mistake,[130] duress or other cases of illegality of contract. In the cases where a contract is annulled for duress or misrepresentation, it must be noted that the expressions 'rescind' and 'avoid' are used as synonyms. In Equity, the sanction of voidablility is recognised in the case of 'undue influence'.[131]

In English Law, the terms 'void' and 'voidable' are similarly used. These two terms cannot be considered as totally in line with the distinction that separated the ideas of absolute and relative nullity.

Certainly, at first glance, the conditions for implementation are quite similar to those which govern actions in absolute and relative nullity respectively. For example, the two parties can invoke the 'void' character of the contract and the judge cannot refuse to pronounce this sanction if the conditions are fulfilled. Like the situation of relative nullity, in the case of a 'voidable' contract, the party who was the victim of a mistake has the option of ratification or rescission of the contract within a reasonable time period; in principle, the judge has a discretionary power to grant or refuse the rescission depending on different factors (see section 2 (2) of the *Misrepresentation Act* of 1967, which confirms this power in the case of non-fraudulent misrepresentation.)

Behind this apparent convergence, in reality, English Law envisages the terms 'void' and 'voidable' in a manner which distances itself considerably from the distinction between absolute and relative nullity in the civil law systems.[132] In English Law, the conditions giving rise to this sanction, quite similar it is true, take second place in the preoccupations of jurists and in case law, in favour of a question considered as pivotal: that of the effects of a 'void' or 'voidable' contract on the rights of third parties. A 'void' contract is considered to have never existed and no right can be transmitted to a third party buyer, by virtue of the maxim *nemo dat quod non habet*. A 'voidable' contract continues to have effect up until such a time as it is rescinded and therefore a third party buyer possesses a valid title: he cannot be required to return good to the original owner unless rescission has been granted.[133]

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129 In the 19th century the Supreme Court declared that '*a lunatic or a person* non compos mentis*, has nothing which the law recognizes as a mind and … cannot make a contract which may have any efficacy as such*': Dexter v. Hall, 82 US (15 Wall) 9, 20 (1872). Today this contract is not considered as void but as voidable. The flaw can be invoked by the incapable party (§ 15 Restat.). In some states, the rule of nullity has been retained by statute and a contract entered into by a incapable party during a period of guardianship is considered void. (E.A. FARNWORTH, *op.cit.*, p. 232).

130 A distinction must be made between mutual mistake and unilateral mistake: E.A. FARNSWORTH, *op.cit.*, p. 613 and 619. Generally, voidablity can be put into action in the case of unilateral mistake, with the exception of 'palpable mistake' (a mistake which the other party expected and was recognised to have accepted). The actual case law has often allowed voidablity in the case where only the consent of one party was affected by the mistake. J. D. CALAMARI, J.M. PERILLO, *op.cit.*, p. 355.

131 J. D. CALAMARI, J.M. PERILLO, *op.cit.*, p. 324.

132 J. CARTWRIGHT, 'Defects of consent and security of contract: French and English law compared', in: *Themes in Comparative Law, in Honour of Bernard Rudden*, P. BIRKS, A. PRETTO (eds.), OUP 2002, p. 153.

133 *Shogun Finance Limited v. Hudson* [2003] UKHL 62, [2004] 1 All ER 215; B. FAUVARQUE-COSSON, 'Contrat void ou voidable: de l'enjeu de cette distinction, en droit anglais, pour le tiers acquéreur de bonne foi', RDC 2004/4, p. 1096.

b) The persisting difficulties surrounding the distinction

Classifying nullities into two categories does not allow us to take in all the causes of nullity. This is why the different systems have undertaken to define nullity by creating subcategories which will allow us to fine tune the distinction.

In French law, MM. FLOUR, AUBERT and SAVAUX[134] identify five cases of nullity: nullity for a flaw in consent, nullity for the absence of purpose, nullity for the disregarding of formal rules of contract, nullity for the violation of a provision of social ordre public and finally, nullity protecting interests other than those of the parties.

Lack of consent occurs where consent has been expressed but in fact there is only the appearance of consent. Pragmatically, this is a question of '*erreur-obstacle*'[135] and a contract that has been concluded under the stranglehold of mental trouble. In this instance, according to the terms of Article 489 subsection 2 of the Civil Code, the mental trouble is sanctioned by relative nullity. By contrast absolute nullity continues to be used as a sanction for *erreur-obstacle* even though it would seem logical that this would be punished by relative nullity, which can be invoked by the two parties as in such a case the two have been deceived. The French Proposals (Avant-projet français) harmonises and rationalises these two figurative cases in Article 1109-2, which states *'l'absence de consentement entache la convention de nullité relative,'* ('The absence of consent taints the contract with relative nullity').

Nullity for the absence of purpose is designed to protect the interests of the party who is obligated under the contract without there being a reciprocal obligation, purpose being understood not only in the sense of the purpose of the obligation but also in an economic sense close to the Anglo-Saxon idea of consideration. Nullity for lack of purpose comes in to protect an individual's interests and thus lack of purpose must logically be punished by relative nullity. However, it seems that, for a long time, the absence of purpose has been confused with the illicit purpose or an immoral purpose both of which must be punished with absolute nullity because their purpose is to protect ordre public. This confusion explains why, until a very recent period, the absence of a credible price was punished with absolute nullity. In all events, it seems that relative nullity has prevailed afterall. Such is, moreover, the direction taken by the French Reform Proposals which state in Article 1124-1: *'L'absence de cause est sanctionnée par une nullité relative de la convention. L'illicéité de la cause entache celle-ci de nullité absolue,'* ('Absence of purpose is punished by the relative nullity of the convention. Illegality of purpose taints the contract with absolute nullity'). The French Reform Proposals propose to punish the lack of an object equally with relative nullity. In effect, in the terms of Article 1122, *'l'illicéité de l'objet entache la convention de nullité absolue. L'absence d'objet est sanctionnée par une nullité relative,'* ('An illicit object the contract with absolute nullity. The absence of an object is punished with absolute nullity.')

Nullity imposed for disregarding the rules of formality is one of the most difficult questions for the determination of the choice of nullity as the foundation for such rules varies in relation to the interests protected. Although, if it is clear, for example, that the formalities imposed in the area of donation are laid down with the aim of protecting the donor and that the formal requirements imposed in the area of consumer rights tend to

134 J. FLOUR, J.-L. AUBERT, E. SAVAUX, *op.cit.*, no. 336.

135 *Ibid.* no. 194.

protect the consumer, it is not so easy to determine which interests the formalities protect in the case of a mortgage or a marriage. The French Reform Proposals broach this delicate question in its Article 1127-4 which states, *'Le régime de l'action en nullité pour défaut ou vice de forme, lorsqu'il n'est pas déterminé par la loi, dépend de la nature des intérêts que la forme vise à protéger,'* ('The regime for instituting proceedings in nullity for a defect or absence of form, when it is not specified by law, depends on the nature of the interests which the formality is designed to protect').

Nullity for the violation of public social order is understood by FLOUR, AUBERT and SAVAUX to mean a violation of a rule akin to an order for public protection. In this situation, it seems logical to consider that the violation of such rules in the framework of contract formation, or in the enactment of a clause should be punished by relative nullity thus preventing the employer, insurer, professional from invoking legislation enacted in favour of the employee, insured or consumer.

Finally, the last scenario of nullity envisaged by the authors concerns nullities that protect private interests other than those of one of the parties, most notably the rights of certain determined third parties. It seems to be now accepted that it is indeed relative nullity which is used to punish a flaw affecting the formation of such a contract.

In Italian law, nullities have also undergone an evolution linked to difficulties of classification by reason of the introduction of new forms of nullity: Italian law has thus developed sub-categories of nullity. From the traditional individualist and voluntarist perspective of Italian law, nullity was conceived as the consequence of the absence of a constitutive element, one which was essential to the contract or a grave anomaly affecting the contract. Under pressure from a number of different factors linked to the increase in transactions and the emergence of weaker parties, contemporary Italian law has strived to control the fairness of exchanges by sanctioning the exercise of the liberty to contract of the co-contractant (which is explained in Italian law through the medium of the exercise of *'l'autonomie privée'* (Private autonomy)) when such an exercise shows itself to be formally correct but abusive in its substance. The exercise of contractual freedom is legitimate within the limits of its compatibility with the interest that the judicial system considers 'worthy of protection' (*'meritevoli di tutela'* Article 1322 of the Code civil). In this new panorama, nullity derives not solely from a structural deficiency in the contract, but also from contractual conduct which does not merit state protection. In this manner, certain special laws set out exceptions to the principles laid down by the Code in the matter of nullity. Thus it is not possible to define a unified category of nullity. Special nullities are referred to in quite a general manner. This heterogeneous category includes the classic cases of nullity[136] and the *'nouvelles nullités'*/new nullities.[137] Italian law thus uses a terminology which has been enriched to described the different characteristics of nullity.

The nullities can be textual or virtual, depending on whether they depend on an express legislative text or on the application of general criteria, such as those laid down by subsections 1 and 2 of Article 1418 of the Italian Civil Code.[138] The Italian *Cour de*

136 C.M. BIANCA, *Il contratto*, in: *Diritto civile*, vol. III, 2nd Edition, Milano, 2000, p. 623.

137 C.M. BIANCA, *Il contratto*, in: *Diritto civile*, vol. III, 2nd Edition, Milano, 2000, p. 624.

138 Article 1418, subsection 1.: *'Il contratto è nullo quando è contrario a norme imperative, salvo che la legge disponga altrimenti'*. Subsection 2: *'Producono nullità del contratto [la mancanza di uno dei requisiti indicati dall'articolo 1325], l'illiceità della causa, l'illiceità dei motivi nel caso indicato dall' art. 1345 [e la mancanza nell'oggetto dei requisiti stabiliti dall'art. 1346 c.c.]'*.

cassation has finally intervened[139] to define the field of application of nullities: it is limited to cases in which either the clash with imperative norms invalidates the 'intrinsic' elements of the contract (the case in virtual nullity) or the nullity is directly and expressly provided for by the legislator (the case in textual nullity).

Italian law establishes, moreover, a distinction between structural and political nullities. Structural nullities are those which derive from the non-respect of a condition imposed by law. They render the contract imperfect or incomplete and thus are sanctions, in the terms of article 1418, subsection 2 of the Civil Code, a lack of agreement, object, purpose, required formalities, as well as a contract concluded under an impossible suspending condition or even subject to a potestative condition. Political nullities are the consequences of the violation of general obligations imposed by the law (nullity for illicitness), for the direct protection of the public interest regarding the judicial regulation of commerce and for the protection of the particular interests of the contractants. These nullities can be textual (see for example, Article 1418 subsection 3 of the Civil Code) or virtual. In the latter case, such nullities operate as sanctions for illicit contracts – where the illicitness affect the purpose, common intent or the object – and contracts that are contrary to imperative norms excluding exemption *ex lege*.

In English law, as in American law, there is a case law based approach to nullities. This renders any attempt at systematisation delicate. Some authors have proposed to introduce terminological distinctions to characterise nullity by reason of the illicitness of a contract. For example, CHESHIRE and FIFOOT have suggested that a distinction be drawn between contracts that are radically contrary to the fundamental values of society and those which only place a social or economic interest in question: the first type of contract would be 'illegal and void' whereas the second type would be simply declared 'void'.[140] 'Illegal and void' would refer to contracts to commit a crime, civil infraction or fraud, or contracts which threaten sexual morality, contracts contrary to public security, contracts that obstruct the administration of justice, contracts aimed at corruption in public life and finally contracts which have the aim of defrauding the fiscal administration. Contracts that would be simply declared 'void' include those which were designed to deprive the courts of their natural competence, those which endanger the institution of marriage and those which hamper the principle of free competition.

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139 Cass.civ., 29 September 2005, n. 19024, nota V. ROPPO, G. AFFERNI, *Dai contratti finanziari al* contratto in *genere: punti fermi della Cassazione sulla nullià virtuale e responsabilità precontratuale*. It must be pointed out that the First Chamber of the *Cour cassation* has reconsidered this interpretation in a decision dated 16 February 2007 (Ordonnance n° 3683 du 16 février 2007 Corr.giur. 2007, p. 631, note V. MARICONDA, "*Regole di comportamento nella trattativa e nullità dei contratti: la criticabile ordinanza di rimessione della questione alle sezioni* unite"). In its consideration of whether the violation of an obligation of information weighing on financial agents constituted a violation of mandatory norms, the *Cour de cassation* held that it constituted a nullity in conformance with Article 1418, paragraph 1 of the Code civil. This divergence in interpretation between the different chambers of the *Cour de cassation* must be settled by a decision of a united sitting before the end of 2007. Thus, the last word on the contrast in case law will be pronounced by a united sitting of the court before the end of 2007.

140 M. FURMSTON, *Cheshire, Fifoot* & *Furmston's Law of Contract*, OUP, 15th Edition, 2006, p. 372.

In spite of these differentiated terminologies, it seems that the regimes of relative and absolute nullity (or the equivalent terms) have converged towards having common characteristics.

c) Towards a timid convergence of the respective regimes

The various nullity regimes each present common points, no matter which system is being studied. The decision of the party with the cause of action, ratification, prescription or even the scope of the nullity and its retroactive effect are characteristic elements which, to a certain extent, are defined in a similar manner. Nonetheless, this overlap is merely an overall tendency since certain divergences here and there can be revealed. These nuances introduce terminological confusion as, depending on the system studied, when for example relative or absolute nullity is referred to, the term is not understood as referring to an univocal regime.

The person entitled to take legal action: First, the general tendency regarding who has a cause of action in law is largely to extend the right to take an action in absolute nullity, while an action in relative nullity is restricted to those persons whose interests are protected.

Thus, in French law, absolute nullity can be invoked by all persons who can show a serious interest in the result, either personal, legitimate, about to be brought into existence or a current interest. In the case of relative nullity, it is necessary to establish whether the nullity protects the interests of the two contractants or other interests. In the first scenario, the principle is that only the contractant who the nullity is designed to protect can act in justice. This is also the solution retained by the French Reform Proposals which state in Article 1129-3: *'La nullité relative ne peut être invoquée que par celui que la loi entend protéger,'* ('Relative nullity may only be invoked by those whom the law intends to protect'). In the second scenario, it is appropriate to attribute the right to take proceedings to all persons protected, whatever their number, but to restrict the right to those people alone. Nullity is in principle pronounced by a judge.[141] From this point of view, the distinction between relative and absolute nullity is not sufficient to explain the powers of the judge. In effect, a judge pronounces nullity, whether it is absolute or relative:[142] in certain cases the judge is obliged to pronounce whereas in others the power is discretionary. For example, the relative nullity of acts entered into by a person lacking

141 In the line of the classic theory of nullities, it has been maintained that sometimes the judge while satisfied that absolute nullity had been established would pronounce the relative nullity of the contract. For a criticism of this approach considered to be redundant, see: F. TERRÉ, Ph. SIMLER et Y. LEQUETTE, *Droit des obligations*, Dalloz 2005, no. 365, p. 361.

142 Nevertheless, the possibility offered to the parties to annule their contract without going before a court must be rememberd here. This is referred to as contractual or amiable nullity. On this matter see, in particular, O. GOUT, *Le juge et l'annulation du contrat*, Préf. P. Ancel, PUAM 1999, n° 153, p. 111. "… The parties recognising on their own initiative, in other words, by avoiding recourse to the courts, that the contract that binds them is void, and make it disappear from the legal order by bringing about all the consequences that attach to such a disappearance".

capacity could in some cases be imposed by law (Article 502 of the French Civil Code regarding acts entered into after a judgment placing the person under guardianship) or could be discretionary (Article 503 of the French Civil Code which states that acts concluded by an individual lacking capacity before the judgment placing such an individual in guardianship can be declared null). Moreover, case law seems hesitant on the point of whether a judge can choose to award nullity or not as a matter of course. Some decisions consider that a judge can award absolute nullity as a matter of course on the condition that the nullity affects the ordre public; others hold that the judge can accord nullity as a matter of course whatever its nature, relative or absolute, as long as the judge respects the principle of *'immutabilité du litige,'* which is greatly revised by the New Code on Civil Procedure.[143]

In the law of Quebec concerning absolute or relative nullity, the judge must declare the non-conformity of a contract with the proscriptions of the law. Article 1420 of the Civil Code of Quebec states that the relative nullity of a contract *'ne peut être invoquée que par la personne en faveur de qui elle est établie ou par son cocontractant, s'il est de bonne foi et en subit un préjudice sérieux,'*[144] ('cannot be invoked except by the person in whose favour it is established or by his co-contractant if he is in good faith and suffering a serious injury'). In all events, the court cannot automatically accord nullity. On the contrary, Article 1418 states that *'la nullité absolue d'un contrat peut être invoquée par toute personne qui y a un intérêt né et actuel,'* ('the absolute nullity of a contract can be invoked by any person who has an actual or potential interest therein'). Moreover, it can be accorded automatically by the judge.

In Italian law, in the terms of Article 1421 of the Civil Code, any person who has an interest can take an action and nullity can be automatically accorded by the judge *(rilevabilità d'ufficio)*. Nevertheless, European Community law has been greatly influential in this regard: Italian law provides more and more often, owing to the transposition of directives, for relative and absolute nullity in an expression that is very close to that of French law.[145] This new distinction has consequences for the regime of nullity: relative nullity can be invoked solely in the interest of the person demanding the action. Multiple examples illustrate this characteristic: In the matter of contract negotiated outside commercial premises (Article 10 d.lgs. 92/50), concerning timeshare properties (Article 9 d.lgs 98/427), concerning distance selling contracts (Article 11, d.lgs. 99/185), banking contracts and consumer credit agreements (Articles 117, 124, and 127 d. lgs 93/385). In the cases outlined by Articles 1469 *quinquies* and 1519 *octies*, only the person protected has the right to take action but the flaw that affects the contract can be automatically taken account of by the judge.

In English and American law, the same scheme can be observed: the protected person can invoke the nullity of a contract if it is 'voidable' whereas any other person with an interest can take an action to establish the nullity of a 'void' contract. When the contract is 'voidable', the courts privilege the principle of conservation of contract. Only the interested party has the power to demand the declaration of nullity; until the commence-

143 On this question see, J. GHESTIN, *Traité de droit civil. Le contrat: formation*, LGDJ no. 750-1 and following.

144 This drafting is a modification of the wording of the Civil Code of South Canada which was not as flexible. This approach does not seem to be known in French law.

145 R. QUADRI, *'Nullità e tutela del contraente debole'*, in: C.e I, 2001, p. 1143.

ment of such an action, the contract is perfectly valid.[146] However, when a contract is 'void', the judge has the power declare nullity in his own right: he can *'refuser d'appliquer le contrat contraire à l'ordre public,'* ('refuse to apply a contract contrary to the ordre public).[147]

In German Law, the *'Nichtigkeit'* takes effect without the intervention of a judge. Yet it must be declared as a matter of course by a judge if, in the case of litigation, the parties have established the necessary facts. In the case of *'l'Anfechtung'* the party concerned can choose to unilaterally declare that the contract is annulled. This unilateral declaration (*'Gestaltungerklärung'*) would be taken into account by a judge in the case of litigation and could be invoked by any person.[148]

Prescription and Ratification. Secondly, the operation of nullities necessitates the determination of the prescription period for the action in nullity and of the possibility of ratifying the contract tainted with such a flaw. The distinction between relative and absolute nullity in this regard is of some importance. Relative nullity, which protects private interests, should allow the person concerned to renounce such protection by ratifying the contract or to act within a relatively brief period; absolute nullity, which punishes a violation of a rule in the general interest, should not be able to be set aside by ratification and should be the object of an action within a longer time period. For the most part, the legal systems studied apply this distinction but certain particularities are maintained.

In French law, ratification is analysed as a unilateral act by which one person renounces the right to invoke a nullity. This conception of ratification is confirmed by the French Reform Proposals which outline in subsection 3 of its Article 1129-4 that *'la confirmation, ratification, ou exécution volontaire dans les formes et à l'époque déterminées par la loi, emporte la renonciation aux moyens et exceptions que l'on pouvait opposer contre cet acte, sans préjudice néanmoins du droit des tiers,'* ('ratification, validation, or voluntary execu-

146 'As such, the agreement, though voidable, creates legal obligations and results and is properly defined as a contract': R. A. LORD, *Willinston on Contracts*, 4th Edition, New York, 1990, p. 49.

147 *Holman v. Johnson* [1775] 98 E.R. 1120, esp. p. 1121, per L. MANSFIELD. On the jurispudential evolution see: E. McKENDRCK, *Contract Law*, Palgrave law masters, 7th Edition, 2007, pp. 69 and following.; B. FAUVARQUE-COSSON, *op cit*.

148 Compare with Spanish law which distinguishes between *"nulidad"* and *"anulabilidad"*. *"Nulidad"* is characterised by the fact that a contract tainted by a this flaw is "void *ab inito*, and thus does not generate any effect of whatever nature (O. GOUT, *op.cit.*, n° 32.The causes of *"nulidad"* are generally outlined by the law (absence of consent, object, cause and any formality that is outlined as *ad solemnitatem*, illegality of object or cause, contrary nature of the contract to the rule of law, contrary to public policy…) "A*nulabilidad*" has come to punish the alteration of conditions of validity of a contract that are laid down with the purpose of protecting the contractant (flaws in consent, incapacity). Contrary to *"nulidad"*, *anulabilidad*" is dependence on legal action by the person that the law is designed to protect. In this regard, this action resembles an action in nullity that is recognised in French law (See on this matter: M. PASQUAU LIANO, *Nulidad y anulabilidad del contrato*, ed. Civitas 1997; *adde*. D. HOUTCIEFF, "Les sanctions de la formation du contrat", in: *Les concepts contractuels français à l'heure des Principes du droit européen des contrats*, P. REMY-CORLAY, D. FENOUILLET (sous la direction de), Dalloz 2003, p. 115 and following, esp. p. 121).

tion in the form and in the time period as laid down by law, leads to the renunciation of the methods and exceptions which one could use to oppose a contract, without prejudice to the rights of third parties'). Ratification of nullities should respond to the criteria of the law that are common to all ratification: the ratifier must have knowledge of the flaw by which the act is tainted, meaning the cause of the nullity; he must have the intention of repairing the flaw, i.e. to renounce the right to assert the nullity; and the ratification itself must be exempt of all flaws.[149] In principle, ratification can only cover the relative nullity of a contract or act. Ratification leads to the retroactive validation of a null contract. *'Celui-ci produit, pour le passé comme pour l'avenir, tous les effets dont, en le concluant, les parties étaient convenues'*[150] ('The latter produces, for the past and for the future, all the effect which in concluding the act, the parties had agreed upon'). However, *'la confirmation a un effet purement relatif, c'est-à-dire limité au seul confirmant: celui-ci perd son droit de critique; les autres conservent le leur,'*[151] ('ratification has a purely relative effect, i.e. limited to the ratifier alone: this person loses the his right to criticize; the others retain theirs,') without causing injury to the rights of third parties.[152] The ratification of the contract is not capable of being invoked against third parties, if it would harm their rights. The act remains valid between the parties: it influence remains limited between the parties and does not affect the rights of third parties at all.

French case law subjects actions in absolute nullity to the thirty-year prescription period of Article 2262 of the Civil Code. An action in relative nullity has a fifteen-year prescription period (application of Article 1304 of the Civil Code). The *'exception de nullité'* ('exception of nullity') is perpetual.[153] Therefore, even if the foundation for the exception of nullity is found in the act itself, to avoid the execution of an irregular act after the expiration of the prescription period, jurisprudence has allowed the exception to be raised in relation to a partially executed contract. In such a case, the jurisprudence has outlined that the nullity, raised by way of action or exception, leads to the retroactive erasure of the contract; if the parties cannot be returned to the state they were in before the conclusion of the contract, restitution must intervene in the form of an indemnity.[154] In the framework of the French Reform Proposals, the prescription periods for absolute and relative nullity are shortened (Article 1130: *'L'action en nullité absolue se prescrit par 10 ans et l'action en nullité relative par trois ans (…),'* 'An action for absolute nullity is subject to a prescription period of 10 years and relative nullity by three years').

The law of Quebec is quite similar to French law. The ratification of absolute nullity is impossible; it can only operate against relative nullity. Ratification can be express or implied. Nevertheless, ratification requires, on the one hand, knowledge acquired by a party of the existence of the cause of nullity (i.e. that the right to nullity must have been vested, actual and known to the person protected): and, on the other hand, his certain and evident intention to renounce his right to nullity and to cover the defect (Article 1423). Ratification has the effect of making the cause of nullity disappear and rendering

149 J. FLOUR, J.-L. AUBERT, E. SAVAUX, *op.cit.*, no. 342.

150 *Ibid.* no. 349.

151 *Ibid.*

152 See Article 1338 section 3, *in fine*.

153 M. STORCK, 'L'exception de nullité en droit privé ', *D.* 1987, chron. 67.

154 Civ. 1ère, 16 July 1998, Bull. civ. I, no. 251, p. 175; *D.* 1999, jur. 361, note P. FRONTON.

the contract retroactively unassailable as it is deemed to have been correctly constituted *ab initio*.

In an identical fashion to French law, the law of Quebec allows nullity (whether it be relative or absolute) to be invoked by way of an action or by way of exception. This second option has the advantage, like in French law, of a perpetual prescription period; this power is expressly outlined by Article 2882 of the Civil Code. Since the reform of the Civil Code, it has been decided to subject an action in relative nullity to a prescription period of three years (as compared to the ten-year period before reform) however, relative nullity by way of exception has a perpetual period. In this matter, the French Reform Proposals have aligned itself with this judicial reality as without exception, Article 2274 states: *'Toutes les actions sont prescrites par trois ans, sans que celui qui allègue cette prescription soit obligé d'en rapporter un titre ou qu'on puisse lui opposer l'exception déduite de la mauvaise foi,'* ('All actions become prescribed after three years. A person who claims the benefit of such a prescription does not have to adduce any legal basis for it nor can he be faced with a defence alleging his bad faith'). In a more original manner and breaking with it common heritage with the French system,[155] The Quebec Civil Code harmonised the prescription periods for absolute and relative nullity and limits the period in which a party can act to by way of legal action to three years (Article 2925 of the Civil Code of Quebec). In this the Quebecoise approach differs from that of the French Reform Proposals which outline in the terms of Article 2275 an exception to the three-year prescription period stated in Article 2274. Article 2275 provides: *'Toutefois, se prescrivent par dix ans: (…) 2. les actions en nullité absolue (…),'* ('Nevertheless, the following become prescribed after ten years: (…) 2. Actions claiming absolute nullity'). The articulation of the periods of prescription for actions in absolute or relative nullity is confirmed elsewhere by the explicit terms of Article 1130 subsection 1 of the French Reform Proposals which state *'L'action en nullité absolue se prescrit par dix ans et l'action en nullité relative par trois ans, à moins que la loi n'en ait disposé autrement,'* ('An action for absolute nullity becomes prescribed after a period of ten years, and the action for relative nullity after a period of three years, unless the law otherwise provides').

In Italian law, the regime for nullity is characterised by the fact that it is not subject to prescription periods (*'imprescrittibilità'*) and the impossibility of nullity to be dispensed with by ratification (*'insanabilità'*). An action in nullity is imprescriptible (Article 1422 of the Civil Code), but has no bearing on the effects of either adverse possession (Article 1153 of the Civil code) nor those of concerning the prescription of an action for the *'action en répétition de l'indu,'*/'recovery of undue payments,' (ten-year prescription period: Article 2033 of the Civil Code) or for the action for damages (Article 1338 of the Civil Code). In effect, the obligation of restitution does not derive from the nullity itself, but the performance of a void contract, except if the contract is contrary to public morality. Nullity cannot in principle be set aside. However, exceptions are laid down. Between the contractants, void donations can be ratified (Article 799 of the Civil code). Nullity or voidability of an employment contract does not produce any effect for the period during which the employment relationship was executed, except if the cause of the nullity is derived from the object or purpose being illicit. A void contract can be 'converted' in regard to third parties (Article 1424 of the Civil Code): therefore a new contract is formed, which must fulfill all the necessary substantive and formal conditions. The

155 See Articles 2258 and 2242 of the Civil code of South Canada.

effects of the 'healing publicity' '*pubblicità sanante*' (Article 2652 of the Civil code) are borne out five years after the legal claim for nullity is recorded. This rule does not apply with regards to third parties who have acquired the property before the legal claim. An action '*d'annullabilità*' is subject to a prescription period of five year starting from the conclusion of the contract. In the case of a flaw in consent or of incapacity, the prescription period runs from the day when the duress ceased or, the discovery of the mistake or fraud, or from the day when the state of incapacity or inhibition ended. A voidable contract can be ratified ('*convalidato*') by the contractant who is instituting the action for nullity, by an act of ratification (Article 1444 of the Civil code) either express or implied (when the contractant has voluntarily executed the contract in the knowledge of the cause of the voidablity).

In German Law, the parties can 'ratify' a '*nichtig*' contract ('*bestätigen*'). However, this translation is not really appropriate: it is not really a ratification of a '*nichtig*' contract, but rather the formation of a new contract which fulfils the same substantive and formal conditions expunged of nullity, by the means of an act of ratification. There is no period of prescription or debarment in the case of a legal action. Only the recovery of undue payments is subject to a period of three years counting from the end of year in which the creditor either knew or should have known of the existence of his right (or a maximum of ten year, § 199 subsection 1,4 BGB). The law of annulment resulting from '*Anfechtung*' ('*Anfechtungsrecht*') is subject to a delay of debarment which is '*sans hésitation fautive*' ('without question for fault') for the mistakes outlined in § 119 BGB (at the maximum, 14 days counting from the discovery of the mistake) and one year for duress and fraud, counting from the end of the threat or the discovery of the fraud (§ 123 BGB). Once this period has passed the legal act will remain valid. An 'annulable' legal contract can be the object of ratification ('*Bestätigung*'), which conforms to § 144 of the BGB. This ratification necessitates, in the same manner as French law, that the person who ratifies has both knowledge of the flaw and the will to remedy it.

However, it is important to note that neither nullity ('*Nichtigkeit*') nor voidability ('*Anfechtung*') of a contract will affect the transfer of property (principles of separation and abstraction). As the transfer of property is an autonomous legal act in German law, distinct from the underlying contract (contract of sale, for example), it is only void or voidable when it is in itself tainted with a flaw, which is rarely the case, taking into account its neutral morality.[156] Moreover, neither nullity nor voidablity of a transfer of property prevents the acquisition of the property by a third party as long as that third party acts in good faith as regards the nullity or voidablity. (§§ 932 and ss 142, al. 2 BGB).

In American law, there is no established period of prescription: an 'avoidance' action (this action is called 'disaffirmance') must be entered into within a 'reasonable time'. The ratification of a 'voidable' contract, by reason of incapacity of one of the parties, can be express or implied or the result of the passing of a period of 'disaffirmance'.[157] Moreover, the party who is the victim of 'duress' can confirm the contract: he thus loses the power to demand nullity.[158]

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156 See H. C. GRIGOLEIT, 'Abstraktion und Willensmängel – die Anfechtbarkeit des Verfügungsgeschäfts', AcP 199 (1999), p. 379 and folllowing.

157 E. A. FARNSWORTH, *op.cit.*, p. 232.

158 E. A. FARNSWORTH, *op.cit.*, p. 263.

In English law, according to the terms of the Limitation Act of 1980 section 5: 'An action founded on a simple contract shall not be brought after the expiration of 6 years from the date which the cause of action accrued'. The law on the extinctive prescription does not apply to recourse founded in Equity. By consequence, when a contract is 'voidable', *'il n'y a pas à proprement parler de délai légal de prescription,'* ('strictly speaking, there is no legal prescription period').[159] So, for a 'voidable' contract, it is the notion of reasonable diligence which applies: *'si le demandeur n'a pas eu la diligence d'agir dans un temps raisonnable, il sera réputé avoir accepté l'état de chose dont il se plaint et perdra son droit d'agir en Equity,'* ('if the plaintiff has not had the diligence to act within a reasonable time period, he will be considered to have accepted the state of the things of which he is complaining and will lose his right to act in Equity).[160] However, English law grants the judge a discretionary power to refuse to pronounce rescission due to various factors, including the lapse of time.

Retroactivity and the scope of nullity. The retroactivity connected with the effects of nullity, both relative and absolute, remains a point of contention, even though the greater part of legal systems have adopted it as a starting point for their analysis. This question seems to be closely linked to the scope, either partial or total, of nullity and to the question of restitutions, a not insignificant factor of legal complication and uncertainty.

In French law, once nullity is pronounced, (and according to case law, either by way of an action or an exception) the same effects are produced whether the nullity be relative or absolute: the void act is retroactively destroyed because it is considered to have never existed. If the contract has been performed, even partially, restitution will be awarded. Retroactivity between the parties and with regard to third parties is diminished by legislation and case law.[161] The scope of nullity also gives rise to legal difficulties. Potential links between contracts can pose difficulty: Article L 311-21 subsection 1 of the Consumer code states for example that *'le contrat de crédit est résolu ou annulé de plein droit lorsque le contrat en vue duquel il a été conclu est lui-même résolu ou annulé,'* ('A credit contract is dissolved or annulled by right when the contract in regard to which the credit contract is concluded is itself dissolved or annulled'). However, it should be stated that in the matter of groups of contracts and/or chains of contracts, the termination of a contract will be followed by the supervening nullity of others, a form of sanction felt to be more respectful to legal security.[162] Such seems to be the position of the French Reform Proposals which state in its article 1172-3: *'Lorsque l'un des contrats interdépendants est atteint de nullité, les parties aux autres contrats du même ensemble peuvent se prévaloir de leur caducité,'* ('When one of two or more interdependent contracts is tainted with nullity, the parties to the other contracts in the same group can avail of their supervening nullity'). Moreover, partial nullity is recognised in French law. This only affects a part of the

159 O. MORETEAU, *op.cit.*, p. 272.

160 O. MORETEAU, *ibid.*

161 See for example: Article 1844-15 of the Civil Code which states that *'lorsque la nullité de la société est prononcée, elle met fin, sans rétroactivité, à l'exécution du contrat,'* ('When the nullity of a company is pronounced it puts an end to the performance of a contract without retroactivity'). The case law prohibits restitution in the case of annulment (en cas d'annulation).

162 See below.

contract.[163] In order to determine the extent of the nullity, it is generally measured against subjective criteria, such as the essential nature of the provision annulled: when it is established that the parties would have not contracted were it not for that clause, the nullity of that clause will lead to the nullity of the whole act: in the opposite scenario, the act will continue to have effect with the illicit clause severed. In such cases, it can be queried if this is really an example of partial nullity or more properly the application of *'réputé non-écrit,'*/'clauses deemed never to have been written'.

In Swiss law, Article 20.2 of the Code of Obligations states that only the flawed clauses are considered to be void, unless it is shown that the contract in its entirety would not have been concluded without these clauses.

In the law of Quebec, the retroactive effect of nullities is indifferent to the nature of the nullity in question, whether it be absolute or relative. Article 1422 states that: *'Le contrat frappé de nullité est réputé n'avoir jamais existé. Chacune des parties est, dans ce cas, tenue de restituer à l'autre les prestations qu'elle a reçues,'* ('A contract that is null is deemed never to have existed. In such a case, each party is bound to restore to the other the benefits he has received'). In the two cases, the judge must remit the parties to the *status quo ante* according to the measures for restitution laid down in articles 1699 and following. The Civil code of Quebec lays down in numerous provisions the nullity of a single clause disclaiming responsibility, an anti-competition clause without affecting the validity of the rest of the contract. These cases of partial nullity are provided for by Article 1438 which stated that the nullity of a clause does not automatically invalidate the contract unless, in the particular circumstances, the clause and the contract form an indivisible whole.

In Italian law, retroactivity also constitutes the principle of the effects of nullity or voidability. In the case of the performance of a void or voidable contract, the regime is identical: the restitution of the benefits is organised by means of an action in unjust enrichment *(en répétition de l'indu)* except against a person who lacks capacity (Article 1443 of the Civil Code). Moreover, the party who has knowledge of the cause of the nullity or voidability must pay damages (Article 1338 of the Civil code). Alleviations are sometimes provided for, notably to preserve the rights of third parties in the cases of adverse possession and registration *'sanante'*, in regard to third parties.[164] Voidability, which does not derive from incapacity, does not harm the rights of third parites who are bona fide purchasers for true value, against whom voidability is not effective (Article 1445). But after registration, voidability is enforceable even against third party purchasers for true value (Article 1145). By contrast, if the contract is concluded for no consideration or is tainted with voidability on the basis of the incapacity of one of the parties, the sanction is enforceable against third parties, unless the third party has performed the registration of the contract of sale three years (chattels or registered goods) or even five years (property rights) before the registration of the legal claim for nullity. This rule is explained by the fact that, in this case, the third party has the possibility of verifying the validity of the contract thanks to the system of legal registration. Partial nullity of a contract or nullity of specific clauses leads to the nullity of the entire contract if it can be established that the contractants would not have concluded the contract without the

163 S. GAUDEMET, *La clause réputée non écrite*, Préf. Y. Lequette, Economica 2006, no. 97, p. 54 and following, no. 97.

164 See below.

void clauses (Article 1418 subsection 1 of the Civil Code). Reference is made in such a case to the 'essential' character of the void clause. This character is determined by reference to the time at which the contract was concluded, on the basis of an objective evaluation. In a case of doubt, the judge must opt for partial nullity, by reason of the principle of conservation of contact. Article 1419 subsection 2 states that nullity of certain contractual clauses does not lead to the nullity of the contract when these clauses can be replaced by imperative norms (automatic substitution, for example, in the cases of clauses providing for an exorbitant rate). By contrast, in multilateral contracts, the nullity which affects the obligation of one party does not in principle extend to the whole contract, except in the case where this obligation must be considered as essential to the performance of the contract (Article 1420 of the Civil Code).

In German Law, '*Nichtigkeit*' is in principle, always retroactive (§ 142, subsection 1 BGB).[165] After '*Anfechtung*', the legal contract is considered void from its conclusion[166] and all benefits obtained during the performance of the contract later declared void must be restored under the principle of unjust enrichment (§ 812 subsection 1 1st paragraph 1st section.[167] BGB). In the case of mistake, the person who is mistaken must pay damages, in addition to unjust enrichment to the other party (§ 122 BGB), calculated depending on the amount of negative interest.[168] The possibility for nullity which only affects one of the contractants ('*relative Nichtigkeit*'), while lauded by a minority of academic legal commentators,[169] has not yet been recognized in case law. By contrast, when the nullity only concerns a specific clause or a part of the text, it affects in principle the totality of the contract (§ 139 BGB), except if it has been established that the parties would have concluded the contract without the offending part. The regime regarding abusive clauses is different on this point (§ 306 BGB).[170]

In American law, a voidable contract imposes the same obligations on the parties as a perfect contract until a demand for nullity has been made.[171] The void contract has no legal effect: the contract does not exist. Absolute nullity is thus retroactive. A judicial declaration of nullity aims to destroy the effects of the flawed contract. This sanction

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165 Some exceptions are provided for, like an employment contract or a corporation contract, for which restitution would be quasi-impossible: Case law, approved by the majority of the authors allows the existence of a contract in fact up until the moment of the invocation of the fault by one of the parties.

166 For employment contracts and company contracts, retroactivity is avoided in order to prevent the situation of impossible restitution.

167 The first part of the alternative concerns the case where the '*causa*' of the benefit was lacking from the outset. According to certain authors, it is the first part (subsequent frustration of '*causa*') of the second phrase of the same paragraph which should be applied, in spite of its retroactive effect. This academic debate has no effect on the actual result.

168 The negative interest consists of putting the co-contractant in the state in which he would have found himself if he had never know about the contract (damage to trust, '*Vertrauensschaden*'), whereas the positive interest consists of putting the co-contractant in the state in which he would have found himself if the contract had been duly executed.

169 C.-W. CANARIS, *Gesetzliches Verbot und Rechtsgeschäft*, 1983, S. 24.

170 See below.

171 R. A. LORD, *Willinston on Contracts*, 4th Edition, New York, 1990, p. 49.

gives rise to the regime of 'restitutions' envisaged for cases of 'unjust enrichment' in order to restore the parties to their initial positions.[172] In the case of a 'voidable' contract to which a minor is a party, the courts have often considered that the other party does not have the right to total restitution due to the 'very imprudence and indiscretion of infancy'.[173] In the case of a contract declared void as contrary to public policy, restitution is not guaranteed unless the situation causes a disproportional loss.[174]

In English law, retroactivity seems to pose a problem. Although it is admitted for a 'void' contract, it seems to be more difficult to accept for a 'voidable' contract. The theory of 'unjust enrichment' is to be put into practice to impose restitutions. Thus, contracts concluded by minors are, with certain exceptions 'voidable.' In the case of nullity, the case law is very hesitant as to the retroactive effect which can arise. The Minors' Contract Act of 1987 has given the judge the possibility of according the restitution of the goods when it is equitable and when the minor refuses to pay for these goods by invoking his incapacity. In the category of illicit contracts, the concept of 'severance' links up with partial nullity. 'Severance' takes places only if the illegal part of the contract can be separated from the rest of the contract without the contract

172 Cf. commentary c) of paragraph 7 of the 2nd Rest: 'Consequences of avoidance. The legal relations that exist after avoidance vary with the circumstances. In some cases the party who avoids the contract is entitled to be restored to a position as good as that which he occupied immediately before the formation of the contract; in other cases the parties may be left in the same condition as at the time of the avoidance. In many cases the power of avoidance exists only if the original situation of the parties can be and is restored at least substantially; but this is not necessarily the case. An infant, for instance, in many jurisdictions is allowed to avoid his contract without this qualification, so that when the infant exercises his power the parties frequently are left in a very different situation from that which existed when the contract was made. See § 14; Restatement of Restitution § 62. As to breach of contract, see Chapters 10 and 16 of this Restatement; as to mistake, misrepresentation, duress and undue influence, see Chapters 6 and 7'.

Cf. also § 158 (Relief Including Restitution), which lays down that the regime of restitutions applies to all the sanctions envisioned by the chapter. The commentary of the paragraph explains that 'avoidance of a contract ideally involves a reversal of any steps that the parties may have taken by way of performance, so that each party returns such benefit as he may have received. This is not, however, possible in all cases. Occasionally a party who has performed may be entitled to recover on the contract for the part that he has performed under the rule on part performances as agreed equivalents (§ 240). Even where this is not so, it may be appropriate to permit avoidance coupled with a money claim for restitution to the extent that one party's performance has benefited the other. Such claims are governed by the rules stated in §§ 370-77. A party may also have a claim that goes beyond mere restitution and includes elements of reliance by the claimant. See, e.g., Illustration 8 to § 153.'

173 *Utterstrom v. Myron D. Kidder, Inc.*, 124 A. 725, 726 (Me. 1924). E. A. FARNSWORTH, *op.cit.*, p. 225.

174 Cf. § 197 of the 2nd Rest., Restitution Generally Unavailable: 'Except as stated in §§ 198 and 199, a party has no claim in restitution for performance that he has rendered under or in return for a promise that is unenforceable on grounds of public policy unless denial of restitution would cause is proportionate forfeiture'.

becoming radically different from the original contract concluded by the parties.[175] In this case, the court amputates the contract and the contract survives without its illegal part. In the area of disclaimer clauses, the contract survives in spite of one or more abusive clauses which are then considered to be without effect.

Today, nullity no longer constitutes a totally homogeneous collection from the point of view of terminology. Nevertheless, nullity seems to remain a generic category in spite of these jolts: specific terms are linked to nullity, which generates additional terminological uncertainty.

B. Specific terms linked to nullity

Specific terms have appeared in different legal systems in a somewhat anarchic fashion. They distinguish themselves from nullity in their accepted meaning but are often tightly linked to nullity from the point of view of regimes, having regard to the type of fault punished or the retroactive nature of the termination of the contract that they give rise to. The following terms will be mentioned here:[176] rescission **(1)** inexistence **(2)** clauses considered to have no effect *(clauses réputées non écrite)* **(3)** and supervening nullity *(caducité)***(4).**

1. Rescission

This term appears in many systems.

In French law, rescission, the historical origins of which have already been explored, gives rise to a specific case of relative nullity;[177] most notably in a situation where *'lésion'* is proved. "A synonyme for damage in common day parlance, the word *'lésion'* designated in contractual matters, a very particular type of injury suffered by one of the contractual parties because of an existing inequalityin the benefits of the contract from the moment of formation of the contract".[178] "Rescision" in its capacity as more that an alternative term for the expression of relative nullity, allows follows the same regime in principle.[179]

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175 'If the illegal part of the contract can be separated from the rest of the contract without rendering the remainder if the contract radically different from the contract which the parties originally concluded (…)', E. McKENDRICK, *Contract Law*, Palgrave Law Masters, 7th Edition, 2007, p. 345.

176 Concerning the right of retraction for which the regime is uncertain, although sometimes close to that of nullity, it has been explored in the observations developed in the part concerning European Community and international acquis, to the extent that this right is a substantial issue in the transposition of directives concerning contracts concluded by consumers. See however, the study in French law of S. MIRABAIL, *La rétractation en droit privé français*, Préf. J.-P. Marty, LGDJ 1997.

177 The French Reform Proposals use this term in the same accepted meaning (article 1118).

178 F. TERRÉ, Ph. SIMLER, Y. LEQUETTE, *op.cit.*, n° 302.

179 "Such an action cannot be brought except by the party who has suffered from the unbalance; the rescindable act can be confirmed; the action is subject to a prescription period of fifteen

Elsewhere, in the law of Quebec, even though the Civil Code of Lower Canada was in conformity with the French provisions in denominating the cause of action in nullity of contract for the case of *lesion*, as an "action in rescission", the Civil Code of Quebec, in an effort to harmonise its vocabulary, has deleted the reference to rescission in favour of nullity. However, the characteristics, specific to this type of action have been retained.[180]

In Italian law, the law recognises the importance of the partial defect of purpose by '*rescissione*' only if the inequality between the benefit of one party and the reciprocal benefit is of iniquitous proportion (contracts concluded in a state of personal danger, Article 1447 of the Civil code) or notorious ('*ultra dimidium*': This consists of a general action in rescission for injury, Article 1448).[181] The nature of this sanction is debated.[182] The parties must be returned to the state they were in before the conclusion of the contract: if restitution is not possible, the rescission gives rise to payment of damages. The rights of third parties are not affected by rescission until the moment that the claim in rescission is publicised (Articles 2652.1 and 2690 of the Civil Code).

In American law, the use of the term 'rescission' is ambiguous. The terms 'rescission', 'termination', 'cancellation' are, in effect, often used indifferently to define the 'remedies' that put an end to a contract. The UCC has however, tried to furnish indications in posing definitions.[183] The significance of these terms also depends on their contractual context. A certain number of definitions are found in § 2-106 of the UCC. The term 'rescission' is not included in this list but the terms defined reveal just how ambiguous the terminology is: '(3) "**Termination**" occurs when either party, pursuant to a power created by agreement or law, puts an end to the contract otherwise than for its breach. On "termination" all obligations which are still executory on both sides are discharged but any right based on prior breach or performance survives. (4) "**Cancellation**" occurs when either party puts an end to the contract for breach by the other and its effect is the same as that of "termination" except that the cancelling party also retains any remedy for breach of the whole contract or any unperformed balance'.

The term 'rescission' is used, in the context of the validity of contract, as a synonym for relative nullity in the case of 'misrepresentation' and 'duress'. Its connotation is shown to be even more ambiguous in that it is often used in many senses.[184] For example,

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years. Like all nullity, rescision has a retroactive effect. The act being considered as never having been enacted, each party must return the benefits received (…)" *(ibid.)*. With regard to the specificities of rescission for *lésion*, see, in particular G. CHANTEPIE, *La lésion*, Préf. G. Viney, L.G.D.J. 2006.

180 J.-L. BAUDOUIN, P.-G. JOBIN, N. VEZINA (with the collaboration of), *op.cit.*, n° 313.

181 A. TORRENTE, P. SCHLESINGER, *Manuale di diritto privato*, 17th Edition, Milano 2004, p. 208.

182 See below, A.2. a.

183 E. A. FARNSWORTH (*op.cit.*, p. 561) returns all these notion to the same common title 'termination': 'although the UCC 2-106 defines cancellation to refer to a party's act in putting "an end to the contract for breach of the other" and termination to refer to a party's act in putting "an end to the contract otherwise that of its breach, the word termination is broadly used in this treatise to refer to both kinds of acts. Courts sometimes use rescission instead of termination, but this usage is undesirable because it suggests avoidance of the contract, which would leave the injured party with no remedy other than restitution."

184 J. D. CALAMARI, J.M. PERILLO, *op.cit.*, p. 79.

reference is made to rescission in the case of extinction of contract by application of a contractual clause of *'résiliation'*, cancellation of the contract or even in the case of cancellation of the contract for non-performance or even in the case of nullity for incapacity or fraud.

In English law, the term 'rescission' is, as in American law, the source of terminological difficulties. As in American law, the term is habitually reserved in the context of nullity for 'misrepresentation': 'rescission for misrepresentation' is referred to. In this case, '[the contract] is set aside for all purposes both retrospectively and prospectively and the aim is to restore the parties […] to the position they were in before they entered the contract'.[185] Moreover, it is sometimes used to *'désigner l'extinction du contrat en cas de résolution,'* ('designate the extinction of the contract in the case of dissolution').[186]

2. Inexistence

Inexistence refers to the case where the contract is deprived of an element without which it is impossible to conceive the existence of a legal contract. Certain systems have rejected this idea **(a).** Others seem to have given it a particular place and attributed to it a regime linked to that of nullity **(b).**

a) The rejection of inexistence by certain systems

The law of Quebec has never codified the theory of existence. This theory arising from academic legal discussion, is sometimes taken up in case law.[187] In any event, the reform of the Civil Code has put an end to the hesitations concerning the introduction of the notion of inexistence to Quebec Law. In effect, the drafting of Article 1416 gives insight into the rejection of this theory by the legislator since it is stated: *'Le contrat qui n'est pas conforme aux conditions nécessaires à sa formation peut être frappé de nullité,'* ('A contract which does not conform to the conditions necessary for the formation of contract can be deemed a nullity').

In Belgian law, after a long period of sceptism both in case law and academic writing,[188] the *Cour de cassation* approved the theory of inexistence in a decision dated 9 of January 1936.[189] However, a few years later, the Belgian *Cour de cassation* put an end to

185 E. McKENDRICK, *Contract Law*, Palgrave Law Masters, 7th Edition, 2007, p. 392; *Newbigging v Adam* [1886] 34 Ch. D 582.

186 O. MORETEAU, *op.cit.*, p. 394.

187 *Rosconi c. Dubois*, [1951] *R.C.S.* 554, p. 559; Agricultural Chemicals Co. c. Boisjoly, [1972] R.C.S. which speaks of inexistence concerning mistake on the subject of the contract. See generally: J.-L. BAUDOUIN, P.-G. JOBIN, N. VEZINA (avec la collaboration de), *Les obligations*, 6th Edition, 2005, no. 401.

188 H. DE PAGE, *Traité élémentaire de droit civil belge*, T.1, 1933, Bruxelles, Bruylant, p. 108, n° 101: "The case law has never understood anything of these questionable subtleties; It has rejected them and it was correct in doing so".

189 Cass., 9 January 1936, Pas., 1936, I, p. 110. "The dispute concerned a contract for a life annuity concluded on behalf of a person who died the day the contract was concluded. The court held

the acceptance of this term in positive law, in another decision. In a decision dated 21 October 1971,[190] the learned judges outlined that "the absence of consent does not render a contract inexistent but merely void; (…); this nullity which only protects private interests, is relative". From the time of this judgment, the majority of legal writing, followed by the case law, transposed all the instances which previously belonged to the domain of inexistence to the domain of nullity.[191]

In English law as in American law, this concept does not exist in itself. However, given that inexistence does not have to be pronounced by a judge it is possible to reconcile this notion with the term 'void' as the null and void nature of a contract is not decided by a judge but rather, where it is present, established by him.

b) The adoption of inexistence by other systems

Inexistence is a concept born in case law and nourished by academic debate in a certain number of civilist systems such as the French, Italian and German systems.[192]

French law, although hesitant regarding the meaning of the word, inclines toward its use. Inexistence is one of the causes of ineffectiveness of contract and, more generally, that of any legal act. It is generally presented in quite an elliptic manner, with the aim of distinguishing it from nullity or other causes of ineffectiveness[193] of a legal act due to a problem encountered during the formation of contract.

Inexistence seems to have been born in the 19th century in France, at first confined to the area of family law, before being extended to numerous other sections of law. In the 19th century, due to the fact that inexistence was based on the seriousness of the flaw, in order to determine the substance of the notion of inexistence, the problem of determining the respective domains of nullity and inexistence presented itself. In the work of classic legal writers '*une transfusion constante de la catégorie des nullities absolues qui se vide*

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that such a contract is without cause and thus is inexistant" P. WERY, "Nullité, inexistence et réputé non écrit", in: *La nullité des contrats*, P. WERY (sous la coordination de), Commission Université-Palais, Larcier, 09/2006, Vol. 88, p. 7 and following, esp. p. 15.

190 Cass., 21 October 1971, *Pas.*, 1972, I, p. 174, *R.C.J.B.*, 1972, p. 415, note F. RIGAUX.

191 For full analysis of the quesiton see P. WERY, *op.cit.*, p. 16-17.

192 Lebanese law, greatly influence by the French legal academic debate of the 1930s, has codified this notion by proposing a tripartite reading of the sanction for absence or flaw during the formation of legal acts, organised around absolute nullity, relative nullity and inexistence. The act will be considered to be inexistent in the case of lack of object (Article198 Code of Obligations and Contract), of absence or illicit or immoral nature of purpose (Article 216 subsection 1), absence of true consent (Article 196) or even the lack of wisdom (interpretation given to Article 176). In all these occurrences, it is not necessary to take legal action to establish that the contract has not been formed and even if an action is executed it is subject to no period of prescription. See: V. Ch. LARROUMET, *Droit civil, Tome III. Les Obligations. Le Contrat*, 5th Edition, Economica 2003, no. 530 bis, p. 536.

193 For example see Ph. MALAURIE, L. AYNES, Ph STOFFEL-MUNCK, *Droit civil. Les obligations*, Defrénois, 2005, no. 667, p. 323; A. BENABENT, *Droit civil. Les obligations*, Domat, 10th Edition, Montchrestien, 2005, no. 200 and following.

peu à peu à celle de l'inexistence, qui se gonfle démesurément'[194] (a steady transfusion from the categories of absolute nullity, which became more and more empty, in favour of the category of inexistence which was greatly inflated) was witnessed. The domaine of inexistence became so vast that a real terminological problem was posed: '*fallait-il laisser subsister la nullité absolue ou la remplacer par l'inexistence?*' ('Should absolute nullity be left to exist or should it be replaced by inexistence?'[195] The attention of the doctrine at the beginning of the 20th century, in the matter of reconstruction of the theory of nullity, presented inexistence as a fully-fledged concept. According to certain authors it was part of a tripartite articulation of the types of ineffectiveness of a legal act: relative nullity, absolute nullity and inexistence. *'La cause d'inexistence est envisagée comme cause subjectivement gravissime de nullité'*.[196] (The cause of inexistence is seen as being subjectively more serious that the cause of nullity). Other authors considered that this lead to a '*complication inutile et illogique*'.[197] (a useless and illogical complication). *'L'acte nul, même absolument, a du moins la valeur d'une manifestation de volonté; il est incorrect, inadmissible, mais il est; au lieu que l'acte inexistant est à peu près le néant'*.[198] (A void act, even one affected by absolute nullity, must have less validity than a manifestation of consent; it is incorrect and unacceptable but it remains; whereas an inexistence act is closer to nothingness). The French Reform Proposals expressly exclude the idea of inexistence in the case of an absence of consent preferring absolute nullity for such a case.[199]

In case law, the confusions between nullity and inexistence denounced by legal academic writing at the start of the 1930s, remain obvious. In a decision of 10 June 1986, the first Civil Chamber made implicit reference to the notion of inexistence by attaching to it significant consequences by deciding that an action in nullity was, in such an occurrence, inprescriptable.[200] Morever in a decision of 5 March 1991,[201] the same jurisdiction made reference, this time expressly, to the idea of inexistence and confirmed that in the absence of mutual consent, a lending contract did not exist: *'Celui-ci ayant pour objet de financer l'acquisition d'une voiture, elle en a déduit que le prêteur ne pouvait*

194 G. DURRY, 'Rapport sur l'inexistence, la nullité et l'annulabilité des actes juridiques en droit civil français', in: L'inexistence, la nullité et l'annulabilité des actes juridiques en droit civil français, TAHC, 1961-1962, p. 615.

195 PLANIOL and RIPERT write elsewhere that 'c'est à tort que l'on a voulu transformer de nombreux cas de nullité en cas d'inexistence, à plus forte raison absorber dans l'inexistence tous les cas de nullité absolue'. (It is mistaken to wish to transform the numerous cases of nullity into situations of inexistence, it would be better to absorb into inexistence all the cases of absolute nullity'. PLANIOL, G. RIPERT, *Traité pratique de droit civil français*, n° 285, p. 365.

196 H. ADIDA-CANAC, 'Actualités de l'inexistence des actes juridiques', *Rapport annuel de la Cour de cassation* 2004.

197 C. LARROUMET, *op.cit*.

198 L. JOSSERAND, *Cours de droit civil français*, t. I, n° 151 p. 199.

199 Avant-projet français, Exposé des motifs, partie relative à la Validité du Contrat – consentement, Y.-M. SERINET, G. LOISEAU, Y. LEQUETTE.

200 Cass. civ. 1ère, 10 June 1986, Bull. civ. I, n° 159, p. 159, *RTD civ.* 1987. p. 535, obs. J. MESTRE. When an offer to give is not accepted by its beneficiary *'il ne pouvait y avoir prescription de l'action en nullité d'un acte auquel faisait défaut l'un de ses éléments essentiels'*. (it is not possible to have prescription for an action in nullity for an act which is lacking one of its essential elements).

201 Cass. civ. 1ère, 5 March 1991, D. 1993. 508, note L. COLLET.

inscrire un gage sur l'automobile du chef du contrat inexistant. L'inexistence du prêt entraîne l'inexistence de la sûreté légale à laquelle il était censé donner naissance. Le détour par l'inexistence s'explique ici par la volonté de tenir en échec une solution contestable, à savoir qu'en cas d'annulation d'un prêt, les sûretés accessoires conservent leur efficacité au titre de l'obligation "valable" de remboursement qui subsiste.'[202] (As the purpose of such a contract is to finance the acquisition of a car, it has been held that the lender could not register security on a car subject to an inexistent contract. Inexistence of the loan necessarily entails the inexistence of legal security that it has been deemed to give rise to. The roundabout route of inexistence is explained here by the wish to hold back a contestable solution, ie in the case of nullity of lending contracts, the securities that go with it retain their effectiveness under the title of a 'valid' obligation of re-imbursement which exists). In the same line of thought it is also classic to recall the words of a decision given by the *Chambre des Requêtes*, on 30 December 1902,[203] which concerned inexistence of a bid placed without the relevant department's recognition. This being so, in deciding that this bid was not only void but inexistent, the court concluded that the previous bidder remained bound and that the building must be sold to him.

In a more contemporary manner, there have been two distinct functions attributed to inexistence and nullity. These functions are theoretically very close and often confused in practice: the first is a state, '*néant*' (nothingness), the second, a sanction of a state different to nothingness, that of a corrupted state.

Material inexistence envisions the case of the total absence of the material act, much like the case of an uncelebrated marriage. Legal inexistence '*correspond quant à elle à des hypothèses où une condition de validité requise ad validitatem fait purement et simplement défaut, la gravité objective du vice invalidant l'acte comme s'il s'agissait d'une inexistence matérielle*'.[204] (corresponds to situations where a condition of validity required *ad validitatem* is purely and simply absent, the objective seriousness of the flaw invalidates the act as if it was a case of material inexistence.) A case of absence of consent can be envisioned under the heading of material inexistence (however, the case of incapacity must be excluded as it give rises to relative nullity.) Elsewhere, an example can be seen in a particular application of corporate law, notably in regard to fictional corporations *'Une société fictive est un fantôme juridique ne répondant pas à la définition fondamentale de l'article 1832 du code civil, elle ne comporte pas 'd'affectio societatis.'* (A fictional corporation is a legal ghost which does not correspond to the fundamental definition of art 1832 of the Civil Code; it does not behave with *affectio societatis*'.[205]) In regards to the terms of article 1844-10 of the Civil code regarding nullities in the corporate law, it would be normal to consider that fictional corporations should be annulled. However even though this approach was approved by a number of authors[206] others[207] relying on particular decision of

202 F. TERRÉ, Ph. SIMLER, Y. LEQUETTE, *op.cit.* n° 414, spe. note 1 *in fine*.

203 Ch. Req. 30 December 1902; DP 1903, 1, p. 137, note E. GLASSON; S. 1903, 1, p. 257, note A. TISSIER.

204 H. ADIDA-CANAC, *op.cit.* n° 13.

205 L. COLLET, 'Inexistence d'un contrat de prêt à défaut de consentement', D. 1993, Jur. p. 508.

206 For example, P. LE CANNU, note on Com. 16 June 1992, *Bull. Joly* August-September 1992, § 274, n° 21, p. 880.

207 J.-P. SORTAIS, note sous Rouen, 6 June 1973, *Rev. sociétés* 1974.741; J. CALAIS-AULOY, J-Cl., V° Sociétés fictives, n° 1; M. JEANTIN, note sous Civ. 1re, 23 May 1977, D.1978.89.

the Cour de cassation,[208] considered fictional corporations to be inexistent rather than null: *'Les sociétés fictives sont atteintes d'une tare beaucoup plus grave, quoique généralement moins visible; ce n'est pas leur validité qui est en cause, c'est déjà leur existence même'* (Fictional corporation are tainted with a much greater defect, although it is often less visible; it is not their validity which is in question, it is more their very existence).[209]

In addition, other authors have seemed to be stricter in their approach and have proposed to distinguish between fictional corporations caused by the less grievous faults, (for example false contributions) and inexistent corporations, caused by the more serious faults: lack of *affectio societatis*.[210] However, it has been held by the Commercial Chamber, in a decision given on 16 June 1992,[211] that *'la société fictive est une société nulle et non inexistante'* (a fictional corporation is a void and inexistent corporation).

Contrary to the effects of nullity which retroactively means that the 'contract' has never existed, going back to the day of the formation, one of the effects of inexistence is to establish the original nothingness of the contract through the binoculars of legal fiction.

It is classic legal theory to recognise as a characteristic trait of inexistence its imprescriptibility.[212] This characteristic is the direct consequence of the assertion that inexistence does not require any legal action to be established. However, a number of contemporary academic authors seem critical of this understanding.[213] As for the jurisprudence, it seems uncertain on the issue, oscillating between no prescription and the thirty year prescription period of art 2262 of the Civil Code,[214] through the bias of assimilating inexistence and absolute nullity.

As done with absolute nullity, it can be deduced from the jurisprudence that inexistence can be invoked by any interested party who can justify their interest to take action.

The impossibility of ratifying an inexistent act is a given in civil procedure and administrative law. In contract law, even if the conceptions of academic writers are conflicting, it remains the case that case law seems to recognise the impossibility of the ratification of an inexistent act. In effect, following the majority of academic opinion, which has a tendency to amalgamate inexistence with absolute nullity, and with the exclusion of all references to relative nullity, case law has outlined in decisions regarding inexistence for absence of price in contracts of sale, that the act is subject *'ni de comfirmation, ni de ratification'* (neither to ratification or confirmation).

The non-intervention of a judge seems to constitute one of the fundamental arguments of the proponents of the theory of inexistence. Yet, this dispensation with the

208 Civ. 3e, 22 June 1976, *D.* 1977.619, note P. DIENER; Com. 19 December 1983, *Bull. mens. inf. soc.* 984.295, § 105; obs. E. ALFANDARI and M. JEANTIN, *RTD com.* 1984 p. 475; Com. 11 October 1988, *Bull. Joly* 1988.939,§ 308 obs. crit. P. LE CANNU.

209 J. CALAIS-AULOY, J-Cl. Sociétés, V° Sociétés fictives, n° 2.

210 M. JEANTIN, note under Civ. 1re, 23 May 1977, *D.*1978.89 cited by L. COLLET, *op.cit.*

211 Cass. com. 16 June 1992, *Bull. civ.* IV, n° 243; *Bull. Joly* 1992, § 313, p. 960, obs. P. LE CANNU.

212 S. SANA CHAILLE DE NERE, *op cit.*, n° 5.

213 For example: H. and L. MAZEAUD, J. MAZEAUD, F. CHABAS, *Leçons de droit civil, Tome I / Premier volume, Introduction à l'étude du droit*, 10ème édition, Montchrestien, 1991, n° 356 *in fine*.

214 Cass. com. 16 juin 1992, D. 1993 p. 508, note L. COLLET.

involvement of the judge is questionable and tends to cause confusion between recourse to a court and the extent of its powers. In and of itself *'si tous les intéressés sont d'accord pour reconnaître que l'acte est entaché d'un vice et par suite pour ne pas l'exécuter, ou revenir sur son exécution, il ne sera pas nécessaire de recourir au juge. En revanche, si l'accord ne se fait pas sur ce point, l'un des intéressés peut évidemment agir d'autorité et faire comme si l'acte n'avait jamais existé, mais que l'acte soit inexistant ou qu'il soit nul, ce sera à ses risques et périls car décider unilatéralement qu'un acte est nul n'est rien d'autre que se faire justice à soi-même. En cas de contestation, c'est le juge et lui seul qui pourra trancher.'*[215] (if all the interested parties are agreed to recognise that the act is tainted by a flaw and as a consequence agree not to perform the contract or to reverse any performance it is not necessary to go before a judge. By contrast, if there is no agreement on this point, one of the interested parties can obviously act with authority and act as if the act had never existed, whether the act is inexistent or void, this conduct has its own risks and perils as deciding unilaterally that an act is void is nothing short of self-styled justice. In the case of contention it is the judge and the judge alone who can decide.)

In Italian law, inexistence as a category has a purely academic origin, but is sometimes used by the courts,[216] it takes its meaning by being contrasted to the notion of nullity. Inexistence is defined as a *'catégorie sociale'* (social category)[217] which helps to interpret and fill in lacunae in the legislation on the matter of invalidity of acts: if the legislation regulates nullity in too rigid a fashion, the interpreter can find a certain flexibility in the domain of inexistence.[218] There is no difference in nature between inexistence and nullity but more of a difference in the degree of anomalies that affect the contract.

According to academic writing and case law, inexistence is recognised when *'de profondes anomalies dénaturent de manière essentielle la structure et la fonction de l'espèce contractuelle'* (profound anomalies alter the essential manner of the structure and function of nature of contract).[219] In such a case it is not possible to support the assertion that *'un fait ou un acte social correspondent à la notion de contrat [quand] les éléments nécessaires pour avoir une espèce contractuelle manquent'*.[220] (a deed or social act corresponds to the notion of contract when the elements necessary for the nature of contract to exist are missing.) Thus *'l'inexistence va au-delà de la nullité: le contrat est inexistant quand il est privé de son minimum essentiel qui permet de parler d'un contrat ou d'un acte unilatéral'*[221] (inexistence goes further than nullity: the contract is inexistent when it is deprived of essential minimum that allows something to considered a contract or a unilateral legal act). Inexistence implies a deficiency so serious that it precludes identification as a legal act.[222] The French *Cour de Cassation* holds that *'si la nullité et l'annulabilité sont réunies dans le genus de l'"invalidité" et supposent une reconnaissance juridique de l'espèce légale, l'inexistence*

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215 G. DURRY, *op.cit.*, p. 617.

216 F. DI MARZIO, *La nullità del contratto*, Padova, 1999, p. 22.

217 F. GAZZONI, *Manuale di diritto privato*, Napoli, 2003, p. 963.

218 R. SACCO, G. DE NOVA, 'Il contratto', in: *Trattato di diritto civile*, 3° ed., Torino, 2004, p. 508.

219 Cass. 14 February 1975, in: GC, 1975, I, p. 993.

220 Cass. 20 October 1959, n. 2987, in: GI, 1960, I, 1, p. 1370.

221 F. GALGANANO, 'Simulazione. Nullità del contratto. Annulabilità del contratto', in: *Commentario del codice civile Scialoja-Branca, a cura di Galgano*, Bologna, p. 240.

222 A. TORRENTE, P. SCHLESINGER, *Manuale di diritto privato*, 17° ed., Milano, 2004, p. 249.

est caractérisée par le fait que l'acte n'est pas reconnaissable, en raison de son anomalie.'[223] (if nullity and voidability are united under the rubric of 'invalidity' and suppose a judicial recognition of a legal nature of the act, inexistence is characterised by the fact that the act is not recognizable by reason of its anomaly). For same reason as those given in this approach, inexistence can be invoked by all interested parties without limitation.[224]

In German law, the notion of '*Nicht-Existenz*' is not expressly enshrined by the BGB. But it can be employed to designate the fact that all the necessary elements of a legal act are not (or no longer) present and that, as a consequence, this legal act does not exist (or no longer exists). For example, when an offer has been issued but has not (or not yet) been accepted, the contract has not (or not yet) been concluded and is thus inexistent. The same notion could be used for when someone raises their arm at an auction as a reflex (thus without any intention to physically act) no expression of will exists and by consequences no valid bid, as the physical desire to act is a constituent element of any legal act. Thus no legal act at all exists in this case, not even a void legal act. To the extent that no legal action for nullity exists in German law the regimes for inexistence and nullity are *a priori* identical. There exists a sole difference regarding the burden of proof: the party who bases himself on a legal act must prove its existence whereas in principle it is incumbant upon the contrary party to show the proof of the nullity of such an act.

3. Clauses deemed 'struck out' or 'unwritten'

In Italian Law, the expression '*réputé non écrit*' (clauses deemed unwritten) remains unrecognised. Reference is sometimes made in a very flexible fashion to ineffectiveness of contract. In the greater part of the systems studied, the expression is used is a recurring and frequent manner to enshrine the *ab initio* ineffectiveness of certain clauses **(a).** German law is singular in distinguishing between unfair clauses deemed unwritten, unfair clauses deemed not to be integrated into the contract and ineffective clauses **(b).**

a) The *ab intio* ineffectiveness of clauses deemed to be 'struck out'

In French law the expression '*clause réputée non écrite*' (clause deemed to be unwritten) seems to be quite widely used. Different legislative[225] or regulatory texts use the expression '*réputé(es) non écrit(es)*', including, the Insurance Codes,[226] the Civil Code,[227] the Commercial Code,[228] the Consumer Code,[229] the Construction and Housing Code,[230] the

223 Cass. 10 April 1973, n. 1016, in: GC, 1974, I p. 343.

224 Cass.civ. 7 March 1980, in: GC, 1981, I, p. 111.

225 The following references are taken from the texts reproduced in the appendix of the doctoral thesis of S. GAUDEMET, *op.cit.*, p. 307.

226 Art. L 121-16, L 125-3, L 126-2, L 211-6, R. 322-53 II, R. 322-55-4 II.

227 Art. 900, 900-8, 1078-1, 1152, 1231, 1244-3, 1386-15, 1792-5, 1831-5, 1843-5, 1844-1, 1844-10, 1873-6, 2037 (which became art. 2314 of ord. n° 2006-346 of 23 March 2006).

228 Art. L 132-8, L 134-16, L 141-2, L 142-45, L 221-7 al. 3, L 221-12 al. 1, L 221-13 al. 2, L 221-16 al. 2, L 222-9, L 223-14 *in fine*, L 223-22 al. 4, L 223-26 al. 5, L 223-27 al. 3, L 223-28 *in fine* …

Environmental Code,[231] the General Code on Territorial Communities,[232] the Monetary and Financial Code,[233] the Code on Research and Development,[234] the Rural Code,[235] the Public Health Code,[236] the Social Security Code,[237] the Employment Code,[238] and even the new Code of Civil procedure.[239] Equally, jurisprudence makes reference to the concept.

This frequent use of the terms leads to the question of whether the expression is synonymous with that of partial nullity of the clause with which it is sometimes considered interchangeable.

The legal vocabulary of the Association Henri Capitant proposes, firstly *'non écrit'* (unwritten, struck out) a definition of that which is *'réputé non écrit'*(considered to be unwritten): '*se dit, dans un acte juridique, d'une clause illicite dont la nullité n'emporte pas celle de l'acte qui la contient, la clause (seule annulée) étant censée n'avoir jamais existé*' (which means, in a legal act, which the nullity of an illicit clause does not lead to the whole act being declared void, the clause (the only one annulled) is considered never to have existed.) *'L'hypothèse est, en effet, non pas celle d'un acte réputé non écrit mais d'une clause réputée non écrite. Ce sont quasi exclusivement des clauses, des conditions, des mentions … qui sont, aujourd'hui, déclarées non écrites*'[240] (the assumption is, in effect, not that of the act being deemed unwritten but merely the clause being struck out. It is nearly exclusively clauses, conditions and legal obligations which are today, deemed to be struck out'.)

In 1804, only article 900 made reference to a struck out clause. Moreover, it seems improbable that the framers of the code intended, by this insertion to create a distinct sanction from that of nullities. More pragmatically, the designation of a clause as unwritten was connected to a wellknown concept: the theory of nullities, something which explains the existence of a certain amount of terminological confusion.[241] *'La formule*

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229 Art. L 121-73, L 132-1 al.6, L 211-17, L 341-5.

230 Art. L 111-18, L 221-5, L 231-3, L 231-7.

231 Art. L 541-33.

232 Art. L 2223-34-1.

233 Art. L 112-1 al. 2, L 131-5, L 131-8, L 131-13, L 131-18, L 131-22, L 131-31, L 214-65 al. 3, L 214-66, L 214-74, L 214-75.

234 Art. L 341-2.

235 Art. L 143-5, L 321-4, L 411-68, L 411-77, L 415-6, L 415-12, L 416-6, L 461-27, L 462-16, L 462-18.

236 Art. L 1113-9.

237 Art. L 922-11, R. 922-26, R. 931-3-15, R. 931-3-21, R. 931-3-23, R. 931-3-39.

238 Art. L 122-42, L 124-3 6° , L 132-2-2, L 132-26, L 511-1, R. 517-1.

239 Art. 48, 1406 and 1459.

240 S. GAUDEMET, *op.cit.*, n° 7, p. 5.

241 The difficulties present themselves concering the vocabulary to be used when a clause is struck out: "*caviardage*" (censored) or "*gommage*" (scoured) (J. CARBONNIER, *Les obligations*, 22ème édition, PUF, 2000, n° 104, p. 204), "*effacement*" (erasure) (H. ROLAND, L. BOYER, *Adages du droit français*, Vitiantur et vitiant, Litec 1992, p. 955), "*amputation*" (amputation) (F. TERRÉ, *Introduction générale au droit*, Dalloz, 3ème édition, 1996, n° 408, p. 365), "*biffage*" (crossing out) (see for example. Civ. 3ème, 26 April 1984, Toth c/Entreprise Da Costa, unreported: *"le biffage de la clause relative à l'exception d'inexécution signifiait simplement que cette clause était réputée non écrite"*)(the crossing out of a clause relating to exceptional non-performance signifies

"clause réputée non écrite" désignerait simplement une nullité dont le législateur ou le juge entend limiter les effets à la clause illégale'.[242] ('The formula, "clause deemed unwritten" simply designated a type of nullity, the effects of which the legislator or judge intended to limit to an illegal clause.'). An example of this state of affairs can be taken from the analysis of a recent decision given by the First Chamber on 7 March 2006.[243] In this case, security has been taken out by a physical person, *a priori*, for a unlimited period. However, one clause of the contract stated that the commitment of the security lasted only as long as *'les instances'* (the authorities) of the credit company decided to accept the cancellation of the contract. Using the contract of security, the credit company called in payment of the security. The French *Cour de cassation* rejected the appeal put to it, considering that the litigious clause effectively denied the debtor the opportunity to unilaterally cancel the contract and thus it was *'nulle de sorte que, ne pouvant recevoir application, elle n'était pas de nature à affecter la validité de ce cautionnement'*. (void to the extent that it could not be applied, but not to the extent that it affected the validity of the security). The terminology used by the Court does not fail to incite questions. The Court holds that a *'clause nulle (…) ne pouvant recevoir application (…)'* (a void clause (…) cannot be applied). It can be deduced from this that the nullity was such that it was not of the nature to cast doubt in the spirit of the co-contractant, it did not even create an appearance of validity. Moreover, in principle, the theory of nullities implies that the clause or act is considered to be valid until a judge has decided that it is void. From this point of view, it seems that the use of the term 'nullity' is inappropriate, even improper. The object of the Court in this context was to save the contract as a whole while holding that one of the clause was void *ab initio*. This is the essential purpose behind striking out clauses.

An historical analysis confirms the three essential characteristics of the sanction of *'réputé non écrit'* (striking out clauses): the desire to deprive certain clauses of their obligatory value, the maintenance of the validity of the act as a whole and indifference to the importance which the parties have attached to the litigious phrase.[244]

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simply that the this clause is considered to be struck out); or even *"éradication"* (eradication) (J. MESTRE, RTD civ. 1987. 737; F. TERRÉ, Ph. SIMLER, Y. LEQUETTE, *Droit civil. Les obligations*, Dalloz 2005, n° 82, p. 99). See generally, S. GAUDEMET, *op.cit.* n° 5, p. 2 and following.

242 See S. GAUDEMET, *op.cit.*, n° 2. The confusion (assimilation) makes itself felt in the drafting of certain laws. For example, article 1446 of the NCPC states that: *'lorsqu'elle est nulle, la clause compromissoire est réputée non écrite'*. (when it is void a compensatory clause is struck out). For other references see. S. GAUDEMET, *op.cit.* n° 15, esp. note 6.

243 Civ. 1ère. 7 March 2006, n° 04-12914, *Droit et Patrimoine*, October 2006 n° 152, obs. Ph. STOFFEL-MUNCK and L. AYNES.

244 It seems that the notion of struck out clauses was recognized by Roman law, most obviously in the law of succession. *"En effet, après avoir été décrites par la périphrase 'ac sine conditione relictum esset', les conditions litigieuses furent désignées par les expressions suivantes: 'pro non scriptis esse', 'pro nullis habendas', 'nullius sunt momenti', 'nullum vim habere't, avant que l'expression 'pro non scripto habetur' apparaisse au VIe siècle, dans les Institutes de Justinien. Ces différentes formules décrivaient finalement une même réalité: les conditions condamnées étaient considérées comme non écrites dans les dispositions testamentaires, comme étant privées, dès leur édiction, de force juridique contraignante"*. (In effect, after having been described by the circumlocution *ac sine conditione relictum esset*, the litigious conditions were described by the following expressions: *pro non scriptis esse, pro nullis*

Any person who can justify an legitimate interest, direct, personal, vested and actual is authorized to the extent that an action to declare a clause to be unwritten is not an '*action attitrée*' (nominated action). Moreover, the legislator has recognised the right of authorized consumer organisation to act to suppress abusive clauses contained in the standard form contracts suggested to consumers: '*C'est, dans cette hypothèse, un intérêt collectif que ces institutions font valoir: elles ne sont pas, elles-mêmes, les destinataires de la règle de droit dont elles requièrent l'application en justice*'.[245] (In this context, it the collective interest that these institutions assert: they are not, in themselves, the recipients of the rule of law for which they are seeking court action).

The judge can automatically take notice of a struck out clause, subject to the adversarial principle and discretionary principle. Hence, '*il ne lui appartient pas d'ordonner la suppression de la clause réputée non écrite – pas plus que de prononcer la nullité de la clause annulable –, mais simplement de refuser d'ordonner l'exécution desdites dispositions*'[246] (The right to order the suppression of the struck out clause does not belong to him – any more than the right to declare a voidable clause, void – but simply the right to refuse to order the performance of the provisions concerned.)

An action to declare a clause to be struck out appears to be imprescriptable. This seems to be the position adopted as much by academic commentators[247] as by case law.[248] At the same time '*lorsque la stipulation litigieuse a reçu exécution, le constat par le juge de son caractère non écrit peut être complété par le prononcé de restitutions. Il s'agit alors de revenir sur les effets passés de la clause déclarée non écrite, de remettre les parties dans l'état qui aurait été le leur en l'absence d'exécution de la disposition litigieuse. (…) En matière de clauses réputées non écrites, la restitution paraît trouver sa raison d'être dans l'accomplissement de prestations en*

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habendas, nullius sunt momenti, nullum vim haberet before the expression *pro non scripto habetur* appeared in the 6th century in the *Institutes of Jusitinian*. These different formulations described in fact the same reality: the condemned conditions were considered as being struck out is testamentary dispostitions, as being deprived of binding legal force from their issuing.) S. GAUDEMET, *op.cit.* n° 130.

245 S. GAUDEMET, *op.cit.* n° 215.

246 S. GAUDEMET, *op.cit.* n° 225 *in fine*.

247 S. GAUDEMET, regarding the terms of act. 2219 which ushers in the title of the Civil Code pertaining to prescription, considers that '*toutes les actions*' (all the actions) outlined by article 2262 of the Civil Code are those which tend to '*acquérir*' (gain)or to '*se libérer*' (break free) and that for this reason are subject to a period of prescription.' *Or là n'est pas le sens que l'on a donné à l'action en constatation du réputé non écrit: une telle action ne vise qu'au constat d'une situation existante; cet état du droit existe, de par la loi ou la jurisprudence; il n'y a pas lieu d "'acquérir' ni de se 'libérer', la clause n'obligeant pas les parties*." (Whereas, this is not the sense which is given to an action to strike out a clause: such and action only envisions an existent situation; this is the state of law that exists, either according to legislation or jurisprudence. It is not a time to 'gain from' or to 'free oneself' from a clause that is not binding on the parties (S. GAUDEMET, *op.cit.* n° 242).

248 Notably in the matter of co-ownership. See the references cited by S. GAUDEMET, *op.cit.* n° 234 esp. note 2; adde J.-F. ARTZ, 'Les clauses réputées non écrites en droit de la copropriété – Ou le domaine respectif des articles 42, alinéa 2, et 43 de la loi du 10 juillet 1965', in: *Liber amicorum Jean Calais-Auloy, Etudes de droit de la consommation*, Dalloz, 2004, p. 29, spéc. n° 13 p. 38 à 40.

exécution d'une clause dépourvue de valeur obligatoire. L'action en restitution devrait alors être soumise à la prescription trentenaire, et ce à compter de chacune des exécutions litigieuses. Partant, si l'action en constatation du réputé non écrit n'est pas soumise à prescription, l'action tendant à revenir sur les éventuels effets produits par la clause déclarée non écrite devrait l'être'.[249] (when the litigated stipulation has been executed, the finding of a judge that it is a struck out clause can be completed by pronouncing restitutions. These restitutions comprise of reversing the effects caused by the struck out clause and returning to the parties to the state which they would have been in if the litigated disposition had not been executed (…) In a situation of a struck out clause, restitution can find its *raison d'etre* in furnishing benefits by executing a clause that is devoid of legal value. An action in restitution is thus subject to a prescription period of thirty years, counting from the execution of each of the litigated provisions. As such, if the action to establish that a clause is struck out is not subject to prescription, the action to reverse the eventual effects produced by the struck out clause must be'.

Voluntary regularisation of such a situation cannot occur except by means of a formal correction. In effect '*on ne régularise que ce qui est irrégulier*'. (one cannot regularise that which is irregular). Moreover, stuck out clauses have the effect of purging the contract of all irregularity, and do so from the conclusion of the contract. *'Le mécanisme du réputé non écrit exclut donc tout vice: il assure, dès la formation du contrat, l'existence d'un contenu contractuel obligatoire parfaitement licite.'*[250] (the mechanism of striking out clauses excludes all flaws of formations: it assures, from the formation of the contract, the existence of a perfectly licit, binding contractual content. It is not the parties that remove the flaw. It is, *de facto*, purged by the mechanism of struck out clauses. The parties to a contract must proceed by simply putting the contract into conformity with the judicial reality. No ratification seems possible.)

The Swiss Civil Code only make timid usage of the mechanism of unwritten clauses, as it only appear in article 483 al 3: *'Sont réputées non écrites les charges et conditions qui n'ont pas de sens ou qui sont purement vexatoires pour des tiers.'* (Charges and conditions which do not make sense or are purely persecutory towards third parties are considered to be struck out). However, in the heart of the Code of Obligations, which complements the Civil Code, the occurrences of stuck out clauses multiply.[251] The use of another expression 'clause réputée non avenue' (clause deemed null and void)is further noted as possibly giving rise to confusion.[252]

The Belgian Civil Code seems to equally recognise the sanction of striking out a clause most notably in its articles 1153, 1231 and also 900 which provide, in reflection of its French counterpoint: *'Dans toute disposition entre vifs ou testamentaire, les conditions impossibles, celles qui seront contraires aux lois ou aux moeurs, seront réputées non écrites'*. ('In all inter vivos or testamentary dispositions, impossible conditions, conditions which are contrary to the law or public morals will be struck out).

The Civil Code of Quebec also recognises the notion of struck out clauses to punish different clauses without destroying the act which contains them. This is shown in

249 S. GAUDEMET, *op.cit.* n° 246.

250 S. GAUDEMET, *op.cit.* n° 269.

251 Art. 995 al. 1, 995 al. 2, 999, 1002, 1006, 1104, 1106, 1109, 1110, 1115.

252 Articles 1123 and 1125 use the terms' *réputé non avenue*'.

articles 757,[253] 758,[254] 778,[255] 1101,[256] 1216[257] and 1438.[258] This last article reveals the terminological difficulties which exist in the articulation of sanctions, that the clauses concerned are '*sans effet*' (without effect), '*nulles*' (null) or '*réputées non écrites*'. (struck out). However, the Quebec doctrine does not seem to see in these terminological variations, hesitation about their basis: moreover it considers the difference terms as synonyms.[259] It is also noted that the mechanism for striking out clauses used in the Quebec

253 *'La condition impossible ou contraire à l'ordre public est réputée non écrite. Ainsi est réputée non écrite la disposition limitant les droits du conjoint survivant lorsqu'il se lie de nouveau par un mariage ou une union civile'*. (A condition that is impossible or that is contrary to ordre public is deemed unwritten. Thus, a clause limiting the rights of a surviving spouse in the event of a remarriage or new civil union is deemed unwritten.)

254 *'La clause pénale ayant pour but d'empêcher l'héritier ou le légataire particulier de contester la validité de tout ou partie du testament est réputée non écrite. Est aussi réputée non écrite, l'exhérédation prenant la forme d'une clause pénale visant le même but.'* (A penal clause intended to prevent an heir or a legatee by particular title from contesting the validity of the will or any part of it is deemed unwritten. An exheredation taking the form of a penal clause intended for the same purpose is also deemed unwritten.)

255 *'Le testateur peut modifier la saisine du liquidateur, ses pouvoirs et obligations, et pourvoir de toute autre manière à la liquidation de sa succession ou à l'exécution de son testament. Toutefois, la clause qui a pour effet de restreindre les pouvoirs ou les obligations du liquidateur, de manière à empêcher un acte nécessaire à la liquidation ou à le dispenser de faire inventaire, est réputée non écrite.'* (The testator may modify the seisin, powers and obligations of the liquidator and provide in any other manner for the liquidation of his succession or the execution of his will. However, a clause that would in effect restrict the powers or obligations of the liquidator in such a manner as to prevent an act necessary for liquidation or to exempt him from making an inventory is deemed unwritten.)

256 *'Est réputée non écrite toute stipulation de la déclaration de copropriété qui modifie le nombre de voix requis pour prendre une décision prévue par le présent chapitre'*. (Any stipulation of the declaration of co-ownership which changes the number of votes required in this chapter for taking any decision is deemed unwritten.)

257 *'La clause tendant à empêcher celui dont le bien est inaliénable de contester la .validité de la stipulation d'inaliénabilité ou de demander l'autorisation de l'aliéner est réputée non écrite. L'est également la clause pénale au même effet.'* (Any clause tending to prevent a person whose property is inalienable from contesting the validity of the stipulation of inalienability or from applying for authorization to transfer the property is deemed unwritten. Any penal clause to the same effect is also deemed unwritten.)

258 *La clause qui est nulle ne rend pas le contrat invalide quant au reste, à moins qu'il n'apparaisse que le contrat doive être considéré comme un tout indivisible. Il en est de même de la clause qui est sans effet ou réputée non écrite.*' (A clause which is null does not render the contract invalid in other respects, unless it is apparent that the contract may be considered only as an indivisible whole.- The same applies to a clause without effect or deemed unwritten.)

259 *'L'art. 1438 C.c. assimile lui-meme a la cause nulle, celle qui est sans effect ou qui est reputée non écrite. Précision utile, puisque le législateur, à travers le Code, emploie une terminologie variable pour interdire certaines clauses'*. (Art. 1438 C.c.itself absorbs the void clause, which is without effect or is considered to be struck out. This is a useful precision as the legislator, through the Code, uses a variable terminology to forbid certain clauses) J.-L. BAUDOUIN, P.-G. JOBIN, N. VEZINA

Civil Code seems not to apply exclusively to clauses since, for example, when it is a syndicate agreement that is in question, the phrase *'sans effect'* (without effect) is uses as can be seen, for example, in article 1102.[260]

In American law, the Second Restatement outlines that some conditions are not considered as 'being part of the agreement': "the other party has reason to believe that the party manifesting such assent would not do so if he knew that the writing contained a particular term, the term is not part of the agreement."[261]

In English law, before the transposition of the Unfair Terms in Consumer Contracts Regulations of 1999, and the Directive of 5 April 1998 on unfair clauses, English law allowed the use of exclusion clauses by common law and legislation. The elements analysed of such clauses are as follows. Is a disclaimer clause incorporated into a contract? Is it expansive enough to cover a violation by a party who seeks to avail of such a clause? If the clause is ambiguous, it must be interpreted *contra preferentem*. The Unfair Contract Terms Act 1977 (UCTA) allows clauses that are considered to inequitable per se and those which are do not pass the 'reasonableness test' to be excluded. If the clause in question is considered to be inequitable or unjust, it cannot protect the party who seeks to use it, it would be 'non binding' in regard to the other party and can thus be considered as 'void'.

b) The German distinction between non-integrated clauses and non-effective clauses

In German law, the 1977 legislation regarding unfair clauses – well before the transposition of the aforementioned directive – allowed a regime of clauses considered not to be integrated into the contract to be outlined. The German law on unfair clauses is much more complex than the directive which, although inspired by German law, was simplified. German law recognised two different consequences to the abusive character of a clause. The first *'Nichteinbeziehung'* (non-integration) concerns clauses, which either do not match the specific conditions of integration of general clauses in the contract (§ 305 al. 2 BGB), or are considered as staggeringly unfair (§ 305c al. 2 BGB). According to these provisions, the clauses do not make up part of the contract (*'werden nicht Vertragsbestandteil'*). The second type of consequence concerns the case of clauses considered as abusive by reason of their content within the meaning of §§ 307 to 309 BGB: such clauses are ineffective (*'unwirksam'*). The practical result is the same whatever type of clause is concerned: the clause will have no effect while the rest of the contract is maintained (§ 306 BGB).

(avec la collaboration de), *Les obligations, 6ème édition*, Editions Yvon Blais, 2005, n° 414, spéc. note 61.

260 *Est sans effet toute décision du syndicat qui, à l'encontre de la déclaration de copropriété, impose au copropriétaire une modification à la valeur relative de sa fraction, à la destination de sa partie privative ou à l'usage qu'il peut en faire.* (Any decision of the syndicate which, contrary to the declaration of co-ownership, imposes on a co-owner a change in the relative value of his fraction, a change of destination of his private portion or a change in the use he may make of it is without effect.)

261 § 211, subs. 3.

This terminological difference is maintained for two reasons.

Firstly, the sanction of 'non-integration' in the contract comes into play only in the cases where not only the clause itself, but all the circumstances of the situation are taken into account. As a result, it is not the specific terms of the clause which are punished, but their use in a specific situation; the same clause could be validly integrated in another contract if the offeror respected the condition of § 305 al. 2 BGB or avoided the shocking character of the concrete effects of the clause (§ 305c al. 2 BGB). In contrast, '*Unwirksamkeit*' (ineffectiveness) affects one clause in itself: this same clause cannot be inserted in a contract whether or not it is of the same kind. Thus "*Unwirksamkeit*" of a clause factors in a quality of the clause in itself, whereas '*Nichteinbeziehung*' only affects a specific situation.

Secondly, and this reason is linked to the first, only violation of §§ 307 to 309 of the BGB which provide for '*Unwirksamkeit*' can be litigated at a collective level by consumer associations and by other empowered organisations, through the means of an action for cessation (§ 1 *Unterlassungsklagengesetz* – Law regarding actions for cessation). The provisions which envision *Nichteinbeziehung* are not subject to collective control – something which is logical, taking into account the singular nature of the situations concerned.

4. Supervening nullity

Supervening nullity seems to be an exclusively francophonic concept,[262] which, in spite of academic studies, both ancient and recent,[263] continues to provoke difficulties.

Historically the term '*caducité*' (supervening nullity) seems to have been introduced into the legal language by so-called '*caducaires*' laws, enacted in the area of bequests. Supervening nullity understood in its historic sense must be understood as '*une inefficacité affectant un legs valable à l'origine, dont l'exécution est devenue impossible ultérieurement*',[264] (an ineffectiveness affecting a bequest that was valid to start with, the execution of which has become impossible, at a later stage) by reason mainly of '*son incapacité de recevoir, son prédécès ou enfin sa répudiation*'.[265] (incapacity to receive, the beneficiary having predeceased the grantor or even repudiation). In this accepted meaning, the supervening nullity of a bequest was without retroactive effect and operated by operation of law.

An examination of the different French and Belgian codes, shows that the term '*caducité*' (supervening nullity), as well similarly close expressions, appear only in spora-

262 It seems to be unknown in Italian law. Other systems do not recognise the concept in itself but use approximate institution such as 'frustration of purpose' in the common law.

263 In French law, see: V. WESTER-OUISSE, 'la caducité en matière contractuelle: une notion à réinventer', *JCP* G 2001, I. 290; C. PELLETIER, *La caducité des actes juridiques*, Préf. Ph. Jestaz, L'Harmattan 2004; R. CHAABAN, *La caducité des actes juridiques*. Etude de droit civil, Préf. Y. Lequette, LGDJ Tome 445, 2006; F. GARRON, *La caducité du contrat (Etude de droit privé)*, Préf. J. Mestre, PUAM 1999. In Belgian law, see; P.-A. FORIERS, *La caducité des obligations contractuelles par disparition d'un élément essentiel à leur formation. De la nature des choses à l'équité, de l'impossibilité au principe de l'exécution de bonne foi*, Préf. L. Simont, Bruylant 1998.

264 R. CHAABAN, *op.cit.* n° 5, p. 4.

265 *Ibid.*

dic fashion and specifically in area of succession law[266] and donations.[267] However case law has extended the range of supervening nullity to new situations such as contract, taking support from the traditionally accepted meaning.

Notably, French case law has thus extended[268] the domain of supervening nullity[269] to unilateral promises when the beneficiary refuses to take up an option[270] or even where a contract is subject to a suspensive condition that is not realised.[271] Supervening nullity is equally found to apply when the object of the contract has disappeared after the contract's formation or even when a person who had been crucial to the consent of one of the parties dies in the context of contracts concluded *intuitu personae*, such as a contract of agency. Contemporary jurisprudence seems to have found a new use for supervening nullity in litigation pertaining to ensemble contracts:[272] in effect, the question posed in this variety of group contract is to determine the legal basis for '*en cascade*' (cascade)[273] destruction of interdependent contracts. The French C*our de cassation* has oscillated between *résiliation*,[274] termination,[275] nullity[276] and supervening nullity.[277] However the

266 The place of articles 1035 and following in the French and Belgian Civil codes under section VIII entitled 'De la révocation des testaments et de leur caducité' should be noted. It should also be noted that in Quebec law, in the area of wills, the death of a legatee before that of the testator renders the bequest subject to supervening nullity. (art. 750 and following of the Quebec Civil Code).

267 Articles 1081 and following (esp. 1088) of the French and Belgian civil codes.

268 The scope of supervening nullity also extends to an offer which is not accepted or which is refused (see particularly, R. CHAABAN, *op.cit.*, n° 235 and following, p. 214 and following).

269 For example, a contract concluded subject to a suspensive condition is consider '*caduc.*' (C. PELLETIER, *op.cit.* n° 149 and following) if the condition is not fulfilled; a unilateral promise is also considered to be subject to supervening nullity if by the passing of time or the refusal to take up the option, the contract of sale is never formed; it is same situation for an offer or even a preference agreement.

270 See, for example, in the area of refusal to take up an option in a case of unilateral promise to buy, Cass. civ. 3e., 13 May 1998, *Bull. civ.* III, n° 103, p. 69; D. 1999. somm. 10, obs. O. TOURNAFOND.

271 See for example; Cass. civ. 7 November 2006, n° 05-11.775, Bull. civ. I, n° 457, p. 393; and also, Cass. civ. 3e., 16 June 1999, *Bull. civ.* III, n° 142, p. 98; Defrénois 1999, art. 37079, p. 1329, n° 96, obs. D. MAZEAUD.

272 Cass. civ. 1re, 4 April 2006, *Bull. civ.* I, n° 190; D. 2006, p. 2656, note R. BOFFA; RDC 2006, p. 700, note D. MAZEAUD; adde. Cass. civ. 1re, 1 July 1997, n° 95-15642, *Bull. civ.* I, n° 224, p. 150.

273 S. AMRANI-MEKKI, 'Indivisibilité et ensembles contractuels: l'anéantissement en cascade des contrats', Defrénois 2002, art. 37505, p. 355.

274 Cass. com., 4 April 1995 *Bull. civ.* IV, n° 115; D. 1996, jur., p. 141, note S. PIQUET; JCP. E. 1996, II. no 792, note E. TARDIEU-GUIGUES et M.-Ch. SORDINO, *Contrats, conc., consom.* Juin 1995, no 105, p. 7, note L. LEVENEUR.

275 Cass. com., 3 January 1972, *Bull. civ.* IV, n° 1; *D.* 1972, jur. p. 649, note. M. TROCHU. It must, however, be specified here that this decision was given before the decision by the mixed chamber which held as a principle that termination of a contract of sale cause the recision of a hire-purchase contract. (Cass. ch. Mixte, 23 November 1990, Bull. civ. ch. mixte, n° 2 and 3).

majority of academic writing[278] considers that supervening nullity is the most adapted sanction to get to grips with this complicated situation. In effect, a contract linked to another contract which was ultimately declared void (with or without retroactive effect) is validly formed and it is the intervention of an event after its formation that comes to affect its full effectiveness, in this case the interest to perform the contract.

However, in spite of this jurisprudential use of the notion, it has not yet be the subject of general legal consecration. In the French Reform Proposals supervening nullity features in the title of sanction for formation of contract.[279] Article 1131 states that: *'La convention valablement formée devient caduque par la disparition de l'un de ses éléments constitutifs ou la défaillance d'un élément extrinsèque auquel était subordonnée son efficacité [al.1]. La caducité produit effet, suivant les cas, rétroactivement ou pour l'avenir seulement [al.2]*'.[280] (A validly formed contract becomes subject to supervening nullity by the disappearance of one of its constitutive elements or the failure of an extrinsic element to which its effectiveness was subordinate [subsection 1]. Supervening nullity produces effect depending on the case either retroactively or simply for all future effects [subsection 2].) This definition is close to that proposed by Quebecoise doctrine, according to which *'il y a caducité d'un acte juridique lorsqu'un événement, subséquent à la formation de celui-ci et indépendant de la volonté des parties, atteint l'acte dans l'un des éléments nécessaires à sa*

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276 Cass. com., 3 October 1977, *Bull. civ.* IV, n° 212, p. 180; *Defrénois*, 1978, p. 862, obs. J.-L. AUBERT; Cass. com. 17 December 1985, *RTD civ.* 1986, p. 595, obs. J. MESTRE; Cass. com., 8 July 1970, *Bull. civ.* IV, n° 234; Cass. com., 18 June 1991, *RJDA*, 1991, n° 878.

277 Cass. com. 5 June 2007, *D.* 2007.1723, note X. DELPECH; Cass. civ. 1re, 4 April 2006, *Bull. civ.* I, n° , *Defrénois* 2006, n° 15, art. 38431, p. 1194 note J.-L. AUBERT; *D.* 2006, Jur. p. 2656 note R. BOFFA; *RDC* 2006/3, p. 700 obs. D. MAZEAUD; déjà en ce sens, Cass. civ. 1re, 1 July 1997, *Bull. civ.* I, n° 224, D. 1998, jur., p. 32, note L. AYNES; *JCP* G 1997, IV. 1881; *D.* 1998. somm.110, obs. D. MAZEAUD; *Defrénois* 1997, art. 36681, p. 1251, note L. AYNES.

278 See for example, S. AMRANI-MEKKI, *op.cit.*, p. 355; on the same point but with some doubts on the generalisation of subjective case R. CHAABAN, *op.cit.* n° 203 and following, p. 185 and following; equally, C. PELLETIER, *op.cit.* n° 101 and following, who recalls, nevertheless, the difficulty which can raise the use of the concept in the case of retroactive disappearance of a dissolved contract. The solution is also that use in the French Reform Proposals, which state in article 1172-3, that: *'Lorsque l'un des contrats interdépendants est atteint de nullité, les parties aux autres contrats du même ensemble peuvent se prévaloir de leur caducité'* (When one of a set of interdependent contracts is tainted with nullity, the parties to the other contracts in the same group can take advantage of their supervening nullity.) (emphasis added). Contra. recently, S. PELLE, La notion d'interdépendance contractuelle. Contribution à l'étude des ensembles de contrats, Préf. J. Foyer and M.-L. Demeester, Dalloz 2007, n° 438 and following, p. 401 and following.

279 However, an examination of the reasoning shows the difficult state of the notion or more precisely the absence of its systemisation. Although it can be understood negatively, as something which is different from nullity or termination, it appears generally difficult to address positively. The difficulty is all the more marked given that no uniformity existed in the regime.

280 For an approving view of this definition, see: R. CHAABAN, *op.cit.*, n° 304 and following, p. 273 and following; C. PELLETIER, *op.cit.* n° 147 and following, p. 194 and following; Y.-M. LAITHIER, note below Cass. civ. 1re, 7 November 2006, n° 0511.775, *RDC* 2007/2, p. 259.

subsistance et le prive d'effets'.[281] (Supervening nullity of a legal act occurs when an event subsequent to the formation of the act and independent of the will of the parties, touches one of the necessary element for the act's subsistence and deprives it of effect). Academic writing has enlarged the classic definition which considered '*caducité*' as '*la sanction de la disparition postérieure à la formation du contrat, d'un élément essentiel à sa validité*'. (a sanction caused by the later disappearance of an element essential to a contract's validity, present at the formation of a contract). Supervening nullity can only be pronounced after a event that was not fault-induced. It simply allows *'l'inefficacité d'un acte juridique pour défaillance non fautive d'un élément essentiel'*[282] (the ineffectiveness of the legal act for non-faulty induced failure of an essential element) to be established.

Further questions can be asked concerning the regime of supervening nullity. Although, for example, it is classic to consider that supervening nullity is retroactive[283] and automatic (the decision of the judge being merely declarative),[284] some authors have proposed a new interpretation of supervening nullity. They suggest a distinction, regarding the retroactive effect, between contracts concluded instantly and those with a successive formation: only the first are subjected to a retroactive effect. The same authors consider that supervening nullity is judicial.[285]

II. Destruction of a Contract as a Sanction for Non-performance

The destruction of a contract, or indeed of a clause, can also be seen as the sanction or the remedy for non-performance or for the defective performance of a contractual obligation.

In this context, the terms used to designate the destruction of a contract for non-performance of contractual obligations are numerous. In the majority of systems studied, however, the central terms are those of '*résolution*' (dissolution) and '*résiliation*'. The usage of these terms in not sufficiently stable: terminological wavering is obvious (**A**).

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281 J.-L. BAUDOUIN, P.-G. JOBIN, N. VEZINA (avec la collaboration de), *Les obligations*, 6ème édition, Les éditions Yvon Blais, 2005, n° 397, p. 414.

282 R. CHAABAN, *op.cit.* n° 27.

283 See the recent case, Cass. com. 5 June 2007, n° 04-20380, (unreported) where the commercial chamber, having regard to articles 1131 and 1134 of the Code civil, quashed a decision and held that in regard to the reflex nullity of contracts which formed part of a group contract that: "(…) The termination of contracts of rent and maintenace, when these contracts make up a complex and indivisable group contract, does not give rise to the termination of the contract of sale but only its **supervening nullity (*caducité*). The buyer must restore the bought good and the vendor the price received, unless the price is diminished by an indemnity corresponding to the depreciation the bought good has suffered by reason the buyer's use and also taking into consideration the injury suffered by the buyer by reason of the destruction of the group contract** (…)".

284 For example. C. PELLETIER, *op.cit.*; F. GARRON, *op.cit.*

285 R. CHAABAN, *op.cit.*, p. 431.

Without a doubt, one of the causes of this poorly mastered diversity resides in determining the system that is to apply, and in particular determining the effects of destruction: the difficulties associated with retroactivity are reflected in the terminology most commonly used (**B**).

A. The fine distinction between the terms 'résolution' and 'résiliation'

One would expect there to be two sets of markedly distinct concepts, one applying to each of the two terms. However, in the countries of a civil law tradition (**1**), as is those of the common law (**2**), confusion between the two terms can be detected.

1. The confusion between 'résolution' and 'résiliation' in the countries of a civil law tradition

The fault line dividing '*résolution*' and '*résiliation*' that is traced by the majority of legal systems rests, sometimes, on the technicalities of their implementation but above all, on their effects: *résiliation* can be treated as a weapon which certain systems give to each contracting party, and in a general sense, it only produces its effects in respect of the future, while in these same systems, *résolution* can in principle be treated as judicial, and brings about the retroactive destruction of the contract. Even where this terminological opposition is maintained, it is possible to misconstrue it in practice, which leads to confusion.[286]

In French law, the use of the terms '*résolution*' and '*résiliation*' refers to certain abilities available to the co-contractants in order to put a unilateral end to the contract, abilities contained just as much in legislation as they are in case law.

From a terminological perspective, these two notions seem to have always caused trouble.

Traditionally[287] *résolution* and *résiliation* have been contrasted on the sole criterion of the retroactive effect produced by the former, as opposed to the latter. Academic authors

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286 S. STIJNS notes in this vain that, '*les termes résolution, résiliation, dénonciation et rupture, pour ne nommer que ceux-ci, sont régulièrement confondus. "Instaurée" par le législateur dans le Code Napoléon, la confusion est omniprésente dans la pratique. Ce problème de terminologie dévoile une incertitude juridiqueprofonde quant aux caractéristiques et aux effets de la résiliation (unilatérale ou par consentement mutuel), la résolution (judiciaire, unilatérale ou de plein droit) et la rupture,*' ('the terms *résolution, résiliation, dénonciation* and rupture, to name but those, are regularly confused. "Established" by the legislators in the Napoleonic Code, this confusion is omnipresent in practice. This terminological problem reveals a profound judicial uncertainty in relation to the characteristics and the effects of *résiliation* (unilateral or by mutual consent), *résolution* (judicial, unilateral or by right) and rupture'). ('La résolution pour inexécution en droit belge: conditions et mise en œuvre', in: *Les sanctions de l'inexécution des obligations contractuelles, Etudes de droit comparé*, M. FONTAINE; G. VINEY (Ed.), Bruylant, LGDJ 2001. no. 9, p. 523).

287 S. AMRANI-MEKKI, *op.cit.* n° 2; J. FLOUR, J.-L. AUBERT, Y. FLOUR, E. SAVAUX, *Droit civil. Les obligations. Tome 3. Le rapport d'obligation*, 4ème édition, Sirey 2006, n° 255; F. TERRÉ, Ph. SIMLER, Y. LEQUETTE, *Droit civil. Les obligations*, 9ème édition, Dalloz 2005, n° 655; A. BENABENT, *Droit civil. Les obligations*, 10ème édition, Montchrestien, 2005 n° 391; Ph. MA-

in the nineteenth century, *'réservaient le premier terme à la seule sanction de l'inexécution des contrats synallagmatiques et lui conféraient, par application de l'article 1183 du Code civil, un effet rétroactif en remettant les choses "au même état que si l'obligation n'avait pas existé". Le terme de "résiliation" figurant à l'article 1722 sanctionnait alors la destruction totale de la chose louée par cas fortuit et l'on enseignait de façon traditionnelle que cette résiliation ne jouait que pour l'avenir,'*[288] ('reserved the former term solely for instances concerning the non-performance of bilateral contracts and, by application of Article 1183 of the Civil code, deemed it to have retroactive effect in restoring things "to the same state they would have been in had the obligation never existed." The term *"résiliation"*, which appears in Article 1722 therefore punished the complete destruction by CAS FORTUIT of the object rented out, and in a traditional manner students were told that this *résiliation* operates only in respect of the future'.)

However, the inherent difficulties with respect to making restitutions in the context of contracts with ongoing obligations (contracts by instalments) led the French *Cour de cassation* to rule, on many occasions that *'la résolution pour inexécution de ce genre de contrats pouvait ne pas rétroagir au jour de sa formation, sans d'ailleurs que l'on sache exactement à quelle date celle-ci devait prendre effet (…) au point de confondre parfois les termes de "résolution" et de "résiliation"*[289] *(…) puisque l'un et l'autre étaient censés produire à peu près les mêmes effets,'*[290] 'dissolution for non-performance of this type of contract could not have retroactive effect back to the day of formation, without it being known on exactly what date such formation should be deemed to have taken effect (…) to the extent that the terms résolution and résiliation sometimes got confused (…) since both were supposed to produce approximately the same effects'.

Thus a consensus seemed to form which considered that, as a rule, *résolution* had retroactive effect whereas *résiliation* did not, except in cases of the *résolution* of a contract with ongoing obligations.[291] However such an approach did not fail to cause a certain amount of difficulty. In a case of unilateral (or extrajudicial) résolution of a contract with ongoing obligations, "unilateral *résolution* thus merited the name unilateral *résiliation*, to the point of rendering the distinction between unilateral *résiliation* in a strict sense and

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LAURIE, L. AYNES, Ph. STOFFEL-MUNCK, *Les obligations*, 2ème édition, Defrénois 2005, n° 881; H. et L. MAZEAUD, J. MAZEAUD, F. CHABAS, *Leçons de droit civil, Tome II, Obligations. Théorie générale*, 9ème édition, Montchrestien, n° 1103; Ch. LARROUMET, *Droit civil. Les obligations. Le contract., tome III*, 5ème édition, Economica 2003, n° 714; Ch. JAMIN, note sous Cass. 1ère civ., 7 June 1995, JCP G 1996, I. 3914.

288 Ch. JAMIN, note on Cass. 1ère civ., 7 June 1995, JCP G 1996, I. 3914 citing F. MOURLON, *Répétitions écrites sur le troisième examen du Code Napoléon*, Marescq Aîné, t. 3, 7e éd., 1866, n° 745.

289 Our emphasis, Cass. civ., 16 February 1932, S.1932, 1, p.163.

290 Ch JAMIN, *op.cit.* n° 5.

291 *Contra* Cass. 1re civ., 7 June 1995, *èditions Glénat c/Bourgeon*, *Bull. civ.* I, n° 244; *JCP* G 1996, II, 22581, note A. FRANCON; Ch. JAMIN, *ibid.* This decision holds that *'la résiliation du contract a pour effet, comme la résolution, d'anéantir le contract et de remettre les parties dans l'état où elles se trouvaient antérieurement sous la seule réserve de l'impossibilité pratique'*. (*résiliation* of a contract has the effect, like *résolution* of destroying the contract and putting the parties back in the state that they found themselves with the sole exception of practical impossibility). However, it is considered that this was a decision on the facts.

unilateral *résiliation* as an exception to the judicial character of destruction of contract for non-performance, extremely delicate."[292]

However, the debate is far from settled. Certain authors suggest that another distinguishing criterion be used as a substitute for that of retroactivity. In this way, Mme. AMRANI-MEKKI, considers the description of *résiliation* as the *'anéantissement du contrat uniquement pour l'avenir,'* ('destruction of the contract solely for the future') is 'dubious'. In effect, such a description *'postule que la rétroactivité de la résolution fait partie de son essence. Or, il s'agit d'un effet pratique de la notion et non d'une composante de ladite sanction.*[293] *L'impossibilité pratique, de fait, qu'il y a à effectuer des restitutions réciproques ne change pas son essence. En outre, il est acquis aujourd'hui que l'absence de rétroactivité de la résolution ne provient pas de la nature successive des contracts mais de celle des obligations qu'ils comportent. Enfin, le terme de résiliation pourrait également laisser envisager un effet rétroactif. "Re" signifie le mouvement en arrière et "salire" est le synonyme de sauter, de bondir. Etymologiquement, le mot résilier fait donc référence à un retour en arrière, supposant un certain effet rétroactif*,' ('postulates that the retroactive effect of *résolution* is among its essential elements. Rather, it is a question of a practical effect of *résolution*, and not a defining characteristic of the sanction.[294] Indeed, the practical impossibility that exists in relation to making reciprocal restitutions does not change the essence of *résolution*. Moreover, it is today well settled that the absence of retroactive effect of *résolution* does not come from the ongoing nature of the contracts, but rather from the ongoing nature of the obligations they produce. In short, the term *résiliation* could also feasibly produce a retroactive effect. *'Re'* signifies a movement backwards, a reversion, and *'salaire'* is a synonym for jumping or bounding. Etymologically, the word *résilier* therefore refers to a turning back, which

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292 B. FAGES (ed), *Lamy droit du contrat*, Etude n° 465: The disappearance of the contractual bond by the action of one party alone – *La résiliation unilatérale*, esp. n° 465-2. Elsewhere, this state of affairs incurred the criticism of a number of legal commentators. "M. Dupichot deplored this regrettable linguitic confusion" [J. DUPICHOT, "La prétendue résolution amiable" peut, toutefois, opérer rétroactivement … mais seulement inter partes … comme toute résiliation", *Gaz. Pal.* 1983, I, Doct., p. 215] in no uncertain words;"because of the contemporay mismash, "résiliation" […] has been progressively fused with the idea of "résolution", a concept entirely foreign to that of résiliation *[ibid.]*". In the same vein, Madame Béhar-Touchais recommended that there should be a distinction between the two types of résiliation. Thus there would be a type of résiliation which meant "a end of the contractual bond only for the future" [M. BEHAR-TOUCHAIS, *Juris-Classeur Contrats et Distribution, Extinction du contrat*, Fasc. 175, Les Causes, Editions Technique, 2, 1998, Index alphabétique, p. 6]. However, the author underlines that it "is regrettable that the same word [résiliation] is used in two different senses. It would be better not to résiliation except for [designation an act which will put an end to the contract only for the future] and to speak in all [other] cases of resolution" [*op.cit.*, p. 26, n° 66] (C. RIGALLE-DUMETZ, *La résolution partielle du contrat*, Préf. Ch. Jamin, Dalloz 2003, n° 396, p. 237).

293 J. GHESTIN, C. JAMIN, M. BILLIAU, *Traité de droit civil, Les effets du contract*, 3e édition, L.G.D.J., 2001, esp. n° 151, p. 190: 'Le rejet de la rétroactivité de la résolution dépend davantage de l'impossibilité de restitution en nature des prestations exécutées que de la qualification de contract à exécution successive'. (the rejection of retroactivity depends moreover on the impossibility of restitution by nature of the duties performed that the designation of the contract as of sucessive performance.)

294 S. AMRANI-MEKKI, *op.cit.*, n° 2.

supposes a certain retroacitve effect.') Thus, for the author,[295] the distinguishing criterion between 'résiliation' and 'résolution' cannot be based on the concept of retroactivity. It would be more appropriate to base such a distinction on the question of whether or not the contract is destroyed by the judge.

For all that, from a terminological perspective, no clear articulation between the cases of judicial and unilateral *résolution* of contract can be found. In French law, if the classical interpretation of Article 1184 of the Civil Code would seem to suggest that the *résolution* of a contract must be declared by the judge, certain instances emerging from case law, from legislation and from academic legal debate have shown that it is possible to have unilateral and extrajudicial *résolution* of a contract.[296] Even though this possibility features among the solutions adopted at common law, in Holland, Germany and in Switzerland, it creates serious terminnological difficulties since the expressions 'unilateral résolution', 'unilateral résiliation', 'extrajudicial résolution' or even sometimes 'extrajudicial résiliation' can be read indiscriminately.

Compiling the inventory of applicable rules of law, Mme. ROCHFELD stresses, in the explanatory introduction to the French Reform Proposals in relation to the non-performance of obligations, *'la doctrine et la jurisprudence en [la résolution] ont néanmoins créé une variante: la "résiliation" ou plus exactement, résolution pour l'avenir, qui écarte la rétroactivité et ne produit effet que pour l'avenir. Néanmoins, le critère de distinction entre la résolution totale et rétroactive et la résolution partielle dans le temps n'est pas très explicite. Lorsqu'un critère est posé, il réside dans le caractère successif de l'exécution du contrat, critère discutable en ce qu'il repose sur la considération de la difficulté spécifique d'organiser des restitutions pour un contrat qui a duré,'* ('both legal scholarship and the courts have nevertheless created a variant on this position by recognising prospective termination which is not retroactive, taking effect only for the future. Nevertheless, the criterion of distinction between complete, retroactive termination of the contract and termination which is partial is not very clear. Where a criterion is suggested, it is found in the successive character of performance of the contract, a criterion which is debatable as it rests on reflections about the particular difficulty found in dealing with restitution in contracts continuing over a period.'). The French Reform Proposals ultimately retained the word 'résolution' the effect of which is not retroactive as a rule, but which on the contrary relates to the future. The exception can be found, on the one hand, in contracts of immediate/instantaneous performance (for which *résolution* will have retroactive effect), and on the other, in Section 6 concerning restitutions. Article 1160-1 of the French Reform Proposals provides as follows:

'La résolution du contrat libère les parties de leurs obligations. (…) Dans les contrats à exécution successive ou échelonnée, la résolution vaut résiliation; l'engagement des parties prend fin pour l'avenir, à compter de l'assignation en résolution ou de la notification de la résolution unilatérale. (…) Si le contrat a été partiellement exécuté, les prestations échangées ne donnent pas lieu à restitution ni indemnité lorsque leur exécution a été conforme aux obligations respectives des parties. (…) Dans les contrats à exécution instantanée, elle est rétroactive; chaque partie restitue à l'autre ce qu'elle en a reçu, suivant les règles posées à la section 6 ci-après du présent chapitre,' (Termination of the contract frees the parties from their obligations.

295 *Contra* Ch. JAMIN, note sous Cass. 1ère civ., 7 June 1995, *JCP* G 1996. I. 3914., esp. n° 8: 'Même s'il nefaut pas à notre sens douter de l'absence de caractère rétroactif de la résiliation (…)'.

296 See *infra*.

(…) As regards contracts with performance successively or in instalments, termination takes effect for the future; the parties' undertakings cease from the time of service of proceedings for termination or from the time of notice of any unilateral termination. (…) If the contract has been performed in part, anything so exchanged by the parties gives rise neither to restitution nor to any compensation as long as they conformed to the respective obligations of the parties. (…) As regards contracts whose performance is instantaneous, termination of the contract is retroactive; each party must make restitution to the other in respect of what he has received, in accordance with the rules set out in section 6 of this chapter (below).

The French Reform Proposals seem thus to opt for an articulation based on the retroactive effect of *résolution* in order to distinguish it from *résiliation*. However, it is apparent that the principle is no longer the retroactivity of *résolution*; it is rather a principle of *résolution* for the future, having for an exception a principle of retroactivity in relation to contracts performed instantaneously, as well as the rules relating to restitution. These rules are valuable, irrespective of whether it be a case of unilateral or judicial *résolution*.

German law and Italian law also show a willingness to distinguish between *résiliation* and *résolution* from a terminological perspective.

German law distinguished between '*Rücktritt*' (dissolution) and '*Kündigung*' (*résiliation)*. In both scenarios, the rupture of the contract occurs in an extrajudicial manner, meaning that the distinction cannot be based on the implementation of the mechanism. Nonetheless, it is possible to query a distinction which is based on effects, particularly as to whether there is any retroactive effect – strictly speaking – in the case of '*Rücktritt*' (dissolution). In this last scenario, the contract is deemed to remain in existence as the foundation for restitutions; the parties must fulfil an obligation of restitution the benefit already received, as well as any real profit made as a result of such benefit having been received (§ 346 subsection 1 BGB). These effects are set aside in cases of '*Kündigung*' (*résiliation)*: '*Kündigung*' affects only contracts to be performed successively, in relation to which there exists no principle of restitution of benefits received, as long as they have been legally received.[297] Moreover, one could query the case of a distinction based on the cause of the rupture. In effect, in cases of '*Rücktritt*', dissolution will only intervene in two instances: if the parties have provided for it in their contract or if it is provided for in law, notably in the case of non-performance or of poor performance after the expiry of a time limit imposed by the creditor (§ 323 BGB). Conversely, in accordance with § 314 BGB, '*Kündigung*' (*résiliation)*, understood in the sense of '*außerordentliche Kündigung*' (extraordinary *résiliation*),[298] is only possible in cases of gross fault which makes future performance of the contract unworkable for the other party up until the end-date (contracts of a set duration) or up until the time limit of the warning (contract of an undetermined

297 *Résiliation* does not have a retroactive effect. It takes effect from the moment that the declation of *résiliation* is recieved by the other party, (or in some cases, the period of advance warning.) Until that moment, the contract remains valid, and its performance can be demanded. By consequence, there will be no restitution except for performance effectuated after this date.

298 On the distinction between '*Kündigung*' and '*außerordentliche Kündigung*' (extraordinary *résiliation*) see the observations under point III below.

duration). Consequently, it seems that the distinction rests as much on the effects attributed to each of the mechanisms as it does on the specific causes which can justify their implementation.

Italian law is enlightening in its usage of the terms *'risoluzione'* (dissolution) and *'recesso' (résiliation)*. First and foremost, Italian law seems to be in line with French law insofar as the distinction between the two terms operates just as much in function of the retroactive effect and the judicial character attributed to *'risoluzione'* as it does in function of the non-retractivity and extrajudicial nature of *'recesso'*. Certain exceptions serve to moderate this notion. Firstly, just like French law, Italian law recognises extrajudicial dissolution (*'risoluzione'*).[299] Moreover, and in the sidelines of the different traditional uses that can be made of the term *'recesso'*, it seems that the consumerist legislator[300] has accorded the consumer the right, under the term *'recesso'*,[301] to put an end to certain contracts retrospectively.[302]

2. Terminological uncertainty between 'rescission' and 'termination' in the common law

Certain commentators debate the use of the terms 'rescission' and 'termination'. The terms 'termination' and 'rescission' are, moreover, sometimes used indifferently by the courts, which can lend to confusion as to the types of compensation or remedies accorded for each.[303] Thus, in English law, this assimilation is a source of uncertainty because the effects of the two institutions are in theory the same: 'termination of contract' has effects only in respect of the future,[304] while 'rescission' brings about a return to the initial situation of the parties, as if the contract had never existed. In brief, certain authors such as M. TREITEL, use the term in a different context ('rescission for breach'), in other words, the right of the innocent party to put an end to the contract following the other party's 'breach of contract'.[305] The effects of a 'rescission for breach' operate only in respect of the future and are not retroactive. This is why other authors,[306] such as McKENDRICK, choose rather to distinguish between these two instances by employing

299 When the parties agreeon a dissolution clause (art. 1456), when a term is considered to be essential by the parties where by reason of the nature of things (art. 1457), or even when the co-contractance has formally notified the other party to demand performance (art. 1454).

300 M.C. CHERUBINI, 'Sul cd diritto di ripensamento', *Riv.dir.civ.*, 1999, p. 710.

301 S. CIGOGNA, 'Ius poenitendi come mezzo di tutela della libertà e ponderatezza del consenso', in: *Studi in onore di P.Rescigno, III. Diritto privato: obbligazioni e contractti*, Milano, Giuffré, 1998, p. 173.

302 M.C. CHERUBINI, *op.cit.*, p. 697.

303 'The Courts have commonly used words such as rescission and termination; but this traditional terminology has attracted some criticism', G. H. TREITEL, *The Law of Contract*, Sweet & Maxwell, 1999, p. 703.

304 O. MORETEAU, *op.cit.*, p. 394.

305 E. McKENDRICK, *Contract Law*, Palgrave Law Masters, Seventh Edition, 2007, p. 384: '(…) this terminology […] creates a confusion between "rescission for breach" and "rescission for misrepresentation"'.

306 E. McKENDRICK, *Contract Law*, Palgrave Law Masters, Seventh Edition, 2007, p. 392, esp. n° 19.6.

the term 'termination' in this context, which is closer to the word '*résiliation*'.[307] There is thus a debate concerning the relevance of the use of the term 'rescission': '*tout exercice du droit de résilier le contract est appelé un droit de rescind le contract (ou le droit d'annuler le contract) mais les puristes déclarent qu'il s'agit d'un mauvais usage du terme*' rescind '*car dans ces circonstances, la résiliation n'est pas effectuée ab initio*',[308] ("every exercise in law by which one seeks to terminate a contract is called a right to rescind the contract (or the right to annul the contract) but purists would deem this to be an incorrect use of the term 'rescind' because in these circumstances, the 'rescission' is not carried out ab initio".) Hence, and with a view to preserving the distinction that exists between *résolution* and *résiliation*, the preferable translation of the term *résiliation* would be that of 'termination', which signifies that the contracts disappear in respect of the future. Moreover, this translation is often adhered to.[309]

B. Hesitations over the regime governing dissolution

The different systems analysed have shown that dissolution can be driven by a double idea: the punishment of the culpable behaviour of one of the parties, and the freeing of the creditor of the bond of contractual duty.[310] This double foundation explains the hesitations encountered, whether they concern the conditions required for dissolution

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307 Academic writing hostiel to the use of the term "termination" is also in vogue. "It is said, against the use of the term *termination* of contract as a result of failure to perform, that the contract is not terminated in all legal senses, in particular in that the party who is the victim of an unequal bargaining power can still enforce it (in particualr the cluases regulating breach as well as arbitration clauses, exemption clauses and liquidated damages" clauses). However, the most particular way of explaining the choices of the victim party is also the most clumsy: non-performance "which gives the right to the victim party to treat the contract as breached" S. WHITTAKER, "Les sanctions de l'inexécution des contrats. Droit anglais", in: *Les sanctions de l'inexécution des obligations contractuelles. Etudes de droit comparé*, M. FONTAINE, G. VINEY (sous la direction de), Bruylant, LGDJ 2001, n° 15, p. 991; *adde*. J. BIRDS, R. BRADGATE, C. VILLIERS, "Themes", in: *Termination of contracts*, J. BIRDS, R. BRADGATE, C. VILLIERS (eds.), Wiley Chancery 1995, p. 3 and following, esp. pp. 10 and 11.

308 P. R. ELLINGTON 'Les causes d'extinction des contracts en droit anglais', RDAI, n° 7, 1997, p. 860.

309 'Résiliation: termination/discharge (without retroactive effect)', in: *Les causes d'extinction des contractsen droit anglais*, P. R. ELLINGTON; *op.cit.*, p. 868.

310 Ch. JAMIN, 'Les conditions de la résolution du contract: vers un modèle unique? Rapport français.', in: *Les sanctions de l'inexécution des obligations contractuelles. Etudes de droit comparé*, M. FONTAINE, G. VINEY sous la direction de, Bruylant, LGDJ, 2001, p. 453; *adde* by the same author 'Les sanctions unilatéralesde l'inexécution du contract: trois idéologies en concurrence', in: *L'unilatéralisme et le droit des obligations*, Ch. JAMIN, D. MAZEAUD (sous la dir.de), Economica, coll. 'Etudes juridiques', Paris, 1999, p. 71 and following; S. STINJS, *op.cit.*, n° 6, p. 517. See the very recent study of Th. GENICON, *La résolution du contract pour inexécution*, Préf. L. Leveneur, LGDJ, 2007, n° 208 and following, p. 151 and following The author L'auteur distinguishes three functions of the insitution: economic, the function of garantee and a penal function.

(**1**), the need of judicial intervention, or absence of such a need (**2**), or lastly, the effects of such a 'destruction' of the contract (**3**).

1. The conditions necessary for dissolution

In the majority of the systems looked at, the dissolution of a contract for non-performance can only happen once such non-performance actually occurs. However, certain judicial systems, having served as the basis for various private codifications, provide for the possibility to rupture the contract even though the non-performance has not yet occurred (**a**). In addition, the element of fault in the non-performance of the contractual obligations plays only a residual role, leaving room for an appreciation of the alleged short-comings (**b**).

a) The relaxed requirement for actual non-performance

Although, in principle, dissolution can only be implemented once the right to demand performance of the contractual obligation crystallises,[311] certain systems allow dissolution to intervene before non-performance has actually occurred, but when it is inevitable. The philosophy behind such an approach is based on the premise that it would be unfair on the creditor, certain that the contractual obligation will never be performend, were he to have no remedy in that regard.

At common law, this in known as 'anticipatory breach of contract'. The scenario is one where the contractant informs his co-contractant, before the event, that he will not be performing his obligations under the contract ('repudiation'). Once this renunciation absolute and categorical, or the inability to perform can be proven in a clear and unequivocal manner, the other party is freed from his obligations. The informed creditor enjoys an option ('right of election'): either he can accept the repudiation, which puts an end to the contract and opens the right to initiate an action in damages; or he can decide to wait until the performance date before seeking his redress, in which case anticipatory repudiation is not accepted.

The decision of *Hochster v. De la Tour*[312] clearly recognised the validity of the principle of anticipatory breach, attached to which there is a cause of action in damages, once the breach is accepted. In the case of non-acceptance of the repudiation by the debtor, the contract continues to produce its effects up until the end-date set out for the performance of obligations.[313]

The same goes for German law, where § 323, subsection 4 BGB allows a creditor to terminate a contract before receiving his benefit as creditor 'when it is manifestly apparent that the conditions needed for dissolution are going to be present'.[314] This applies notably in the scenarios where future non-performance is already foreseeable before the date set out for performance.

311 Y.-M. LAITHIER, *op.cit.*, n° 464, p. 553.

312 [1853] 2 *E. &B.* 678.

313 V. O. MORETEAU, *op.cit.* n° 668 and following.

In parallel to this, Dutch law envisages three scenarios in which it is possible to have dissolution before non-performance has realised.[315] Once it is certain that performance is impossible, pure and simple; once the creditor comes the knowledge (from his dealings with the debtor) that the debtor will either fail to perform his obligations or will perform them poorly; if the creditor has good reason to fear that the debtor will fail in his performance and the debtor does not comply with a formal notice letter stating these reasons and requesting the debtor's performance of his obligations within a reasonable time period, specified in the notice letter. When any one of these three scenarios is present, the creditor is entitled to put an end to the contract and also to demand damages if the non-performance is attributable to the debtor.

b) From an assessment of the degree of fault to one of the seriousness of the non-performance[316]

In the context of judicial *résolution*, French law is, as a rule, not concerned with the cause of the non-performance. In effect, Article 1184 does not mention the causes of non-performance; whether the latter results from an extraneous cause or from the debtor's own fault, it is enough that non-performance has transpired.[317] The great majority of contemporary academic writing, both French and Belgian,[318] considers fault to be necessary to the implementation of dissolution because this mechanism is based upon an

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314 *'Der Gläubiger kann bereits vor dem Eintritt der Fälligkeit der Leistung zurücktreten, wenn offensichtlich ist, dass die Voraussetzungen des Rücktritts eintreten werden.'*

315 H.J. VAN KOOTEN, in *The Principles of European Contract law and Dutch law, A commentary*, D. BUSCH, E. HONDIUS, H. VAN KOOTEN, H. SCHELHAAS, W. SCHIRAMA (eds.), Kluwer Law International 2002, p. 375.

316 See also the observations made in the study dedicated to fault and breach.

317 In this regard, See Y.-M. LAITHIER, *op.cit.* n° 233; See also, Ch. JAMIN, 'Les conditions de la résolution du contract: vers un modèle unique? Rapport français', in: *Les sanctions de l'inexécution des obligations contractuelles, Etudes de droit comparé*, M. FONTAINE, G. VINEY (sous la dir.de), Bruylant, LGDJ 2001, p. 451 and following, esp. p. 453, n° 2; *adde.* J. GHESTIN, Ch. JAMIN, M. BILLIAU, *Les effets du contract*, Traité de droit civil, LGDJ 2001, n° 453. To compare, the French Reform Proposals take the direction of integrating 'the theory of risks' into dissolution, to the extent that dissolution constitutes a measure corresponding to the non-performance of contract whatever the cause; (article 1158)' (Exposé des motifs, Inexécution des obligations (art. 1157 à 1160-1), par Judith ROCHFELD, in: The French Reform Proposals, *op.cit.* p. 54). Article 1158 thus states in the first paragraph that: *'Dans tout contract, la partie envers laquelle l'engagement n'a pas été exécuté, ou l'a été imparfaitement, a le choix ou de poursuivre l'exécution de l'engagement ou de provoquer la résolution du contract ou de réclamer des dommages et intérêts, lesquels peuvent, le cas échéant, s'ajouter à l'exécution ou à la résolution'*. (In all contracts, the party for whom the engagement has not be executed or has been poorly performed, has the choice either to enforce the performance of the contract or to initiate the dissolution of the contract or to claim damages, which can in some cases, be added to the enforced performance or dissolution).

318 S. STIJNS, *op.cit.*, .p. 513 and following, spéc. p. 515, n° 5, p. 542, n° 26 and following.

idea of punishment and not upon the theory of risks.[319] However, certain commentators propose that the seriousness (and not the cause) of the non-performance be taken into consideration.[320]

In the same vein, common law draws a distinction between 'breach of conditions' and 'breach of warranties', the former class of breach alone being capable of giving rise to 'rescission' or 'termination'. At common law, the non-performance of a contract will not automatically cause the 'termination for breach' of the contract. In fact, once 'breach of contract' is found, the creditor can either decide to put an end to the contract, or to affirm it *('affirming the contract')*. In theory, a party to a contract can demand its termination for whatever type of non-performance, whether it be of a trivial or fundamental nature. However, such a one-sided power tends to bring about situations of abuse in which, for example, a party who realises that the price at which he is selling his merchandise to the purchaser is singificantly lower than the price he could have achieved elsewhere, can invoke the trivial non-performance of the contract in order to release himself from his obligation to sell. It is with this in mind that the English courts developped a jurisprudence which tends to avoid this type of abuse.

The *Hong Kong Fir Shipping Co Ltd. v. Kawasaki Kisen Kaisha Ltd.* case clarifies what test is to be applied in order to determine whether a contracting party has the right to put an end to his contract: it is a question of whether the defaulting party 'substantially' deprived the creditor of the benefit of the performance of the contract.[321] The classic scenario is that of 'repudiation'. This is where one party indicates to the other, either

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319 See in particular; J. GHESTIN, Ch. JAMIN, M. BILLIAU, *Les effets du contract*, Traité de droit civil, LGDJ 2001, n° 453.

320 Y.-M. LAITHIER, *op.cit.*, n° 234, p. 319: He proposes a test directly taken form English law which interrupts by its relevance in determining the 'sufficently serious' nature of non-performance: *'il semble que le juge soit avant tout préoccupé par les conséquences provoquées par l'inexécution et celles du maintien ou de l'destruction du contract, pour en déduire dans un second temps, le degré de gravité du manquement allégué'* (it seems that the judge is above all, concerned with the effects causes by non-performnce and those of retaining or destroying the contract, in order to determine in the latter case, the degree of seriousness of the alleged breach. (*op.cit.* n° 236, p. 321). The author makes direct reference to the judgment of Buckley J, in the case, *Decro-Wall International S.A. v. Practioners in Marketing Ltd.*, ([1971] 1 *W.L.R.* 361, esp. p. 380) to explain his analysis. This judgment proposed an explanation of the criteria of non-performnace which affects the roots of the contract': *'I venture to put the test in my own words as follows: will the consequences of the breach be such that it would be unfair to the injured party to hold him to the contract and leave him to his remedy in damages as and when a breach or breaches may occur? If this would be so, then a repudiation has taken place'*. See also the elements of reflection proposed by MM. GHESTIN, JAMIN et BILLIAU, *op.cit.* n° 456, p. 518; *adde*. P. GROSSER, *Les remèdes à l'inexécution du contract: essai de classification*, Th. Paris I, 2000, n° 204 and following; J. ROCHFELD, 'Résolution et exception d'inexécution', in: *Les concepts contractuels français à l'heure des Principe du droit européen des contracts*, D. FENOUILLET, P. REMY-CORLAY (sous la dir.de), Dalloz 2003, p. 213, esp. p. 218 and following.

321 [1962] 2 *QB* 26; [1962] 1 *All ER* 474. *per* Lord DIPLOCK LJ: *'(…) does the occurrence of the event deprive the party who has further undertakings still to perform of substantially the whole benefit which it was the intention of the parties as expressed in the contract that he should obtain as the consideration for performing those undertakings?'*

expressly or impliedly by his behaviour, that he no longer intends to be bound by the contract and therefore that he no longer intends to respect the obligations created flowing from it. The English judges, followed by the legislators, very quickly adopted a distinction in relation to the contractual obligation which was not performed. A 'breach of condition' – which is the violation of an essential obligation, meaning an obligation which goes to the very roots of the contract – can cause the termination of the contract, whereas a 'breach of warranty' – which is the violation of a contractual term deemed to be of lesser importance – give rise to a right to seek compensatory damages, but not to seek termination. The parties can set out what they consider to be a 'condition' or a 'warranty', and this can also be provided for in legislation; the judge must undertake a strict interpretation of the parties' intention. Thus it is possible for secondary obligations – ones which are not the principal obligation – to be elevated by the parties to the status of a '*condition*', thus allowing the rupture of the contract for a failure that is sometimes insignificant. It was precisely with a view to preventing this type of abuse of the ability to repudiate, that the English courts, in the *Schuller AG v. Wickman Machine Tool Sales Ltd.*[322] case, imposed an obligation on the relevant tribunals to verify the classification given by the contracting parties; if they have classified the obligation as a 'condition', that they have used term correctly, in the technical sense of the word, and not just as it is commonly used. In addition, in the scenarios where contracts leave room for doubt in relation to the real intention of the contracting parties, the courts take into consideration the consequences of classifying a term as a 'condition', which means that the more unreasonable the consequences, the less the parties will be deemed to have really consented to it. In a way, this is a method of fighting against a solution that would be 'unjust' or even 'absurd' and to reintroduce a certain notion of loyalty.[323]

Another way the courts can fight against abuses is that of 'innominate terms' also known as 'intermediate terms'.[324] This category of obligations is distinct from 'conditions' in that when the former are violated, they do not lead to the termination of the contract. They are distinct also from 'warranties' in that the court is not compelled to attribute damages. This category affords the courts greater flexibility in the choice of sanction for the breach discovered. An analysis of the case law shows that there is an increasing tendency on the part of the courts to classify obligations as 'innominate'.

In relation to *conditions*, *warranties* and *innominate terms*, it is always incumbent upon the party seeking to rely on the breach to prove it. As a rule, fault does not play a role. In effect, responsibility is strict; the mere failure in relation to the obligation is enough constitute 'breach'. Proof of the absence of any fault on the part of the defaulting party is irrelevant. Conversely, there exist certain obligations, named obligations of 'care and skill', for which the party wishing to rely on the non-performance must show that reasonable care was not taken in the performance of the obligation. In parallel with this, once

322 [1974] *AC* 235.

323 In this vein, E. McKENDRICK, *Contract Law*, 7th edition, Palgrave Macmillan, 2007, n° 10.3 and following, p. 212; *adde*. H. COLLINS, *op.cit*. p. 360.

324 *Hong Kong Fir Shipping Co Ltd v. Kawasaki Kisen Kaisha Ltd* [1962] *2 QB* 26, esp. 70, *per* DIPLOCK LJ: *'There are many … contractual undertakings … which cannot be categorized as being "conditions" or "warranties" … Of such undertakings all that can be predicated is that some breaches will and other will not give rise to an event which will deprive the party not in default of substantially the whole benefit which it was intended that he should obtain'*.

fault has been established, the party alleged to be in default will have a good defence if he can show that he took all the necessary care in the performance of his obligations and had therefore committed no fault.

It must be added, lastly, that both English law and American allow an end to be put to a contract for an event that is independent of the intention of the parties. This destruction of the contract can therefore be the consequence of an instance of *frustration*, of *impracticability* or of *impossibility*.

Traditionally, the principle was posed at common law according to which 'impossibility is no excuse'. However, three important exceptions were very quickly carved out by academic legal commentators. These were *supervening illegality*, *supervening death or disability*, and *supervening destruction*.

At the same time, the theory of impracticability was introduced in the UCC,[325] but its influence was so strong that was also integrated in the 2nd *Restatement*.[326] The two scenarios – impracticability and impossibility – can be distinguished by virtue of the fact that impossibility results from one of the co-contractants suffering an unforeseen difficulty, whereas impracticability depends on circumstances exterior to the parties themselves.

Finally, there are the scenarios of *frustration*. This theory, initially formulated by case law was taken up in both the *1st* and *2nd Restatements*.[327]

The occurrence of these different scenarios allow the non-performance of one party to be excused and '*discharge[s]*' the other party from his contractual obligations.[328]

In Italian law, '*risoluzione*' occurs when the objectives of the contract, i.e. the satisfaction of the respective interests of the contracting parties,[329] are no longer capable of being realised. This inability is determined from the behaviour of the parties or from events which are not imputable to them, nor foreseeable by them. Italian law distinguishes three scenarios in the domain of the general law of '*risoluzione*' (taken to mean judicial dissolution): dissolution for non-performance, dissolution for the occurrence of impossibility after the conclusion of the contract, and for excessive cost of delivering the benefit. It can be stated at this point that in the scenario of dissolution for non-performance, the contract cannot be dissolved so long as the non-performance proves unimportant for the creditor (Article 1455, Civil code).[330] It seems as if this criterion is to be assessed in ac-

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325 UCC *sections* 2-613/616.

326 § 261, Discharge By Supervening Impracticability: '*Where, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary*'.

327 § 265: '*Where, after a contract is made, a party's principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged, unless the language or the circumstances indicate the contrary*'.

328 E. A. FARNSWORTH, *op.cit.*, p. 642.

329 R. SACCO, G. DE NOVA, 'Il contractto', in: *Trattato di diritto civile*, 3° ed., Torino, 2004, p. 613.

330 However, the contract can equally be dissolved by the onset of impossibility following the conclusion of the contract and in cases where the cost of providing the benefit is excessively high. V. G. ALPA, M. DASSIO, 'La dissolution du lien dans le Code civil italien', in *Les sanctions de l'inexécution des obligations contractuelles, Etudes de droit comparé*, M. FONTAINE, G. VINEY (Editor), Bruylant, LGDJ 2001, p. 871 and following, especially p. 876, no. 7.

cordance with a double test: objective and subjective. On the one hand, the role and function of the non-performance in the contractual relationship must be assessed objectively. On the other, the creditor's interest in receiving the performance of the contract as had been promised is also taken into consideration, but in a subjective manner.[331]

In principle, Dutch law[332] considers all types of non-performance (delay, default, impossibility to perform even when such impossibility existed at the time the contract was being concluded and even though non-performance can be excused) afford the creditor the right to dissolve the contract (Articles 6: 82-83 and 6: 265 BW).[333] None the less, there is an exception to the right of the creditor to dissolve the contract. In effect, if the non-performance does not warrant the dissolution of the contract, having regard to its specific nature or its trivial importance, the court can decide to refuse to declare the dissolution of the contract for non-performance.

In German law, dissolution for non-performance is always granted when it concerns complete non-performance. In other instances of non-performance, dissolution is excluded when it is merely trivial. In order to determine whether such non-performance is trivial, German law established a distinction between partial performance and poor/improper performance (§ 323, subsection 5, 2nd sentence):[334] in instances of partial performance, the dissolution will, in principle, only be partial, unless the creditor can establish that the part of the contract that has been performed represents no interest for/benefit to him (§ 323, subsection 5, 1st sentence). On the other hand, in instances of poor/improper performance (e.g. lack of conformity), dissolution is complete in theory, but dissolution will be excluded where the shortfall is negligible;[335] in assessing the gravity of the shortfall, jurisprudence also takes possible fraud on the part of the debtor into consideration, which if present would serve to remove the negligible nature of a failure which, in itself, is otherwise of little importance.[336]

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331 L. ANTONIOLLI, in *Principles of European Contract Law and Italian Law, A Commentary*, L. ANTONIOLLI, A. VENEZIANO (Editors), Kluwer Law International 2005, p. 406 and following, especially pp. 408-409.

332 C.B.P. MAHE, E.H. HONDIUS, 'Les sanctions de l'inexécution en droit néerlandais,' in *Les sanctions de l'inexécution des obligations contractuelles, Etudes de droit comparé*, M. FONTAINE, G. VINEY (Editor), Bruylant, LGDJ 2001, p. 837 and following, especially p. 852, no. 30 and following.

333 V. H.J. VAN KOOTEN, *op.cit.*, p. 364 and following, especially pp. 365-366.; C.B.P. MAHE, E.H. HONDIUS, 'Les sanctions de l'inexécution en droit néerlandais,' in *Les sanctions de l'inexécution des obligations contractuelles, Etudes de droit comparé, op.cit.*, p. 837, esp. no. 30, p. 852.

334 On this topic, see, H. G. GRIGOLEIT, T. RIEHM, 'Grenzen der Gleichstellung von Zuwenig-Lieferung und Sachmangel,' ZGS (Zeitschrift für das gesamte Schuldrecht) 2002, 115 and following, with references relating to the legal academic debate on the applicability of the rules of partial non-performance in the matter of the sale of service contracts.

335 For an example, see, BGH, 8 May 2007, NJW 1007, 2111: no dissolution of the sale of a car whose petrol consumption exceeds the promotional indications by less than 10%.

336 BGH, 24 March 2006, BGHZ 167, 19; NJW 2006, 1960.

2. The implementation of dissolution

The judge has merely a residual role to play in the declaring of dissolution (**a**), by virtue of the current popularity, in various legal systems, of the implementation of dissolution by the parties themselves. (**b**).

a) The residual role of the judge in the declaration of dissolution

Only French, German and Italian law seem to provide for the intervention of the judge, as a rule, in order to pronounce the dissolution of contracts for non-performance.

Since dissolution is still perceived to be a punishment in these various systems, it falls to the judge to decide whether dissolution of the contract for non-performance is appropriate. He assesses the seriousness together with the element of fault in the debtor's behaviour, as well as the proportionality of the sanction having regard to the alleged failure. Therefore, the judge manages to control the appropriateness and relevance of the sanction, and can opt for different solutions: he can refuse dissolution; refuse dissolution while substituting an obligation of equivalent performance; declare dissolution with or without an award of complementary damages; or grant a period of grace.[337]

It appears, none the less, that Italian, French and Belgian law have developed scenarios of extrajudicial dissolution of contract, giving in – little by little – to the economic logic behind other countries' legal systems.

b) The blossoming of an extrajudicial character for dissolution

In the absence of even a disolution clause, (in the absence therefore of 'contractual resolution'), which is generally admitted by the majority of the systems, extrajudicial dissolution of the contract can intervene.[338]

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337 S. STIJNS, *op.cit*. n° 30 and following, p. 550 and following; *adde*. Ch. JAMIN, 'Les conditions de la résolution du contract: vers un modèle unique? Rapport français', in: *Les sanctions de l'inexécution des obligations contractuelles.Etudes de droit comparé*, *op.cit*. n° 12 and following, p. 469 and following V. également. See also Th. GENICON, *op.cit*., n° 537 and following, p. 381and following; n° 680 and following, p. 483 and following The author pronounces in favour of the judicial nature of dissolution of a contract for non-performance.

338 In France, although the principle of not having a legal control over the application of a resolutory clause remains, it is no less true that the extension of the powers of the court in the assessment of the control of the regularity of the implementation of the clause continues which tends, more and more, to paralyse the operation of such clauses in the name of Equity (see in particular, A. BENABENT, *Droit civil. Les obligations*, 10ème édition, Domat, Montchrestien, 2005, n° 397, p. 275; *adde*. generally, Ch. PAULIN, *La clause résolutoire*, préf. J.Devèze, L.G.D.J.1996). Furthermore, although it recently could be shown that the development of resolutory clause is an integral part of the judicial nature of resolution for non-performance (in this regard see, C. POPINEAU-DEHAULLON, *op.cit*., n° 107 and following, p. 92 and following), it remains interesting to note that resolutory clauses in certain systems appear to allow the prinicple of extrajudicial resolution. For example, in English law, the parties can provide ex-

Inspired by the development of extrajudicial dissolution abroad, French case law allows a contracting party to unilaterally dissolve a contract at his own risk and peril in the cas of serious misconduct by the other party to the contract. In effect, the French *Cour de cassation* – but equally the Belgian *Cour de cassation*[339] – have outlined that *'la gravité du comportement d'une partie à un contract peut justifier que l'autre partie y mette fin de façon unilatérale à ses risques et périls, peu important que le contract soit à durée déterminée ou non'*.[340] (the seriousness of the conduct of a party to a contract can justify that the other party puts an end to the contract, unilaterally and at his own risk and peril, regardless whether the contract is of a fixed duration or not). Here, the control of the judge intervenes *a posteriori*, in the case of a disputed of dissolution already effected. The judge could then pronounce that the dissolution put in place was ineffective and in such a case include damages for the injury sufferd by unjustified breach of the contract.[341]

Going even further and breaking away from the regime established under the control of the Civil Code of Lower Canada, the new Civil Code of Quebec has enshrined in its article 1605[342] the possibility of proceeding with a extrajudicial dissolution in the case of non-performance of a certian importance imputable to the debtor. However, *a posteriori* control can always be used by a judge in the case where the debto contests the reason for the dissolution. The judged has the power, if he considers that the dissolution was un-

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pressly in their contract that the contract will automatically come to an end or that one of the parties will have the choice to end the contract upon the occurrance of a specified event. The expression "condition subsequent" is generally used (J. BEATSON, *op.cit.*, p. 138; pp. 527 and 528; E. McKENDRICK, *Contract Law*, *ibid.* M. TREITEL uses the expression: *"cancellation clause"*, v. G.H. TREITEL, *An Outline of the Law of Contract*, *op.cit.*, p. 325) The regime governing the destruction of such a contract depends on the event at the centre of the particular clause. It the occurrence of the event does not depend on the wishes of the parties, then its occurrence will automatically put an end to the contract. (*New Zealand Shipping Co. v. Société des Ateliers et Chantiers* [1919] *A.C.* 1, *per* Lord Wrenbury; p. 15; *Gyllenhammar & Partners International Ltd. v. Sour Brodogradevna Industrija* [1989] 2 *Lloyd's Rep.* 403, *per* Hirst J., p. 413). If' however, the litigious event the the non-performance of a contractual obligation, even trivial, the contract is not necessarily automatically terminated even though there is certain case law which expresses this opinion. (See in particular, *Mardorf Peach & Co Ltd. v. Attica Sea Carriers Corpn of Liberia, The Laconia* [1977] *HL* 324; *Union Eagle Ltd v. Golden Achievement Ltd.* [1997] *AC* 514). Muchlike in French law, solutions have been found to alleviate the rigour of the implementation of the clause. (see in this regard, G.H. TREITEL, *An Outline of the Law of Contract*, *op.cit.*, pp. 324-325).

339 S. STIJNS, *op.cit.*, no 37 and following., p. 563 and following.

340 Cass.civ. 1re., 28 October, 2003, *Bull. civ.* I, n° 211 p. 166. This decision was givien following two identical solutions: Cass. Civ. 1re., 13 October 1998, *Bull,.civ* I n° 300, p. 207.

341 See generally Ph. STOFFEL-MUNCK, 'Le contrôle a posteriori de la résiliation unilatérale', *Droit et patrimoine*, n° 126, May 2004, p. 70 and following.

342 Article 1605 of the Civil Code of Quebec states: 'la résolution ou la résiliation du contract peut avoir lieu sans poursuite judiciaire lorsque le débiteur est en demeure de plein droit d'exécuter son obligation ou qu'il ne l'a pas exécutée dans le délai fixé par la mise en demeure'. (The dissolution or termination of a contract can take place without legal proceeding when the debter is automatically obliged to execute his obligation or when he has not executed it during the period fixed by legal notice.)

justified, to pronounce the creditor liable for damages, the dissolution of the contract by the fault of the creditor or even enforce the contract.[343]

In Italian law, apart from the three cases of judicial dissolution which have been examined above, there exists in parallel three cases of dissolution 'by right': disolution clauses (article 1456), an essential time period (article. 1457)[344] or official notification for performance (article 1454).[345]

In Dutch law[346] the legal regime for dissolution ('*ontbinding*') of articles 6: 265 and following of B.W. does not envisage, in principle, the intervention of a judge even if he is seized on the demand of the creditor. In effect, although article 6: 267 states in its first paragraph that '*La résolution s'effectue par déclaration écrite de celui qui veut l'invoquer*', (Dissolution is effectuated by a written declaration by the party who invokes it), it details in paragraph two, that '*la résolution peut également, à la demande de celui-ci, être prononcée par le juge*'. (Dissolution can also be pronounced by a judge on demand of the party that seeks it). Although the law does not impose any specific formal rules for such a declaration[347] it is advised[348] that the reason for the dissolution of the inexecuted contract be included in it. However, these provisions have only a supplementary character, as the parties can envisage a judicial dissolution as the principle and the extrajudicial dissolution as the exception. Moreover, Dutch law outlines within the framework of certain special contracts (employment contracts,[349] lease contracts,[350] and in corporate law[351]) a very well outlined imperative regime for dissolution sometimes imposing the intervention of a judge.

Swiss law,[352] which has a liberal and individualist conception of a contract, considers that the 'dissolution' of a contract takes place by unilateral declaration of the creditor. The creditor is, in effect, free to put an end to the contract without going through the

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343 J.-L. BAUDOUIN, P.-G. JOBIN, N. VEZINA (avec la collaboration de), *op.cit.*, n° 809 and following.

344 The parties can define, in the contract that links them, that the time period within which the contract must be executed is an essential element of the contract. Its essential nature can also be deduced for the nature or objective of the contract. G. ALPA, M. DASSIO, 'La dissolution du lien contractuel dans le code civil italien,' in *Les sanctions de l'inexécution des obligations contractuelles. Etudes de droit comparé*, M. FONTAINE, G. VINEY (Editor), LGDJ, Bruylant 2001, no. 10, pp. 878-879.

345 In order that the debtor will execute as quickly as possible, the creditor can send him an official notice advising him that in default of performance within a specified period, the contract will be considered to be dissolved. G. ALPA, M. DASSIO, 'La dissolution du lien contractuel dans le code civil italien,' in *Les sanctions de l'inexécution des obligations contractuelles. Etudes de droit comparé*, M. FONTAINE, G. VINEY (Editor), LGDJ, Bruylant 2001, no. 10, p. 879.

346 C.B.P. MAHE, E.H. HONDIUS, 'Les sanctions de l'non-performance en droit néerlandais,' in *Les sanctions de l'inexécution des obligations contractuelles. Etudes de droit comparé*, M. FONTAINE, G. VINEY (Editor), LGDJ, Bruylant 2001, no. 29, p. 851; no. 34, p. 855 and following.

347 Article. 3: 37 subsection 1 BW; v. C.B.P., E.H. HONDIUS, *op.cit.*, no. 34.

348 H.J. van HOOTEN, *op.cit.*, p. 372.

349 Articles 7: 685 and 7: 686 B.W.

350 Article 7 A: 1623 n B.W.

351 Article 7 A: 1684 B.W.

352 P. WESSNER, 'Les sanctions de l'inexécution des contrats: questions choisies. Exposé du droit suisse et regard comparatif sur les droits belge et français,' in *Les sanctions de l'inexécution des*

judical route. However, he does this at 'his own risk and peril': the judge can, within the boundaries of a case, take into account *a posteriori* the opportunity for dissolution taken by the creditory and in certain cases enforce sanctions against him.[353]

In German law, the '*Rücktritt*' (dissolution) intervenes either if the parties have made provision for a contractual right of dissolution, or if this right is envisaged by law, particularly in the case of non-performance or of poor execution after the expiration of a time period imposed by the creditor (§ 323 BGB). Judicial control *a posteriori* is limited to respect for the legal conditions of dissolution; the judge does not in principle possess any margin of appreciation. Reflecting the common law, but equally the Dutch and Swiss legal systems, dissolution and termination ('*Kündigung*') are extrajudicial.[354]

3. The effects of dissolution

French, Belgian and Italian laws adopt a classic distinction between contracts of successive execution and contracts that are instantly executed: the retroactive effect of dissolution is limited to the latter in order to justify of dissolution in the first case and of its retoractivity in the second case. However, in France as in Belgium, a tendency seems to have emerged, both in case law and academic writing to exclude – or at least to confine- the retroactivity of dissolution[355] **(a)**. Other systems, like Germany, Switzerland, the Netherlands aswell as the common law do not attribute any retroactive effect to dissolution, but consider that a obligation of restitution of the reciprocal contractual benefits, already fulfiled, exists **(b)**.

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obligations contractuelles. Etudes de droit comparé, *op.cit.*, no. 55, p. 910; no. 82 and following, p. 921 and following.

353 P. WESSNER, *op.cit.*, no. 82, p. 921.

354 B. S. MARKESINIS, H. UNBERATH, A. JOHNSTON, *The German Law of Contract. A Comparative Treatise*, 2nd Edition. Entirely Revised and Updated, Hart Publishing, 2006, p. 388.

355 *'Quelle que soit la formule retenue, il faut en effet avoir à l'esprit que l'orientation prise par la Cour de cassation, depuis plusieurs décennies, nous éloigne toujours un peu plus de la logique morale, qui fondait classiquement le régime de la résolution, au profit d'une logique plus économique, qui imprègne aujourd'hui les droits de la plupart de nos partenaires européens. Autrement dit, nous passons progressivement d'une résolution perçue comme un instrument de sanction d'un comportement répréhensible, ce qui justifiait une rétroactivité destinée au moins en partie à priver le contractant fautif du droit de tirer profit de l'exécution du contrat, à une résolution envisagée comme un instrument de liquidation, pour l'avenir, d'une situation contractuelle qui n'a plus vocation à perdurer, corrigé le cas échéant par la mise en œuvre du droit de la responsabilité contractuelle*' (Whatever the formula used, it must, in effect, have for a spirit the orienation taked by the Cour de cassation for many decades, we have distanced ourselves even a little further from the moral logic which is the classic basis for the regime of dissolution, in favour of a more economic logic which today impregnates the law of the greated part of our European neighbours. In other words, we are passing progressively from dissolution as percieved as an instrument of punishment for reprehensivle behavior, something that justified retroactivity designed as an instrument of liquidation to the become a contractual situation which no longer has a goal to perpetuate, corrected in certain cases by the functioning of the law of contractual responsibility. (Ch. JAMIN, 'Effet de la résolution judiciaire d'un contrat synallagmatique à exécution successive', JCP G 2004, II. 10031, n° 8).

a) The mitigated retroactivity of dissolution for non-performance

In Belgian law as in French law, the case law has recalled regularly that dissolution '*a pour effet que les parties doivent être replacées dans le même état que si elles n'avaient pas contracté*'.[356] (has the effect that the parties must be returned to the same state as if they had never contracted). It is because judicial dissolution is envisgaged as dissolution condition that it is given retroactive effect by article 1183 of the French and Belgian Civil Codes.[357] However, this return to the *statu quo ante* is only imposed for contracts of instantaneous performance.[358] As a consequence of retroactivity, the restitution[359] must be complete and include the so-called principal restitutions and the complementary restitutions, in the sense that the '*créancier de l'obligation de restitution ne devra recevoir ni plus ni moins que ce qu'il a fourni*'.[360] (the creditor of the obligation of restitution must recieve neither more nor less that what he has already furnished).

However, these solutions are criticised. More and more the academic reflexions and case law fluctuations of these principles have become apparent. The restitutions are

356 In Belgian law: Cass. 24 March 1972, *Pas.*, I, 693; Cass. 13 December 1985, *Pas.*, 1986, I, 490; Cass. 6 June 1996, *Pas.* I, 594; In French law: Cass. civ. 3e., 20 November 1991, *Bull. civ.* III, n° 285, p. 168.

357 Article 1183 states: *'La condition résolutoire est celle qui lorsqu'elle s'accomplit, opère révocation del'obligation, et qui remet les choses au même état que si l'obligation n'avait pas existé'*. (A dissolution condition is one which, when fulfilled works to recall the obligation and put things back in the same state as if the obligation had never existed).

358 The basis is classically taken from the impossibility of restitution of reciprocal benefits (see for example in Belgian law: Cass. 31 January 1991, Pas., I, 520; Cass. 25 February 1991, Pas., I, 617; Cass. 14 April 1994, Pas., I, 370; Cass. 10 April 1997, Pas., I, 443; moreover, this justification is generally considered as not being pertinent as in the numberous instantaneously executed contract, the nature of the fulfilled duty can also be an obstacle to the retroactive erasure which the disappearance of the contractual link entails (See particularly, Y.-M. SERINET, *op.cit.* n° 95 and following, p. 648 and following) More recent academic writing, today, tends to, '*justifier l'exception au principe de rétroactivité par l'inutilité de porter atteinte à l'équilibre des prestations réciproques que les parties se sont fournies dans le passé, à leur entière satisfaction, avant que ne survienne la défaillance cause de la résolution*' (justify the exception to the principle of retroactivity by the uselessness of attacking the balance of the reciprocal duties that the parties have fulfilled in the past, to their entire satisfaction, before the flaw that caused the dissolution intervened). (P.-H. DELVAUX, *op.cit.* n° 12, p. 676 and the references quoted under footnote 25).

359 The question of the basis for restitution is problematique. The contract being in principle destroyed, it can no longer produce effects of the sort where it could serve as the basis for restitution. Also, Belgian academic authors in general, hold unjust enrichment as a basis for restitution and more sporadically a *sui generic* obligation born of the dissolution itself, regulated by common law of obligation (P.-H. DELVAUX, *op.cit.* n° 9, p. 674). In French law, it sems that the basis oscillates between tortous responsibility, unjust enrichment, a *sui generic* regime or even an engagement resulting from the sole authority of law, within the meaning of article 1370 of the French Civil Code (Y.-M. SERINET, *op.cit.*, n° 38-43., p. 612 and following.

360 C. GUELFUCCI-THIBIERGE, *Nullité, restitutions et responsibilities*, Préf. J. Ghestin, LGDJ 1992, n° 797.

complicated to put into action; certain exceptions to retroactivity threaten the coherence of the solution and in particular, the regime unanimously recognised for contracts of sucessive performance, much like the preservation of contractual responsibility and the clauses which organise it, outside of the scope of dissolution of contract. Also, certain academic authors[361] taking support from certain decisions,[362] tend to consider today that the retroactive effect of dissolution *'dépend du point de savoir si le contract est divisible et si son maintien pendant une certaine période ne fausse pas l'équilibre global des prestations voulues par les parties'*.[363] (depends on finding out if the contract is divisible and if the preservation of the contract for a certain period does not distort the general equilibrium of the duties taken on by the parties). In this manner, the indivisibility of obligations from a contract consitutes the condition for the fully retroactive nature of its dissolution.[364] The French Reform Proposals have not integrated the totality of these arguments.[365]

Likewises, Italian law, like French and Belgian law, attributes this retroactive effect[366] to dissolution for non-performance of a contract. It is, in this regard, classically distinguished between contract of successive execution and contracts of instantaneous execution. For the first type, dissolution has no effect on the duties already fulfilled, while for the second type, it has a double effect: 'elle libère les parties des prestations non exécutées dès l'intervention du jugement de résolution, et impose aux contractants la restitution de ce qu'ils ont reçu à partir de la conclusion du contract, de sorte que toute conséquence de l'exécution du contract est éliminée.'[367] (it frees the parties from duties that have not yet been fulfilled by the intervention of the judgment for dissolution and imposes on the

361 Y.-M. SERINET, *op.cit.* n° 103 and following p. 654.

362 Certain decisions, taking into account the criterium of indivisibility, sometimes wear away at the general formulae for deciding the scope to accord to the retroactivity: *'Il résulte des articles 1183 et 1184 du Code civil que, dans les contracts à exécution échelonnée, la résolution pour non-performance partielle atteint l'ensemble du contract ou certaines de ses tranches seulement, suivant que les parties ont voulu faire un marché indivisible ou une série de contracts'* (It follows from articles 1183 and 1184 of the Civil Code that, in the contracts of scaled execution, dissolution for partial non-performance attacks the whole of the contract or some of its aspects only, depending on whether the parties wish the performance to be an indivisible whole or a series of contracts) (for example Cass. civ. 1re, 3 November 1983, Bull. civ., I, n° 252. By passing the sole area of contracts of successive executed similar solutions have been handed down in the ared of dissolution of a contract of association (Cass. civ. 1re. 6 March 1996, Bull. civ., I, n° 118).

363 Y.-M. SERINET, *op.cit.*, n° 100 and following, p. 652 and following adde. M. FONTAINE, 'La rétroactivité de la résolution des contrats pour non-performance fautive', *R.C.J.B.*, 1990, p. 382, n° 46.

364 J. GHESTIN, Ch. JAMIN, M. BILLIAU, *Traité de droit civil, Les effets du contract*, 3ème édition, LGDJ 2001, n° 563, p. 613.

365 Article 1160-1 of the French Reform Proposals state in its first paragraph that *'la résolution du contract libère les parties de leurs obligations.'* (dissolution of a contract frees the parties of their obligations). However one exception is envisaged in the case of contract of instantaneous execution where it is retroactive (subsection 4).

366 G. ALPA, M. DASSIO, *op.cit.*, n° 21.

367 *Ibid.*

contractants the restitution of that which they have recieved counting from the conclusion of the contract, to the extent that all consequences of the execution of the contract are eliminated.)

Although it transpires from Belgian, Italian and French law that retroactivity is an integral part of dissolution, the contrary solution is maintained by German, Swiss and Dutch law as well as by the common law.

b) The obligations of restitution engendered by dissolution for non-performance in the absence of retroactive effect

In German law, the '*Rücktritt*' (dissolution) does not render the contract void but extinguishes the contractual obligation which have not yet been executed and transforms the other obligation into obligations of restitution to the extent that they have already been executed (§ 346 BGB). '*Rücktritt*' is not a quality of a legal act, but a peformative declaration ('*Gestaltungserklärung*') which transforms the contract in a unilateral manner (§ 349 BGB), without destroying it. However, in the area of '*außerordentliche Kündigung*', governed by' § 314 BGB,[368] the 'termination' does not have retroactive effect. It takes effect from the moment that the declaration of termination is recieved by the other party (and in certain cases the advance warning period). Until that moment, the contract remains valid and its performance can be demanded. By consequent, restitution only affects the contractual benefits and duties extended after that date.[369]

Influenced by German law, Swiss case law has recently poses as a principle that dissolution for non-performance does not give rise *ipso facto* to the nullity of the contract with retroactive effect: '*La résolution a pour effet de modifier l'objet du contract pour en faire un rapport de liquidation*'[370] (The dissolution has the effect of changing the objective of the contract to make it a liquidation avenue) ('*Liquidationverhältnis*'). Moreover the basis for an action in restitution is contractual.

In the same line of thought, Dutch law does not attribue any retroactive effect to dissolution for non-performance. However, dissolution '*marque (…) la naissance d'une obligation légale de restituer les prestations reçues pesant sur l'une et l'autre des parties*'.[371] (Marks (…) the birth of a legal obligation to restore the benefits recieved, weighing on both of the parties.) Also, although dissolution frees the parties from their future contractual obligations, the birth of this legal obligation obliges them to return the benefits recieved before declaring the dissolution (6: 271 B.W.) or if that is impossible by reason of the nature of the contractual exchanges and corresponding indemnification (art. 6: 272 B.W.).

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368 These include the termination of a contract of fixed duration of indeterminate duration for grevious fault, of a kind that would render the subsequent execution of the contract insupportable for the other party.

369 Or even the particular case of contractual obligation carried out to the extent that they concerned a period afther the coming intof force of the termination (for example: annual rent paid in advance which must be partially returned if the contract is termination during that year.).

370 P. WESSNER, *op.cit.*, n° 84 and following p. 924.

371 C.B.P. MAHE, E.H. HONDIUS, *op.cit.*, n° 37, p. 857.

Finally, in common law, dissolution is not, in principle, retroactive. The creditor of the inexecuted obligation is discharged of the execution of future obligations. However the difficulty lies in the choice by the creditor, of the basis for his indemnification: *reliance interest*, *expectation interest* and *restitution interest*.

The choice of which interest to indemnify, a complicated question,[372] responds to three principls. Firstly, only the creditor is, generally, in a position to choose between the different interests; next, by reason of the circumstances of each case the judges can chose to refuse to accord the indemnification of a particular interest; finally depending on the case, the judges can also choose to accumulate the indemnification of the different interests within the limits of fair reparation for the damage suffered.[373]

III. Destruction of Contract, a Consequence of the Exercise of Law Detached from Contractual Non-performance

The destruction of a contract is not only a sanction, it is also a right which comes more generally from the principles of prohibition of perpetual engagements and the obligatory force of contract, in virtue of which the parties to a contract of indeterminate duration – and in certain legal scenarios, in contracts of a determined duration – have the right to put an end to their contract, either unilaterally or conventionally, depending on the respect of certain conditions. Moreover, in these cases, it would seem that the term 'resiliation' is most often used **(A).** In addition, under the influence of Community law, special law in the matter of consumer law can allow a consumer to freely and unilaterally put an end to a contract within a certain time period. Although the terminology is unstable it would appear that this right is generally refered to as the right of retraction **(B).**

A. 'Résiliation': the right to sever a contract

Although the term 'résiliation' is generally used to denote non-retroactive destruction of a contracts of continuous execution., it is seen from comparative law that the term is used in a constant manner to denote the faculty of unilateral non-retroactive destruction of a contract of indeterminate duration and is independent of the existenc of any non-performance **(1).** This use of the terms 'résiliation' can be extended to cases of *mutuus dissensus* **(2).**

1. Unilateral 'résiliation'

Whether the dissolution of the contract is judical or unilateral, retroactive or non-retroactive, all these scenarios are aimed at punishing reprehensible conduct. Parallel to this

372 G.H. TREITEL, *An Outline of the Law of Contract*, Sixth edition, OUP, 2004, p. 378.

373 *Ibid*.

case is the situation in which the law expressly permits one party to put an end to the contract. This includes the legal scenarios of a unilateral breach of certain contracts which are grouped under the generic term of *'résiliation'*.[374]

At this juncture it is useful to distinguish between contracts of an indeterminate duration and contracts of a set duration. In the case of a contract of a indeterminate duration, the facility to unilaterally terminated the contract appears ad the natural corrollory to the principle of the prohibition of perpetual engagements. This facility is sometimes expressly outlined by certain legal texts[375] but must in any event be admitted in absence of express legal provision. This facility is limited. Also the notice periods,[376] and even the controls over the motives[377] continue to multiply; all these measures are aimed at anticipating and punishing abuses in the exercise of the right to sever the contract. By contrast in the case of contracts for a fixed term, the ability to unilaterally breach the contract is exceptional and must be very restrictively interpreted. It can be

374 For example, J. FLOUR, J.-L. AUBERT, E. SAVAUX, *Droit civil. Les obligations. 1. L'acte juridique*, 12ème édition, 2006, n° 380.

375 For example, articles L 122-4 and following of the Employment Code.

376 L 122-5 and L 122-6 of the Employment Code.

377 For example L 122-14-2 and following of the Employment Code. The question of justification of the breach by a legitimate reason is greatly discussed (See, in particular, the debates *[l]'obligation de motivation et [le] droit des contrats*, *RDC* 2004, p. 555 and following). However, it appears from French positive law, Toutefois, il ressort du droit positif français, except for a few rare instances, that no obligation to give reason for the breach of a contract exists. This position has been clearly and recently reaffirmed by *Conseil constitutionnel*: "(…) it does not follow from any principle of the freedom of contract which flows from article 4 of the Declaration of 1789 or for that matter, from any other priniple or rule of constitutional valor that the facility for an employer to put an end to 'first employment contract (CPE)' must be dependant on the obligation to first announce the reasons why." (Cons. const. 30 mars 2006, n° 2006-535, JO n° 79, 2 avril 2006, esp. cons. 23). However, a court seized with a dispute, will ensure that the exercise of the right was not abusive (See recently Cass. civ. 1ère, 21 February 2006, n° 02-21240, *Bull. civ.* I, n° 82: "Although, the party who puts an end to a contract of indeterminate duration with respect for the agreed formalities does not have to justify his action by any reason, nevertheless the court can, from an examination of the established circumstances, hold that there was fault degenerating into abuse of the exercise of the right to teminate"). In Belgian law, no obligation to give reasons exists either:: Mons, 16 October 1984, *R.D.C.* 1985, p. 636, quoted by Th. DELAHAYE, "La résiliation unilatérale des contrats à durée déterminée en droit belge", in: *Droit des contrats, France, Belgique 2*, Larcier, 2006, p. 223, esp. n° 14, p. 233, note 50: "A party who makes use of the right to unilaterally rescind does not have to give reasons for his decision. If he does so in an overly enthusiatic manner' the court is not under an obligation to verify that the reason is well founded. There is no abuse of the right to terminate where the party respects the contractual notice".

The Cour d'appel in Brussels is particularily explicit (Bruxelles (Réf.), 1 October 2004, *RG* 2004 *KR* 178): "the contract which binds the parties is a contract of indeterminate duration, so that in principle, each of the parties must respect the contract until it ends; neither of the parties can benefit from the facility to unilaterally end the contract. All anticipated breachs constitute contractual fault, giving the creditor of the inexecuted obligation the choice between enforcement of the contract or termination as wells as damages (…)".

seen, for example, in article 1944 of the French Civil Code as regards a contract of deposit where the contract ceases on the wishes of the depositor; or even article 2003, of the same code, regarding the subject of agency agreement, which foresees that the contract can end according to the wishes of the mandator or the agent. An analogous facility has equally been given to a tenant of an apartment building through the medium of article 12 of the law of 12 July 1989,[378] (article 12) and also to a consumer subscriber to a contract to perform services when the consumer has not been informed in the conditions outlined in the text of the fact that he does not have to see out a contract concluded including a clause of automatic renewal (article L 136-1 of the Consumer Code).[379]

In German law, the term '*Kündigung*' returns, as has been seen,[380] to the concept of '*résiliation*' and that this concept is divided into two varieties: '*außerordentliche Kündigung*' (extraordinary *résiliation*) and '*ordentliche Kündigung*' (ordinary *résiliation*). Moreover, it is the latter to which attention shall be directed. In effect, *ordentliche Kündigung* puts an end to contracts of an indeterminate duration without which there is a need to prove fault. However this facility is subject to a notice period (depending on the type of contract and the period that has past on the contract) but no motive needs to be proved, except in the very important pratical cases of employment contracts or leases regarding severance on the part of the employer or property owner

In Italian Law, the expression '*recesso determinativo*'[381] is used by the legislator to denote the legal technique which allows the terms of contracts of indeterminate duration to be fixed. The term '*recesso*' must be used with care as depending on the context, it can cover different meanings.[382]

It emerges from the collection of legal systems studied that when a situation includes the termination of contracts of indeterminate duration as well as certain fixed term contracts conforming to the law and such a situation is independent from inexecution, the term '*résiliation*' is used. To this it must be added that none of these laws envisage a retroactive effect from '*résiliation*' as such. Thus no legal intervention is necessary to put '*résiliation*' into action. This type of *résilitation* can be made clearer from a terminological point of view by referring to it as '*résiliation unilatérale*' (unilateral termination). This precision term allows *resiliation* to be clearly distinguished from *mutuus dissensus*, which can be referred to as 'contractual' or 'amiable' *résiliation*.

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378 L. n° 89-642 du 6 July 1989.

379 C. CORGAS-BERNARD, *La résiliation unilatérale du contrat à durée déterminée*, Préf. Ch. Jamin, PUAM, 2006.

380 See above.

381 D. VALENTINO, *Recesso e vendite aggressive*, Napoli, 1996, p. 120.

382 It can refer to '*mezzo di impugnazione*' when it allows one of the parties to contest a contract tainted by a formational vice. It also covers the scenario in which one fo the parties puts an end to the contract where there is not contractual intent ('*jus poenitendi*'). G. GABRIELLI, F. PADOVINI, 'Recesso (dir.priv.)', in: *Encyclopédia del diritto*, vol XXXIX, s.d.ma; Milano; 1998; R. SACCO, G. DE OVA, 'Il contratto'; *Trattato di diritto civile*; 3è éd.; Torino 2004, p. 694; D. VALENTINO, *Recesso e endite aggressiv*e, Napoli, 1996, p. 144.

2. Contractual résiliation/termination

Different legal systems allow for contractual termination of a contract, ie the destruction of a contract by the mutual consent of the parties independent of any performance.

This idea of *mutuus dissensus*[383] is expressed in French and Belgian law, in the terms of article 1134 subsection 2 of the respective Civil Codes of each county. Although the literal translation from latin is 'mutual dissent',,[384] academic writers, on the whole, use the terms *'révocation'*[385] (revocation), *"résiliation mutuelle"*[386] (mutual rescission) or *'résiliation amiable ou conventionnelle'*[387] (mutual or contractual termination).

This is also the idea expressed through article 1439 of the Civil Code of Quebec[388] which was re-transcribed by Quebec authors, under the saintly name of *'résiliation bilatérale'*.[389] (bilateral termination).

The idea is also the same as that expressed in subsection 3 of article 1372 of the Italian Civil code.[390]

Finally, it is this same idea which is expressed in English law through the concept of 'rescission by agreement'[391] – equally referred to as, *'discharge by agreement'* – and in German law by the notion of *'Aufhebungsvertrag'*.

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383 The term "distrat" is sometimes found. See. F. TERRÉ, Ph. SIMLER, Y. LEQUETTE, *op.cit.*, n° 476.

384 Regarding the ellipsis which the expression *mutuus dissensus* causes, See. R. VATINET, "Le mutuus dissensus", *RTD civ.* 1987.252.

385 J. CARBONNIER, *Droit civil. Les biens. Les obligations*, 1re édition, Puf Quadrige, 2004, n° 1028, p. 2116; J. FLOUR, J.-L. AUBERT, E. SAVAUX, *Droit civil. Les obligations. 1. L'acte juridique*, 12ème édition, Sirey 2006, n° 379. The use of this term is registered elsewhere, naturally in the line of law taken from the drafting of article 1134 subsection 2 which states: *'Elles [les conventions] ne peuvent être révoquées que de leur consentement mutuel, ou pour les causes que la loi autorise'*. (Contracts can not be revoked except by mutual consent or for causes prescribe by law.)

386 B. FAGES (Ed), *Lamy droit du contrat*, Etude n° 465 préc., esp. n° 465-22.

387 H., L. et J. MAZEAUD, F. CHABAS, *Leçons de droit civil, Tome II, Premier volume, Obligations, théorie générale*, 9ème édition, Montchrestien 1998, n° 722; F. TERRÉ, Ph. SIMLER, Y. LEQUETTE, *Droit civil. Les obligations*, Dalloz 2005, 9ème édition, n° 476, p. 479. However, it must be noted that these autors do not use this expression except when the parties have outlined that there will be no retroactive effect. In a general manner, these authors use the term *'convention révocatoire'* (a revocable contract).

388 *'Le contrat ne peut être résolu, résilié, modifié ou révoqué que pour les causes reconnues par la loi ou de l'accord des parties'*. (The contract cannot be dissolved, terminated' modified or revoked except for reasons laid down by law or the agreement of the parties.)

389 J.-L. BAUDOUIN, P.-G. JOBIN, N. VEZINA (avec la participation de), *Les obligations*, 6ème édition, Editions Yvon Blais, 2005, n° 450, p. 461; n° 804, p. 792 and following; adde. D. JUTRAS, 'La résiliation unilatérale ou les joies de l'exégèse', C.B.R. 2002, p. 153 and following, esp. p. 155.

390 *'Il ne peut pas être défait que pour consentement mutuel ou pour les causes admises par la loi'*. (It cannot be unmade except by mutual consent or for reasons admitted by law.)

391 'A contract which is executory on both sides may be discharged by agreement between the parties that it shall no longer bind them. This affects a rescission of the contract, and nit releases the parties from their obligations under it. Such an agreement is formed of mutual promises, and the con-

B. Retraction

The legal facility accorded to consumers to go back on their word during a determined period of time has been known in France by a very fluctuating terminology:[392] '*dénoncer*' (to renege),[393] '*droit de dénonciation*', (right to renege),[394] '*renoncer*', (to renounce)[395] '*faculté de renonciation*', (facility to renounce)[396] '*faculté de résiliation,*' (facility of recission)[397] '*rétracter,*' (to retract)[398] '*faculté de rétractation*', (facility of retraction) right of '*retour*'.[399] (return)

French legal writing has long debated the question of the legal nature of the right of retraction: '*une partie des auteurs voit dans le droit de rétractation un mécanisme intervenant après la conclusion du contrat, car selon certains auteurs, "on ne peut que rétracter un engagement pris, annuler un acte préexistant, renoncer qu'à une convention établie, dénoncer qu'un accord passé"*[400] *quand d'autres estiment que ce mécanisme ne fait que retarder la formation du contrat, lequel reste, jusqu'à l'expiration du délai dans lequel le droit de rétractation peut être exercé, à l'état embryonnaire*'.[401] ('some of the authors see, in the right of retraction, a mechanism, intervening after the conclusion of contract, as according to some authors, "one can only retract an engagement that has been entered into, annul a pre-exisiting contract, renounce an established legal commitment, or renege on a past agreement,"

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sideration for each promise of each party is the abandonment by the other of its rights under the contract', J. BEATSON, *op.cit.* n° 519. However, this mechanism must be distinguished from other similar mechanisms such as "*abandonment*" – which is the situation in which the court deduces from a long period of inactivity that the parties are in agreement to abandon the execution of the contract which binds them – or a" *substituted contract*" – where it is expressly outlined in a new contract that the initial contract will be terminated; it can also be implied by the introduction of new clauses or new parties. Finally, the difficulties can be overcome through the Anglo-Saxon terminology, in particular, by use of the concept of "*rescission for breach*". In effect, "a sort of agreement or mutual consent exists from which termination results … Non-performance plays the role of an offer. The creditor is the recipent and he can accept or reject at his discretion. If he treats the contract as terminated, he accepts the offer and gives his consent." (B. GILSON, *Inexécution et résolution en Droit anglais*, LGDJ 1969, préf. R. David, p. 52 and following, n° 56 and following which refers to CHESCHIRE and FIFOOT, *The Law of Contract*, 6ème édition, p. 468, quoted by R. VATINET, *op.cit.*, n° 8, p. 257).

392 G. ROUHETTE, "Droit de la consommation" et théorie générale du contrat", in: *Etudes offertes à René Rodière*, Dalloz 1981, p. 247 and following; S. DETRAZ, 'Plaidoyer pour une analyse fonctionnelle du droit de rétractation en droit de la consommation', Contrats, conc et consom. n° 5, May 2004, Etude n° 7; *Adde*. N. RZEPECKI, *Droit de la consommation et théorie générale du contrat*, Préf. G. Wiederkehr, PUAM 2002, n° 102, p. 98 and following; n° 105, p. 102.

393 C. assur., art. L 211-16.

394 C. assur., art. L 211-16.

395 C. consom., art. L 121-25, C. assur., art. L 132-5-1.

396 C. assur., art. L 132-5-1.

397 C. consom., art. L 121-33.

398 C. consom., art. L 271-1.

399 C. concom., art. L 121-22, L 271-1 and L 311-15.

400 C. consom., anc. art. L 121-16.

401 B. STARCK, H. ROLAND, L. BOYER, *Les obligations, Le contrat*, Litec, 6e édition, 1998, n° 410.

while other authors consider that this mechanism only delays the formation of a contract, which remains, until the expiration of the period within which the right of retraction can be exercised, in an embryonic state'). From this perspective, the right of retraction can be considered either as a way to destroy the contract with is validly formed, or as a condition preventing the definitive formation of contract. In this spirit, some authors have taken care to distinguish the '*droit de rétractation pur et simple*' (right of retraction, pure and simple) and the '*délai de réflexion*' (period of reflection) laid down by certain specific legislation.[402] '*Si l'on s'en tient aux droits de rétractation* lato sensu *prévus au profit du consommateur, on peut considérer, selon une première approche, que les textes prévoient une sorte de formation par étape du contrat.*[403] *Cependant, dans les études où il est distingué nettement entre le délai de réflexion et la rétractation au sens strict, les auteurs considèrent que cette faculté constitue une condition résolutoire qui affecte un contrat déjà formé.*[404] *La rétractation constitue dans cette perspective une manifestation de volonté ayant pour objet de mettre fin au contrat déjà formé; elle entraîne la résolution ou la résiliation de la convention*'[405] (If one keeps to the rights of retraction *lato sensu* laid down to the advantage of the consumer, it can be considered that, according to the first approach, the tests set out a sort of staggered formation of contract. However, in the studies where clear distinction has been made between a period of reflexion and retraction in the strict sense, the authors consider that this facility constitutes a resolutory condition which affects an already formed contract. From this perspective the retraction constitutes a manifestation of will which is designed to put an end to an already formed contract: it leads to the dissolution and termination of the contract.)[406]

Also, in German law, the regime of '*Widerruf*' (retraction; literally: revocation) is based on the regime of '*Rücktritt*' (resolution). Here we return to the developments previously examined in the part of the document concerning international and community acquis.[407]

There does not seem to be a general concept of retraction in English law. In fact, the idea of retraction, such as it is envisioned, can be identified in two cases which are the same as those of French law: the right of an offeror to retract an offer that has not yet been accepted ('withdrawal'), and the right of retraction accorded to consumers (right of cancellaction) during a predetermined period ('cooling off period').[408] However, English commentators have established a strict distinction as regards the nature of the 'right of

402 E. POILLOT, *Droit européen de la consommation et uniformisation du droit des contrats*, Préf. P. de Vareilles-Sommières, LGDJ 2006, n° 258, p. 131 and following.

403 In the areas of mortgages (C. consom., art. L 312-1) and distance selling (L. n° 71-566, 12 juill. 1971).

404 R. BAILLOD, 'Le droit de repentir', *RTD civ.* 1984, p. 227; Ph. REMY, *'Droit des contrats: questions, positions, propositions'* in: *Le droit contemporain des contrats*, L. CADIET (sous la direction de), Economica 1987, p. 271, spéc. p. 278.

405 L. BERNARDEAU, "Le droit de rétractation du consommateur, un pas vers une doctrine 'ensemble, à propos de l'arrêt CJCE, 22 avr. 1999', *JCP* G 2000, I, 218; S. DETRAZ, *op.cit.;* J.-P. PIZZIO, 'Un apport législatif en matière de protection du consommateur: la loi du 22 décembre 1972 sur la protection du consommateur sollicité à domicile', *RTD civ.* 1973, p. 66.

406 L. GRYNBAUM, F. LEPLAT, 'Ordonnance "services financiers à distance". De la relativité du Code de la consommation comme code… pilote', *JCP* G 2005, I. 193.

407 See § 357 subsection 1 BGB which itself refers back to §§ 346 and following BGB.

withdrawal' and the 'right of cancellation'. The first concerns *'du droit de se retirer d'un accord avant que celui-ci n'ait été accepté*', (the right to withdrawn a offer before it has been accepted) while the second corresponds to *'droit d'annuler un contrat qui a déjà été accepté.'* (the right to annul a contract which has already been accepted).[409] Also there exists today the expression 'right of cancellation' which is recognised when the right to retract accorded to a consumer in certain specific contracts is envisioned.[410] The concept of retraction in English law is thus linked more to the idea of *résiliation* (termination).

As for the rest of the legal systems, the same idea seems to be disentangled from the Italian translation of the concept, which uses the expression *'diritto de recesso'*, which included the *'droit d'anéantir un contrat déjà conclu par l'intermédiaire d'une déclaration unilatérale de volonté communiquée à l'autre partie'*.[411] (the right to destroy the a contract, already entered into by means of a unilateral declaration of desire communicated to the other party). This right, outlined by articles 64 to 67 of the New Consumer Code, is exercised in the area of contracts concluded with consumers, expressly envisioned by the legislator.[412]

Although these different legal system recognise a right of retraction for a consumer in the area of particular contracts concluded with professional, in whatever fashion, not one of them seems to have established the exact legal nature of this form of destruction of contract.

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408 J. BEATON, *Anson's Law of Contract*, *op.cit*. p. 28. See notably *Consumer Credit Act* 1974, ss 67-8; *Consumer protection (Cancellation of Contracts Concluded away form Business Premises) Regulations* 1987 (S.I. 1987, No 2117) which was amended by S.I. 1988, no 598; *Timeshare Act* 1992; *Package Travel, Package Holidays and Package Tours Regulations* 1992 (SI 1992, n° 1942).

409 E. POILLOT, *op.cit.*, n° 256.

410 E. POILLOT, *op.cit.*, n° 262. *Adde*. G. HOWELLS, S. WEATHERILL, *Consumer Protection Law*, Second Edition, Ashgate, 2005, p. 325 and following; p. 375.

411 F. DEL GIUDICE (sous la direction de), *Dizionario giuridico*, Edizioni Simone, 1992, v° 'Recesso', cited by E. POILLOT, *ibid*, note 5.

412 E.M. TRIPOLI, E. BATELLI, *Codice del consumatore, Milano* 2006, p. 129.

Part II
Guiding Principles of European Contract Law

General Introduction

1. At a time when the elaboration of a European contract law has the attention of the legal community it is possible to ask whether the construction of a common legal foundation would not be helped by the elaboration of guiding principles of European contract law. The object of such principles would differ slightly from the object of the Principles of European Contract Law ("PECL"). The latter project has as its ambition the general regulation of contract law. To this end, it comprises a collection of diverse specific rules aimed at governing the formation and performance of a contract. Such a system could be usefully completed by general rules which would preside over the elaboration of each of the specific rules contained in PECL. It is no longer a question of providing a legal solution to each of the questions posed in contract law, but of determining the ideas through which we can construct a European contract law as a whole.

2. The elaboration of these principles is not intended to replace PECL. On the contrary, the two projects are intended to complete each other. On the one hand PECL constitute the principal source allowing the identification of the Guiding Principles. On the other hand the Guiding Principles can hereafter form a useful guide to the interpretation and application of PECL. Indeed, the meaning of each of the provisions can be clarified by the Guiding Principle of which it is but a particular application. As a result it makes perfect sense to associate the two projects. To this end, the Guiding Principles could easily and usefully be placed in front of PECL, in the form of a first chapter.

3. Naturally, it was from the text and contents of PECL that the Guiding Principles were able to be identified. In the first instance, the provisions of the first chapter on 'General Provisions' were rich with information. However, it was also possible to usefully supplement the results obtained by cross referring to provisions from each of the other chapters. Thus, although the first chapter makes perfectly clear the importance of freedom of contract[1] and contractual fairness,[2] a study of all the provisions showed that PECL are equally permeated by the principle of contractual certainty.

4. As a result, it was possible to build the constituent parts of the Guiding Principles around these three pillars: freedom of contract, contractual fairness and contractual certainty. It remained only to identify the content of these three ideas as they appear throughout the contractual process. To do this, in addition to the information gained from a study of the applications contained in PECL, it was necessary to look to an analysis of comparative law for support. The principles of freedom of contract, contractual fairness and contractual certainty are indeed present in the laws of all the Member States of the European Union. However, their scope varies from one county to another. Nevertheless, the search for guiding principles aimed to identify a common core within the national laws. The study essentially concentrated on the laws of Germany, the Nether-

1 See Article 1.102.

2 See Articles 1.201 and 1.202.

lands, Switzerland,[3] France, Italy, Spain and England and Wales. However, where possible, references have also been made to the legislative provisions of the other countries of the European Union.

This study of comparative law could not be limited to the analysis of the above legal systems alone. The scope of the principles of freedom of contract, contractual fairness and contractual certainty can also be illuminated by two other supplementary sources: first, International law[4] and European Community Law, and secondly various codifications of legal scholarship. With regard to the latter, the study concentrated on the content of the UNIDROIT Principles, the European Code of Contract Preliminary Draft and the Proposals for Reform of the Law of Obligations and the Law of Prescription ("the French Reform Proposals"). These different projects were obviously important sources since, in the same way as PECL, they aim to regulate contractual affairs, while, for the present, being deprived of normative value.

5. From the research undertaken it has been possible to equip the principles of freedom of contract, contractual fairness and contractual certainty with a concrete content. Although the aim of the proposed text is to prescribe general principles, it appeared nonetheless preferable not to proceed by way of abstraction. As a result the provisions have been written in the hope that the rule posed is accessible and intelligible.

The Guiding Principles of European Contract Law are broken into three sections which treat respectively freedom of contract (Chapter 1), contractual certainty (Chapter 2) and contractual fairness (Chapter 3).

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3 Swiss law has been included in the study of European legal systems as it is has been built around numerous diverse influences, in particular those of French and German law, and today it is impossible to hide the influences of European law. To this end see P. ENGEL, *Contrats de droit suisse (Traité des contrats de la partie spéciale du Code des obligations, de la vente au contrat de société simple, articles 184 à 551 CO, ainsi que quelques contrats innommés)* Stæmpfli éditions SA, Berne, 2000, n° 6, p. 9.

4 Only the Vienna Convention of 11 April 1980 on Contracts for the International Sale of Goods (CISG) was examined.

Chapter 1:
Freedom of Contract

Article 0-101: Freedom of the parties to enter into a contract

I. General presentation of the principle

1. In opening the chapter on freedom of contract, it is necessary to clearly state the principle of freedom of contract itself. This principle can only be understood within a framework of respect for mandatory rules. Although freedom of contract is without doubt a fundamental principle of contract law, it by no means results in authorising parties to derogate from mandatory rules. This limit should therefore appear clearly.

2. In addition it appears necessary to clarify the scope of the principle of freedom of the parties to contract. It is important to indicate to the parties exactly what they are allowed to do when entering into a contract. Two points are therefore considered:
- The freedom to choose with whom to enter into the contract.
- The freedom to choose the content of the contract as well as the form. On this last point the principle of freedom of contract necessarily implies the principle of consensualism.

II. Application of the principle in PECL

A. Direct applications

3. First, there is a provision that states the principle of freedom of contract in the current version of PECL: Article 1: 102. This provision reads:

(1) Parties are free to enter into a contract and to determine its contents, subject to the requirements of good faith and fair dealing, and the mandatory rules established by these Principles.

(2) The parties may exclude the application of any of the Principles or derogate from or vary their effects, except as otherwise provided by these Principles.

Given that freedom of contract is a fundamental principle of contract law, it is proposed that it should be made a guiding principle. In this light, two remarks can be made:

On the one hand, in order to exactly specify the scope of this principle it is important, noting of course the reserve due to compliance with the mandatory rules, to be more precise than the current Article 1:102 paragraph 2 in order to indicate the scope of freedom of contract.[1] The examination of several provisions contained in PECL does indeed make it possible to clarify this range.

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1 **Acquis Group** (European Research Group on Existing EC Private Law: study group responsible for drafting the Acquis-Principles): a principle of contractual freedom is posed, together with

– Article 2:301 concerning *'Negotiations Contrary to Good Faith'*. Before reserving the liability of the party who negotiates in bad faith, the provision starts by affirming the freedom of the parties to negotiate, which is nothing other than an expression of freedom of contract at a precontractual stage.[2]
– Article 2:101 concerning *'Conditions for the Conclusion of a Contract'*. This provision establishes, without giving it a name, the principle of consensualism as it states first of all that the contract is concluded by the agreement of the parties *'without any further requirement' (1)*. In addition, it is expressly foreseen that *'a contract need not be concluded or evidenced in writing nor is it subject to any other requirement as to form (…)'* (2).[3] Freedom of contract is therefore understood in this sense as a freedom of form.

On the other hand, it does not appear useful to reproduce the rule from para 2 of Article 1.102 which details to what extent it is possible to derogate from PECL rules. This rule could be maintained within Chapter 1 as it disposes of the statement of the general principle of freedom of contract itself in order to specify one of its particular applications.

4. Secondly, Article 1:103 of PECL details the limiting of freedom of contract by mandatory rules.

This provision allows parties, when the applicable law, determined by the choice of law rules of the forum before which the dispute is brought, so allows, to *'choose to have their contract governed by the Principles, with the effect that national mandatory rules are not applicable'* (1), with the exception of those rules which apply regardless of the governing law (2). The freedom of the parties to submit their contract to PECL can thus allow them to elude the application of certain national mandatory rules, which the commentary has christened 'ordinary' mandatory laws in contrast to the so-called 'directly applicable laws' which are applicable irrespective of which law governs the contract.[4] According to the

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limits. Natural and legal people are free to contract and to determine the content of their contract. However, mandatory rules may limit that freedom of contract. These limits (in particular those relating to the free determination of the content of the contract) are justified by the unequal nature of the relationship which may exist between the parties (an imbalance resulting from a difference in economic power, knowledge …). The working group proposes to further clarify the limits to this principle of freedom of contract and to define what a consumer is. It was originally proposed that an article pertaining to 'non-mandatory rules' be inserted, which was to lay out that 'a law pertaining to contracts is not mandatory, subject to contrary provisions'. This proposition does not appear to have been adopted. On the other hand, the drafting of Article 1:102 has evolved as freedom of contract is not simply limited by 'the mandatory rules posed by these present principles' but by 'any mandatory rules'.

2 Article 2:301 PECL *'(1) A party is free to negotiate and is not liable for failure to reach an agreement. (2) However, a party who has negotiated or broken off negotiations contrary to good faith and fair dealing is liable for the losses caused to the other party. (…)'*

3 Compare similarities with Article 11:104 PECL which states that, concerning assignment *'an assignment need not be in writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses'*.

4 *Principles of European Contract Law, Part I and II*: Prepared by The Commission on European Contact Law and Part I and II edited by Ole LANDO and Hugh BEALE, 2000 p. 102 (hereafter, *Principles of European Contract Law, Part I and II op.cit.*). *Principles of European Contract Law,*

commentary, these directly applicable rules are rules which '*are expressive of a fundamental public policy of the enacting country and to which effect should be given when the contract has a close connection to this country*'.[5] Thus the freedom of contract of the parties to submit their contract to PECL does not, in any case, allow them to elude the application of national, supranational or international mandatory rules which always apply to the contract regardless of the governing law. The freedom of the parties to contract is therefore systematically limited by fundamental mandatory rules.[6]

B. Indirect applications

5. A large number of the rules contained within the Principles are specific applications of the principle of freedom of contract. The freedom to determine the content of the contract implies for example the freedom to determine the obligations' place of execution (Article 7:101 (1) PECL), the contract's date of execution (Article 7:102 PECL) or the currency of payment (Article 7:108 PECL). Equally, freedom of contract implies that of simulation (Article 6:103 PECL). Between the parties, the prevalence of the covert act is, according to the commentary, a consequence of the principle of freedom of contract.[7]

6. Within the limits posed by mandatory rules, it is important to take into account the rules in the current Chapter 15 which specify the effect of illegality on contracts or contractual provisions. The contract is deprived of effect to the extent that it is contrary to principles recognised as fundamental by the laws of the Member States of the European Union.[8] The Principles retain a wide conception of the fundamental principles and avoid heterogeneous national concepts of immorality, illegality, public policy and morals.[9] The commentary on Article 15:102 states that, although the Principles constitute a self-contained system of rules applicable to the contracts governed by them, it is still not possible to ignore altogether the provisions of national law or the other rules of positive law applying to such contracts, in particular those rules or prohibitions expressly or impliedly making contracts null, void, voidable, annullable or unenforceable in certain

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Part III edited by Ole LANDO, Eric CLIVE, André PRÜM and Reinhard ZIMMERMANN (hereafter *Principles of European Contract Law, Part III op.cit.*).

5 *Ibid* p. 101.

6 In respect of Community Law, the Convention of Rome distinguishes implicitly between three different categories of mandatory rules: 'ordinary' mandatory rules (see articles 3(3), 5(2) and 6(1)), 'directly applicable rules' (see article 7) and rules of international public policy (see article 16). The directly applicable rules and the rules of public policy express particularly important public policy requirements of the Member State which prescribed them. As a result, the freedom of the parties to decide that the contract is subject to the rules of the PECL can allow them to elude the application of 'ordinary' mandatory rules, but in every case they remain limited by the directly applicable rules and the rules of public policy.

7 *Principles of European Contract Law, Part I and III op.cit.* p. 306.

8 See Article 15:101.

9 *Principles of European Contract Law, Part III op.cit.* p. 211.

circumstances. It is therefore necessary to return to the distinction between mandatory rules laid down in Article 1:103 of the Principles.[10]

III. Applications of the principle in comparative law

A. National laws

7. The freedom of parties to contract according to conditions of their choice is recognised in all Member States.[11] In the majority of national laws a rule expressly states the principle of freedom of contract.[12] Points of convergence can also be seen with regard to the content and limits of freedom of contract.

1. Statement of the principle of freedom of contract

8. In respect of the statement of the principle of freedom of contract, it is possible to distinguish between legal systems which recognise a direct commitment to freedom of contract, through one particular provision, and those where the principle, unanimously recognised, is recognised through its various applications.

a) Direct commitment

9. Article 1322, paragraph 1 of the Italian Civil Code poses the principle of freedom of contract within the limits laid down by the law. It results from this that all illicit, illegal, immoral and non-binding contracts are forbidden.[13]

Equally, in Spanish law, the freedom of the parties to contract according to terms of their choice is affirmed by Article 1255 of the Spanish Civil Code.[14] This freedom is not however without limits: the above mentioned provision states that contracts cannot be contrary to statute, to morality or to public policy or Article 6 of the same code.[15]

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10 Article 1:103: *'(1) Where the otherwise applicable law so allows, the parties may choose to have their contract governed by the Principles, with the effect that national mandatory rules are not applicable. (2) Effect should nevertheless be given to those mandatory rules of national, supranational and international law which, according to the relevant rules of private international law, are applicable irrespective of the law governing the contract.'*

11 *Principles of European Contract Law, Part I and II, op.cit.* p. 99.

12 Germany: Article 2(1) of the German Constitution; Greece: Article 5(1) of the Hellenic Constitution and Article 3 of the Civil Code; Denmark: Article 5.1.1 Danske Lov (old Danish Code of 1683); Spain: Article 6 and 1255 of the Civil Code; France, Belgique and Luxembourg: Article 6, 1123 and 1134 para 1 of the Civil Code indirectly; Italy: Article 1322 of the Civil Code; The Netherlands: Article 6:248 BW; Portugal: Article 405 of the Civil Code; Austria: § 859 ABGB.

13 M.-C. DIENER, *Il contratto in generale*: Giuffrè editore, Milano, 2002, §. 1. 3. 3 onwards.

14 Article 1255 Civil Code: *'Los contratantes pueden establecer los pactos, cláusulas y condiciones que tengan por conveniente, siempre que no sean contrarios a las leyes, a la moral ni al orden público'*.

b) Indirect commitment

10. Although they do not dedicate a specific provision to the principle of freedom of contract, some legal systems nevertheless attach freedom of contract to a textual provision.

This is firstly the case in German law. Although there is no provision of the BGB which expressly states the principle of freedom of contract, the principle is nevertheless attached to a written provision, that of Article 2 of the German Constitution. Thus, although the principle of freedom of contract *(Vertragsfreiheit)*, itself a concretisation of the principle of private autonomy *(Privatautonomie)* is not explicitly formulated by § 311 I BGB,[16] the principle has, according to the Federal Constitutional Court, constitutional value, as it is *'included at least implicitly in Article 2 [1] of the Fundamental Law which guarantees to each person the right to free development of his personality'*.[17] The principle of freedom of contract consists of *'the freedom to contract or not to contract (Abschlussfreiheit)'*.[18]

Another such example is French law. Even though no provision of the Civil Code expressly envisages the principle of freedom of contract, Article 1123, concerning the rules on capacity, can be considered an illustration of the principle. In stating that *'any person may enter into a contract, unless he has been declared incapable of it by law'*,[19] the Civil Code lays down two rules: the principle of capacity (a lack of capacity being the exception) and freedom of contract. In the same way, the principle of freedom of contract appears from an a contrario reading of Article 6 of the Civil Code. To the extent that this article provides that 'statutes relating to public policy and morals may not be derogated from by private agreements', it follows that the parties are free to derogate from norms that do not fall within this provision.

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15 Article 6, 3° Civil Code: *'Los actos contrarios a las normas imperativas y a las prohibitivas son nulos de pleno derecho, salvo que en ellas se establezca un efecto distinto para el caso de contravención'* (Acts contrary to mandatory or prohibitive norms are void by operation of law unless they envisage a distinct effect in the case of violation.)

16 'In order to create an obligation by legal transaction and to alter the contents of an obligation, a contract between the parties is necessary, unless otherwise provided by statute' (translation: Budesministerium der Justiz http://bundesrecht.juris.de/englisch_bgb/index.html).

17 *'… Inclus au moins implicitement dans l'art. 2 [I] de la Loi fondamentale qui garantit à toute personne le droit au libre épanouissement de la personnalité'*, M. PÉDAMON, *op.cit.* n. 22. – *Adde* R. ZIMMERMANN, *The New German Law of Obligations (Historical and Comparative Perspectives)*: Oxford University Press Inc., New York, 2005, p. 160, 205, 207 onwards: *'Of course, contract law is, and remains, based on freedom of contract. But it has long been recognized that freedom of contract is not an end in itself. Rather, it must be regarded as a means of promoting the self-determination of those who wish to conclude a contract.'* (p. 205).

18 *'La liberté de contracter ou de ne pas contracter'*, M. PÉDAMON, *op.cit.* n° 22. – This freedom is exceptionally limited by an obligation to contract (Kontrahierungszwang ou Abschlusspflicht): e.g. the obligation to subscribe to an insurance policy. – See also M. PÉDAMON *ibid.* n° 36 on the Law of 27 July 1957 relative to restrictions of competition (Gesetz gegen Wettbewerbsbeschränkungen).

19 Translation: www.legifrance.gouv.fr.

11. In other legal systems, the principle of freedom of contract is recognised as a fundamental principle without being attached, directly or indirectly, to a written provision.

This is the case in Swiss law. In effect, 'la liberté de faire des contrats' (the freedom to make contracts) is considered as one of the four 'libertés fondamentales' (fundamental freedoms) on which Swiss civil law rests.[20] A case of the Swiss Federal Tribunal, 1st Civil Court, 7 May 2002[21] illustrates this point. This case holds that *'private law rests on the principle of private autonomy. In the law of obligations, this principle solidifies into the principle of freedom of contract. This freedom presents diverse facets (freedom to contract, freedom in the choice of contractual partner, freedom of object, form and to bring an end to contractual relations …)'*.[22] While no provision expressly states the principle of freedom of contract, it is nevertheless admitted that *'each person is free to enter into contracts or to refuse to contract'*.[23] In addition, *'the obligation to contract is the exception; it must result from the law or be imposed by virtue of morality'*,[24] and *'the refusal to contract considered as contrary to morality appears rarely in practice'*.[25]

It is the same again in Dutch law. The principle of freedom of contract does not have a textual base yet it is universally accepted and understood as in PECL. Literally, Article 6:248(1) BW[26] refers only to one element of freedom of contract, that of choosing the content of the contract.[27]

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20 P. ENGEL, *Traité des obligations en droit suisse (Dispositions générales du CO)*, Staempfli éditions SA Berne, 2nd ed. 1997, p. 97 citing W. YUNG *'Eugène Huber et l'esprit du Code civil (Grandes figures et grandes œuvres juridiques)'*, published by the Law Faculty of Geneva University, 1948 (hereafter cited as, P. ENGEL, *Traité …, op.cit.*).

21 La Poste c. Acusa, ATF 129/2003 III p. 35, 42.

22 *'Le droit privé repose sur le principe de l'autonomie privée. En droit des obligations, ce principe se concrétise dans celui de la liberté contractuelle. Cette liberté présente diverses facettes (liberté de contracter, liberté dans le choix de son partenaire contractuel, liberté de l'objet, de la forme et de mettre un terme aux relations contractuelles …)'*. Cited by P. ENGEL *'L'évolution récente de la partie générale du droit des obligations'*, in P. ENGEL, C. CHAPPUIS, S. MARCHAND, A. MORIN *L'évolution récente du droit des obligations*, The work of the study day organised at the University of Lausanne 10 February 2004, ed. by M. BLANC, Centre du droit de l'entreprise de l'Université de Lausanne, Publication CEDIDAC 61, Lausanne, 2004, p. 8.

23 *'Chacun est libre de conclure des contrats ou de refuser d'en conclure'*, P. ENGEL, *Traité … op.cit.* p. 97.

24 *'L'obligation de contracter est l'exception; elle doit résulter de la loi ou s'imposer en vertu des bonnes mœurs'*, *ibid.* p. 98.

25 *'Le refus de contracter considéré comme contraire aux mœurs apparaît rarement en pratique'*, *ibid.* p. 100. – *Adde* by the same author *'L'évolution récente de la partie générale du droit des obligations'*, article cited above, p. 10 onwards.

26 *'A contract has not only the juridical effects agreed to by the parties, but also those which, according to the nature of the contract, result from the law, usages or the requirements of reasonableness and equity.'* Translated in D. BUSCH, E. H. HONDIUS, H. J. VAN KOOTEN, H. N. SCHELHAAS, W. M. SCHRAMA (ed.) *The Principles of European Contract Law and Dutch Law, A commentary:* Ars Aequi Libri (Nijmegen) & Kluwer Law International (The Hague/London/New York) 2002 p. 33). (Cited hereafter, D. BUSCH, E. H. HONDIUS et alii, *op.cit.*).

27 Cited *infra* D. BUSCH, E. H. HONDIUS et alii.

Lastly, in English law, the principle of freedom of contract finds its roots in the economic theory of *laissez-faire*,[28] the self-regulation of the market by the principle of supply and demand[29] and the idea that each contracting party, as the best judge and best defender of their own interests, should not be hindered in their contractual efforts. In the same way as French law, with the classically adopted presentation of free will *(autonomie de la volonté)*, the absolute reign of freedom of contract is an exaggeration of reality: the judiciary have always intervened, in a way that over the passage of time can certainly be seen as evolutive, to regulate contractual relations and to make sure that, initially *a minima*, contractual relations respect a certain degree of fairness. This informal, specific but regular intrusion in contractual relations by the judiciary became more and more frequent during the 20th century. The intervention is sometimes however provided and regulated by Parliament, which has, for example, enacted the *Unfair Contract Terms Act 1977* (relating to the prevention and punishment of unfair terms).

2. Content and limits of freedom of contract

a) Limits: Compliance with mandatory rules

12. All the legal systems within the European Union recognise that freedom of contract is limited by mandatory rules. The majority of these legal systems distinguish between mandatory rules and non-mandatory, supplementary rules.[30]

13. Contracts contrary to fundamental principles of morality or those contrary to public policy cannot in principle produce effects. This principle is known to all European legal systems with varying levels of express or implicit acknowledgement.[31] Several legal sys-

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28 See in particular G. H. TREITEL, *An outline of the Law of Contract*, Oxford University Press, 6th edition 2004, pp. 3-5.

29 *'Do nothing, and let the market resolve any problem that arises'*.

30 Known in French law as *règles imperatives* and *règles supplétives*, commentary on Article 1:103 of PECL *(Principles of European Contract Law, Part I and II op.cit. p. 101)* states that this distinction is found in many countries: The Netherlands: mandatory rules are called *regels van openbare orde* or *dwigende rechtsregels* and non-mandatory rules *aanvullende rechtsregels* or *regelend recht*; Germany: mandatory rules are called *zwingende Rechtsvorschriften* and non-mandatory rules *abdingbare* or *dispositive Rechtsvorschriften*; Italy: recognises a distinction between mandatory norms and dispositive norms; Spain: Article 1255 Civil Code creates a distinction between mandatory rules *(normas cogentes)* and non-mandatory rules *(normas dispositivas)*. On the other hand, the distinction between mandatory and non mandatory rules within the Common law is relatively recent. In respect of performance and non-performance very few mandatory rules have existed until recent years. However, the distinction has begun to be recognised: for example in England and Wales: see the Sale of Goods Act 1979 and the Unfair Contract Terms Act 1977; for Ireland: see the Sale of Goods and Supply of Service Act 1980.

31 *Principles of European Contract Law, Part III, op.cit.* p. 211 onwards.

tems use concepts of public policy and morality to determine what is considered to be a lawful contract.[32] Generally, these unlawful contracts are considered void.[33] In English, Irish and Scottish law, contracts contrary to public policy or those deemed immoral are frequently presented as being unenforceable before a court of law. The parties can claim neither damages nor performance in kind.

The system in Germany is a little different. Freedom of contract is recognised as having two types of limit:[34] the general provisions of the BGB and the specific rules in § 307 to 309 BGB on general contractual conditions. In respect of these general provisions, we are concerned with, on the one hand, § 134[35] on the void nature of a legal transaction that violates a '*statutory prohibition*' unless the statute implies otherwise,[36] and on the other hand, § 138[37] on the void nature of a transaction '*contrary to public policy*'. '*The unlawfulness or immorality of the subject*' can be sanctioned by declaring void '*the acts contrary to legal mandatory provisions and morality*'.[38] It is therefore the concept of morality, understood in a specific sense, which constitutes an important limit on freedom of contract.[39] Moreover, the Federal Constitutional Court ensures that these limits on freedom of contract are well respected. In a decision[40] that has been described as '*spectacular*',[41] the Court enjoined the *Bundesgerichtshof*, when it applies provisions such as § 138 and

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32 See Articles 6 and 1133 of the French Civil Code; Article 1343 of the Italian Civil Code; Articles 280 and 281 of the Portuguese Civil Code; Article 3. 40 BW for the Netherlands; Articles 1255 and 1273 (3) of the Spanish Civil Code; Article 19 of the Swiss Code of Obligations.

33 It must be noted however that Austrian law is more nuanced in that it provides that a contract that violates legal rules relating, not to the content of the contract but to the mode, place and moment of conclusion of the contract, will be maintained.
In Swiss law the sanction is, in principle, the invalidity of the act (Article 20 I CO) – subject to '*the special case of* mesures d'ordre *(or* prescriptions d'ordre*, Sollvorschriften as opposed to Mussvorschriften): the infringement of these measures can lead to civil sanctions (damages) or administrative sanctions, or even penal sanctions (fines). However, the act accomplished in contravention of such a measure remains valid: invalidity would result in undermining the rights of innocent third parties and the needless compromise of legal certainty.*' (P. ENGEL, *Traité …*' *op.cit.* p. 111).

34 M. PÉDAMON, *op.cit.* n° 105 onwards.

35 '*A legal transaction that violates a statutory prohibition is void, unless the statute leads to a different conclusion*'.

36 This article also makes it possible to sanction situations of evasion of the law via fraud. See M. PÉDAMON, *op.cit.* n° 107.

37 '*A legal transaction which is contrary to public policy is void*'.

38 '*L'illicéité ou l'immoralité de l'objet* [peut être sanctionnée par la nullité] *des actes contraires aux dispositions légales impératives et aux bonnes mœurs*', M. PÉDAMON, *op.cit.* n° 92.

39 In Austrian Law, § 879 ABGB is also aimed at morality.

40 BVerfGE89, 214 ff.

41 R. ZIMMERMAN, *The New German Law of Obligations … op.cit.* p. 207 onwards: '*This development was initiated by a spectacular decision of the Federal Constitutional Court enjoining the Federal Supreme Court, when applying open-ended provisions as such as §§ 138 I and 242 BGB, to pay due attention to the guarantee of the autonomy of private individuals, as enshrined in Article 2 I of the Basic Law (Grundgesetz, 66). Such autonomy, the Court held, is not properly safeguarded by a regime of unrestricted freedom of contract. On the contrary, the civil courts are bound to control the content of*

242 BGB, to be vigilant in guaranteeing private autonomy as is provided in Article 2 I of the Fundamental Law: according to the Federal Constitutional Court, this autonomy is not safeguarded by a limitless freedom of contract. On the contrary, the civil law jurisdictions are bound to control the contents of contracts which are unduly imbalanced to the detriment of one of the parties, where the imbalance results from a structural inequality in the negotiating powers of the parties.

b) Content of freedom of contract

14. In the majority of the legal systems studied freedom of contract includes the freedom to break off contractual negotiations. As a result, all the Member States of the European Union hold that the breaking off of contractual negotiations is free,[42] subject, more often that not, to a requirement of good faith.[43] In addition, freedom of contract implies more often than not a freedom to choose the other party to the contract, a freedom to determine the content of the contract and a freedom from restraints of form.

15. Freedom of contract first of all allows each contracting party to choose the other party to the contract. German and Swiss law both include this freedom of choice of party[44] and only limit it to the extent necessary to maintain balanced competition.[45] Equally, in French law compliance with mandatory rules sometimes leads to limiting the free choice of contracting party.[46] However the principle of freedom of choice remains.

16. The majority of foreign legal systems also hold that freedom of contract implies a freedom of the parties to determine the content and terms of their contract. Thus in German law it is established that the principle of freedom of contract covers *'the freedom to shape the content of the contract (Gestaltungsfreiheit)'*, which *'allows the parties to arrange*

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contracts which are unusually burdensome for one of the parties and which result from a structural inequality of bargaining power'.

42 *Principles of European Contract Law, Part I and II, op.cit.* p. 191.

43 However, English law, for its part, does not impose on the parties any duty to enter into or continue negotiations in good faith. See Walford v. Miles [1992] A. C. 128, H. L. cited in: *Principles of European Contract Law, Part I and II, op.cit.* p. 192.

44 In respect of German law see M. PÉDAMON, *op.cit.* n° 22. – For Swiss law see P. ENGEL, *Traité …, op.cit.* p. 97, 102; *adde* Swiss Federal Tribunal, 1st Civil Court, 7 May 2002, La Poste c. Acusa, previously cited by P. ENGEL *'L'évolution récente …'*, article cited above, p. 8.

45 See in German law the law of 27 July 1957 concerning restrictions on competition (Gesetz gegen Wettbewerbsbeschränkungen) – discriminatory practices and refusal to sell (see M. PÉDAMON, *op cit* n° 36). – For Swiss law, see P. ENGEL, *Traité, op.cit.* p. 102, which holds that *'the Federal law on cartels and analogous organisations of 20 December 1985 can indirectly impose a contractual partner on [a person] who, if they do not accept this partner, would be seen as breaking the law'*.

46 This can be the case with legal rights of pre-emption (for example, the right of pre-emption belonging to a residential leaseholder: Article 15 of the law of 6 July 1989).

their contractual relations as they want and to dispose, totally or partially, of non-mandatory contractual models; it also allows the parties to create new types of contract'.[47]

However, each legal system admits that the freedom to determine the content and terms of the contract only operates within a framework fixed by mandatory rules. Thus in French law the free determination of the content of the contract gives way when the law requires the insertion of a specific clause in the contract.[48] Equally, in Italian law, the parties are never free to determine the terms and content of the contract outside of what the law states is permissible: thus, even atypical contracts remain subject to the provisions of the Code.[49] In addition, Article 1339 of the Italian Civil Code leads to the automatic insertion in the contract of the terms relating to the price of goods and services imposed by the law, which includes replacing those laid down by the parties; Article 1340 provides for its part that customary terms (in the sense of regular use) are considered inserted into the contract if the parties did not intend to exclude them.[50]

17. Finally, freedom of contract implies a freedom of form.[51] This rule is recognised by the majority of the Member States of the European Union: in general neither writing nor any other formality is required for a contract to be valid.[52]

B. International law and Acquis communautaire

18. The **Vienna Convention** does not expressly dedicate a provision to the principle of freedom of contract. Only the specific application of freedom of contract which permits parties to exclude the application of the Convention or to derogate from of its provisions is included.[53] The UNCITRAL Secretariat's explanatory note on the United Nations

47 '*La liberté de façonner le contenu du contrat (Gestaltungsfreiheit)*, [qui] *autorise les parties à aménager comme elles l'entendent leurs rapports contractuels, à s'écarter totalement ou partiellement des modèles de contrats réglementés de manière non impérative par la loi; elle les autorise également à créer des types contractuels nouveaux*', M. PÉDAMON, *op.cit.* n° 22.

48 See for example the obligatory insertion of fixed words/expressions in particular in consumer law, such as Articles L 341-2 and L 341-3 of the Consumer Code.

49 Article 1232 of the Italian Civil Code.

50 M.-C. DIENER, *op.cit.* §. 3.4.1.

51 **Acquis Group**: a guiding principle was proposed. The idea was not retained as the Draft Common Frame of Reference proposed to rewrite Article 2:101 (2) PECL. See DCFR II. 1:107: Form: (1) *A contract or other juridical act need not be concluded, made or evidenced in writing nor is it subject to any other requirement as to form.; (2) Particular rules may require writing or some other formality.*

52 See to this end the commentary on Article 2:101: *Principles of European Contract Law, Part I and II*, *op.cit.* p. 142: Germany: impliedly from § 125 BGB; Austria: § 883 ABGB.; Denmark: Article 5.1.1 Danske Lov.; Spain: Article 1258 Civil Code, Article 51 Commercial Code; Finland: Hoppu 36; Portugal: Article 219 onwards Civil Code; Sweden: Aldercreutz I 14; Netherlands: Article 3: 37 (1) BW; Italy, Articles 1326 and 1350 implicitly; Switzerland: Article 11 I of the Code of Obligations.

53 See Article 6: '*The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions.*'

Convention on Contracts for the International Sale of Goods considers that this provision is an expression of the '*fundamental principle of freedom of contract*'. However, this approach corresponds more with paragraph 2 of the current Article 1:102[54] than with the statement of a guiding principle.

The Vienna Convention does not include a general principle of compliance with '*mandatory laws*'.

The principle of consensualism is clearly affirmed by the Convention.[55] Article 11 states that '*a contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses*'.

19. The place occupied by freedom of contract in **Community law** is important, above all in the case law and the secondary legislation,[56] and its recognition within the guiding principles of material Community law is not in any doubt. It began in effect with the Treaty of Rome putting in place a Common Market which goes, '*well beyond the introduction of a free trade area*'[57] and which constitutes '*above all a whole framework of activity for economic operators*'.[58] Thus, freedom of contract appears as a factor in the effective realisation of intra-Community economic exchanges.

20. The principle of freedom of contract can be compared to other principles present in Community law, which helps to reinforce its place within the Community sphere.

First, outside of contract law *stricto sensu*, freedom of contract is directly linked to the general principle of *free movement*, the central notion of the EC Treaty, which manifests itself in the economic areas of free movement of goods[59] and workers,[60] freedom of establishment and the free movement of services[61] and free movement of capital,[62] as well as the non-economic area of free movement of persons.[63] Naturally, it is the first facet of free movement which relates to freedom of contract since this is one of the corollaries of the economic liberalism which permeates Community law.[64] The implementation of freedom of contract is therefore expressed by the fact that an individual, a

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54 See *supra*.

55 Subject to the provisions of Article 12: '*Any provision of article 11, article 29 or Part II of this Convention that allows a contract of sale or its modification or termination by agreement or any offer, acceptance or other indication of intention to be made in any form other than in writing does not apply where any party has his place of business in a Contracting State which has made a declaration under article 96 of this Convention. The parties may not derogate from or vary the effect or this article.*'

56 See *infra* the cited references.

57 '*… Bien au-delà de l'instauration d'une zone de libre-échange*'. J.-P. JACQUET, *Droit institutionnel de l'Union européenne*, Dalloz, 3e éd., 2004, especially n° 58.

58 '*… Avant tout un cadre d'activités pour les opérateurs économiques*', *ibid*.

59 Articles 23-31 EC.

60 Articles 39-42 EC.

61 Articles 43-55 EC.

62 Articles 56-60 EC.

63 Articles 61-69 EC, see also Article 18 § 1 EC.

64 To this end Article 4 § 1 EC states that '*the activities of the Member States and the Community shall include … the adoption of an economic policy … conducted in accordance with the principle of an open market economy with free competition*'.

national of a Member State and exercising their right to free movement, is able to contract in another Member State under the same conditions as a national of that Member State; more often than not these are cross-border contracts.[65] The above illustration applies to each of the Community freedoms.

The principle of freedom of contract should also be read in the light of the principle of '*autonomie de la volonté*' (autonomy of will) of which freedom of contract is a positive expression. This is expressed in 'supplementary'[66] Community law, for example the Convention of Rome on the law applicable to contractual obligations[67] which states in Article 3 the principle of freedom of choice by reference to the role of the parties in the choice of the applicable law for their contract. Within the framework of the Brussels Convention on *jurisdiction and the enforcement of judgments in civil and commercial matters*,[68] today transformed into a Community regulation,[69] the ECJ has also had the opportunity to pronounce on the place of the autonomy of will in this sphere. Thus it has '*attached the requirements of the [ex] article 17 of the Convention in respect of the clause attributing jurisdiction to the establishment by this text [of the aforesaid principle]*'.[70] The ECJ also states that "*article 17 of the Convention embodies the principle of the parties' autonomy to determine the court or courts with jurisdiction, the third paragraph of that provision must be interpreted in such a way as to respect the parties' common intention when the contract was concluded …*".[71]

21. There are numerous applications of the principle of freedom of contract in Community law. One finds for example the freedom to enter into a contract *or not*. Thus, leading the consumer to contract against his wishes by '*creating the impression that the consumer cannot leave the premises until a contract is formed*'[72] is labelled as an 'aggressive commercial practice' by Community law, and, as a result, prohibited by Directive 2005/29/EC.[73]

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65 See *infra* freedom of contract and international private law rules.

66 A doctrinal expression indicating the norms resulting from an International Convention to which the Member States of the Community are parties in the absence of a relevant Community legal base to make such provisions.

67 Rome Convention 80/934 CEE 19 June 1980 on the law applicable to contractual obligations, OJ n° L 266 09/10/1980 p. 0001-0019.

68 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, OJ n° L 299 31/12/1972 p. 0032-0042.

69 Regulation (EC) No 44/2001 22 December 2000 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters OJ L 12 16.1.2001.

70 *'… Rattach[é] les exigences de l'[ex]-article 17 de la Convention en matière de clause attributive de juridiction à la consécration par ce texte [dudit principe]'*, H. ADIDA-CANAC, *Contribution à l'étude du droit communautaire des obligations*, ANRT, 2003, t. 1, n° 351.

71 Point 14, ECJ, 24 June 1986, *Rudolf Anterist v Crédit lyonnais*, Aff. 22/85, *Rec*. 1986 p. 01951.

72 Point 24 on 'aggressive commercial practices', Annex 1 in Directive 2005/29/EC 11 May 2005 on unfair business-to-consumer commercial practices in the internal market (Unfair Commercial Practices Directive) OJ L 149 11.6.2005, p. 22-39.

73 Directive 2005/29/EC 11 May 2005 on unfair business-to-consumer commercial practices in the internal market, cited above.

In the same way, simple contractual negotiations can be freely broken off in order to preserve the right not to enter into a contract, for example if the parties do not reach agreement over one or other condition of the contract.

In addition, freedom of contract is expressed through the free choice of the other party to the contract. Directive 2004/113/EC 13 December 2004 *implementing the principle of equal treatment between men and women in the access to and supply of goods and services*[74] takes the precaution of stating in its Article 3 § 2 that only a discriminatory choice, based on the sex of the other party, can threaten the rule according to which '*all individuals enjoy … the freedom to choose a contractual partner for a transaction*'[75] even where it is for '*subjective reasons*'.[76]

22. The limit placed on freedom of contract by compliance with mandatory rules can also be found in Community law, particularly secondary Community law. This is undoubtedly explained by the fact that contractual provisions resulting from Community law '*have the protection of the contracting party in a weak position as their essential function*';[77] mandatory rules are the ideal tool to do this in that they impose public policy requirements on the wills of the parties. For example, Directive 94/47/EC 26 October 1994 *on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis* in Article 4 requires Member States to make provision to ensure that '*the contract, which shall be in writing, includes at least the items referred to in the Annex*'.[78]

C. Codifications by legal scholars

1. Statement of the principle of freedom of contract

23. In respect of the other projects that can be compared to PECL, it is necessary to distinguish between those that directly commit to the principle of freedom of contract itself, and those that only retain its specific applications.

a) Direct commitment

24. The **European Code of Contract Preliminary Draft** commits directly to the principle of freedom of contract in its '*preliminary provisions*'. Article 2 § 1 concerning '*contractual autonomy*' states that '*the parties can freely determine the content of the contract, within the limits imposed by mandatory rules, morality and public policy …*'. In the same way,

74 OJ L 373 21.12.2004, p. 37-43.

75 Whereas 14.

76 *Ibid*.

77 '*… [ont] pour fonction essentielle la protection du contractant en situation de faiblesse*', H. AUBRY, *L'influence du droit communautaire sur le droit français des contrats*, *op.cit.*, n° 12.

78 Article 4 of the Directive 94/47/EC of the European Parliament and Council 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis, OJ L 280 29.10.1994, p. 83-87.

Article 1.1. of the **UNIDROIT Principles**, entitled, '*freedom of contract*' expressly states the principle of freedom of contract: '*the parties are free to enter into a contract and to determine its content*'.

b) Indirect commitment

25. The principle of freedom of contract is not expressly stated as such in the **Proposals for Reform of the Law of Obligations and the Law of Prescription** in any one individual provision. However, it is the natural basis of many other provisions. In addition to the specific variations considered hereafter, it also implies for example that the initiation and the conduct of negotiations is free (see Article 1104, paragraph 1).

2. Content and limits of freedom of contract

a) Limits: Compliance with mandatory rules

26. In a general sense, all the texts taken into account limit freedom of contract by reserving compliance with mandatory rules.

Article 2 § 1 of the **European Code of Contract Preliminary Draft**, entitled, '*contractual autonomy*', states that '*the parties can freely determine the content of the contract, within the limits imposed by mandatory rules, morality and public policy, as established in this Code, Community law or the national laws of the Member States of the European Union …*'. If the agreement is contrary to public policy, morals, a mandatory law etc it is sanctioned by holding the contract void.[79] It is also specifically envisaged that '*the content of the contract must be (…) lawful (…)*'.[80] It is lawful '*when it is not contrary to mandatory rules of this Code, to Community law or national law, or to public policy or morals*'.[81]

According to Article 1.4 ('*mandatory rules*') of the **UNIDROIT Principles**, '*nothing in these Principles shall restrict the application of mandatory rules, whether of national, international or supranational origin, which are applicable in accordance with the relevant rules of private international law*'.

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79 Article 140: '*1. Unless the law states otherwise, a contract is void*
(a) if it is contrary to public policy or morals or to a mandatory rule adopted for the protection of the general interest or for the safeguarding of situations of primary importance for society;
(b) if it is contrary to any other applicable mandatory rule;
(c) if it lacks any of the essential elements of a contract indicated in Art 5 para 3 and para 4;
(d) in the other cases indicated in this Code and in the applicable laws of the European Union and its Member States;
(e) in all other cases, in this Code or an applicable law, where it is stated that some element is necessary in order for the contract not to be void or in order to give validity to an act, or where equivalent expressions are used.'

80 Article 25: '*The content of the contract must be useful, possible, lawful, and determined or capable of determination*'.

81 Article 30 § 1.

The **Proposals for Reform of the Law of Obligations and the Law of Prescription** do not contain a general reservation of compliance with 'mandatory rules' as it is inferred from Article 6 of the French Civil Code[82] (see *supra* the study of French law). It is nevertheless stated that '*a thing which forms the subject-matter of the undertaking must be lawful*' (Article 1121-2); if it is not the contract is null with absolute nullity (Article 1122). Equally, the cause of the contract must be lawful (Article 1124); in default of which the contract is once again null with absolute nullity (Article 1124-1).

b) Content of freedom of contract

27. The different projects all provide that freedom of contract necessitates that the parties are free to negotiate the contract and to break off negotiations, subject to good faith.

Within the **UNIDROIT Principles** this principle manifests itself in freedom to negotiate and the absence of liability in the case of failure to reach an agreement.[83]

The freedom to break off pre-contractual negotiations is expressly stated in the **Proposals for Reform of the Law of Obligations and the Law of Prescription**.[84] The first paragraph of Article 1104 declares that '*the parties are free to begin, continue and break off negotiations, but these must satisfy the requirements of good faith*'.[85]

Finally, the freedom to break off negotiations is implicitly found in the **European Code of Contract Preliminary Draft** where it excludes, as a matter of principle, the liability of the parties if the negotiations do not succeed.[86]

28. The studied texts all hold, more often than not expressly, that the form of the contract, as well as the proof of it, is free.

Article 1.2 of the **UNIDROIT Principles**, '*no form required*', states that the Principles do not require the contract to be concluded or evidenced by writing, and that it can be proved by any means, including witnesses.

The principle of consensualism is equally demonstrated by the **Proposals for Reform of the Law of Obligations and the Law of Prescription**. Its Article 1127 holds that '*as a general rule, contracts are completely formed by the mere consent of the parties regardless of the form in which this may be expressed*'.[87]

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82 Which is outside the field of the proposals.

83 Article 2.1.15(1): '*A party is free to negotiate and is not liable for failure to reach an agreement.*'

84 See in particular Article 1104, para 1: '*L'initiative, le déroulement et la rupture des pourparlers sont libres, mais ils doivent satisfaire aux exigences de la bonne foi*'.

85 J. CARTWRIGHT and S. WHITTAKER, *Proposals for Reform of the Law of Obligations and the Law of Prescription (English translation of the* Avant-projet de réforme du droit des obligations et de la prescription), http://denning.law.ox.ac.uk/iecl/research.shtml, (herafter, J. CARTWRIGHT and S. WHITTAKER, *op.cit.*).

86 See Article 6 '*obligation of good faith*', specifically § 1: '*each of the parties is free to undertake negotiations with a view to concluding a contract without being held at all responsible if said contract is not drawn up, unless his behaviour is contrary to good faith*'.

87 J. CARTWRIGHT and S. WHITTAKER, *op.cit.*

Only the **European Code of Contract Preliminary Draft** does not expressly state the principle of consensualism. Nevertheless, no other article requires that a particular form be used for a contract to be valid. Only contracts that are specially designated require writing for their validity.[88]

IV. Proposed text

Article 0-101: Freedom of the parties to enter into a contract
Each party is free to contract and to choose the other party.
The parties are free to determine the content of the contract and the rules of form which apply to it.
Freedom of contract operates subject to compliance with mandatory rules.

Article 0-102: Respect for the freedom and rights of third parties

I. General presentation of the principle

1. In the chapter dedicated to freedom of contract it is important to clarify how this freedom is integrated within the pre-existing legal order. The contract produces two types of effect. On the one hand, because of the obligations it creates, it produces an obligatory effect which links the parties. On the other hand, it has results which take effect as social facts and integrate into the pre-existing legal order. As a result, it is advisable to clarify to what extent the parties are free to produce these effects with their contract. Their freedom is necessarily limited by the rights of third parties to the contract.

In the first place, although the parties are free to contract, their contract can in principle only produce a binding effect between the parties to it, and not in respect of third parties, who by assumption, have not consented to the act. There are however legal exceptions to this principle (notably the stipulation in favour of a third party).

Secondly, even if the parties are free to contract, they cannot enter into a contract which ignores the existing rights of third parties. It is a question here of transposing, from the point of view of the effects of a contract, the general principle according to which no one can harm another. Thus, when contracting, the parties cannot, by their agreement, illegitimately undermine the pre-existing rights of third parties. This principle must apply throughout the contractual process, from the time of entering into the contract until its discharge, as well as during the performance of the contract and if it is modified.

[88] See in particular Article 35 for contracts relating to real goods (§ 1, 2 and 3) or gifts (§ 4).

II. Application of the principle in PECL

A. Relative effect of the contract

2. The principle according to which the contract can only produce effects between the parties does not figure in PECL itself. The Principles only include an exception to this principle, in Article 6:110 which deals with the stipulation in favour of a third party (*stipulation pour autrui*). It provides that the third party is able to require the performance of the obligation if the right *'has been expressly agreed upon between the promisor and the promisee, or when such agreement is to be inferred from the purpose of the contract or the circumstances of the case'*.[89]

As a result there is no provision which states that, apart from the exceptions specifically envisaged, the principle remains that the contract will only produce effects between the parties.[90]

Such a provision could be placed within the chapter concerning the effects of the contract.[91] However, it appeared that the regulation of the effects of the contract with regard to third parties was better dealt with in the guiding principles.[92] The determination of what the parties have the right to do and what the parties do not have the right to do vis-à-vis third party rights is in effect clarifying the scope of freedom of contract, since in reality third party rights limit this freedom.

B. Respect for the rights of third parties

3. No provision in PECL specifies the effect of a contract on third parties. This is almost certainly explained by the fact that, in a more general sense, there is no text dealing with the situation of third parties to the contract, with the exception of the stipulation in favour of a third party.[93] However, even if the contract is 'the thing' of the parties, the fact remains that it does produce effects in the pre-existing legal order, and that for this reason its effects impact on third parties.

As a general system of regulation of contract law, the Principles cannot ignore the place and situation of third parties. It is therefore important to fill the current gaps. Here again the decision to create a guiding principle has been taken, instead of creating new provisions in the chapter concerning the effects of the contract.

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89 See Article 6:110(1) PECL.

90 **Acquis Group**: No provision on the effect of the contract in respect of third parties has been proposed.

91 See *infra* the general observations on this chapter.

92 For the position of third parties with regard to contractual certainty, see *infra* Article 0-203.

93 See *supra* Article 6:110. – A comparison may be made with the provisions concerning assignment of claims (Chapter 11) and transfer of contract (Chapter 12) if we consider the assigned debtor as a third party to the contract of transfer. Several provisions state that the transfer cannot aggravate his situation.

III. Applications of the principle in comparative law

A. National laws

1. Relative effect of the contract

4. The principle according to which the contract only produces effects between the parties is recognised in the majority of national laws. Sometimes, the principle is the subject of an express provision.

This is the case with French law. Article 1165 of the Civil Code states that '*agreements produce effect only between the contracting parties; they do not harm a third party, and they benefit him only in the case*' of the stipulation in favour of third parties. This provision is considered to be the textual basis of the principle of relative effect. According to a classical analysis, the second proposition of the provision signifies that it is not possible for the parties to make a third party the debtor or the creditor of the contract other than in the case of the stipulation in favour of a third party. Article 1119 of the Civil Code entertains the same idea as it states that '*as a rule, one may, bind oneself and stipulate in his own name, only for oneself*'. It results from this provision that, once again, a party may only in principle contract for himself.

Equally, in Italian law, Article 1372, paragraph 3 of the Civil Code expressly envisages that the contract '*only produces effects with regard to third parties in the cases provided for by the law*' while paragraph 1 states that '*the contract has the force of law between the parties*'. The principle of relative effect of the contract with regards to third parties is presented as a limit and also a guarantee of freedom of contract: you only undergo the consequences of an act if you have signed up to it.[94] Among the cases where the law admits that the contract does bind a third party, Article 1411 of the Civil Code deals with the stipulation in favour of a third party.

In the same way again, Article 1257 of the Spanish Civil Code poses the principle of the relative effect of the contract, which therefore cannot threaten the rights of third parties. The same provision nevertheless then recognises contracts in favour of a third party *(stipulation pour autrui)* and contracts that are the obligation of a third party (in this case a sort of promise of to stand as surety).

5. In other legal systems, the principle of relative effect is clearly acknowledged, without forming the object of a particular legal text.

In German law, although the BGB does not contain any general provision on the effects of the contract with regard to third parties, the principle *'is that a contract of an obligatory type […] only has effect between the contracting parties, that it does not give rise to any contractual relationship, any obligation or any claim on the part of a third party; this principle can be inferred from certain specific provisions of the BGB (§ 311, 328, 333). It appears as the negative side of freedom of contract'*.[95] However, '*the principle of relative effect is placed to one*

94 M.-C. DIENER, *op.cit.* § 1. 3. 9.

95 *'Est que le contrat de type obligatoire […] n'a d'effet qu'entre les parties contractantes, qu'il ne fait naître aucun rapport contractuel ni aucune obligation ni créance à la charge ou au bénéfice de tiers; ce principe peut se déduire de quelques dispositions particulières du BGB (§ 311, 328, 333). Il apparaît comme la face négative de la liberté contractuelle'*, M. PÉDAMON, *op.cit.* n° 151.

side when the contract produces beneficial effects for the third party or […] when the third party is included in the contractual relationship of obligation (§ 328 onwards)'.[96] Contracts for the benefit of third parties are *Verträge zugunsten Dritter*. *'The BGB establishes two sorts of contracts of this nature*[97]*: the true contract for the benefit of third parties (echter Vertrag zugunsten Dritter) which ressembles the* stipulation pour autrui *of [French] law; the false contract for the benefit of third parties (unechter Vertrag zugunsten Dritter) which can be clearly distinguished. In the first instance, the third party 'directly acquires the right to require performance' from the promisor (§ 328 I). In the second case, the third party, whose position is more fragile, does not acquire any right against the promisor (§ 328 II); only the stipulant can require the performance which is due to him'*.[98]

Originally Dutch law contained a provision, analogous[99] to Article 1165 of the French Civil Code, which stated the principle of relative effect. However, this provision was repealed by the new code. Nevertheless, the principle remains recognised.[100] The principle of relative effect is not however an obstacle to the stipulation in favour of a third party (Article 6:253,[101] 6:254[102] and 6:256 BW), provided that it is based on the

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96 *'Le principe de la relativité contractuelle est tenu en échec lorsque le contrat produit des effets au profit de tiers ou […] lorsque des tiers sont inclus dans le rapport contractuel d'obligation (§ 328 and following)'*, M. PÉDAMON, *ibid.*

97 § 328. *Contracts for the benefit of third parties:*
(1) Performance to a third party may be agreed by contract with the effect that the third party acquires the right to demand the performance directly.
(2) In the absence of a specific provision it is to be inferred from the circumstances, in particular from the purpose of the contract, whether the third party is to acquire the right, whether the right of the third party is to come into existence immediately or only under certain conditions, and whether the power is to be reserved for the parties to the contract to terminate or alter the right of the third party without his approval.

98 *'Le BGB consacre deux sortes de contrats de cette nature: le véritable contrat au profit de tiers (echter Vertrag zugunsten Dritter) qui s'apparente à la stipulation pour autrui [du] droit [français]; le faux contrat au profit de tiers (unechter Vertrag zugunsten Dritter) qui, lui, s'en distingue nettement. Dans le premier cas le tiers 'acquiert directement le droit d'exiger la prestation 'du promettant (§ 328 I). Dans le second cas le tiers, dont la position est plus fragile, n'acquiert aucun droit contre le promettant (§ 328 II); seul le stipulant peut exiger la prestation qui lui est due*', M. PÉDAMON, *op.cit.* n° 158.

99 See the former Article 1376.

100 D. BUSCH, E. H. HONDIUS et alii *op.cit.* p. 283; A. S. HARTKAMP *'Law of obligations*', *Introduction to Dutch Law*, J. CHORUS, P.-H. GERVER et E. HONDIUS (ed.), 4e ed. Kluwer Law International, 2006, p. 160.

101 '*1. A contract creates the right for a third party to claim a prestation from one of the parties or to invoke the contract in another manner against one of them, if the contract contains a stipulation to that effect and if the third person accepts it.*
2. Until its acceptance, the stipulation can be revoked by the stipulator.
3. Acceptance or revocation of the stipulation takes place by a declaration addressed to one of the two persons involved.
4. An irrevocable stipulation which, with respect to the third person, has been made by gratuitous title, is deemed accepted if it has come to the attention of the third person and he has not rejected it without delay' (translated in D. BUSCH, E. H. HONDIUS et alii *op.cit.* p. 282).

102 '*1. Once the third party has accepted the stipulation, he is deemed to be a party to the contract.*
2. The third party can also derive rights from the stipulation during the period prior to acceptance if this

agreement of the parties and that the third party beneficiary can renounce as well as accept the right that has been conferred.

In Swiss law, despite the absence of any provision in this respect, the principle of relative effect is recognised and implies '*a primary concern for the interested parties; third parties remain at a secondary level*'.[103] The Code of Obligations contains a chapter entitled '*de l'effet des obligations envers les tiers*'[104] aimed notably at subrogation (Article 110 CO), the promise to stand as surety (Article 111) and the stipulation in favour of a third party (Article 112).[105]

In English law, the principle of relative effect of contracts is reflected in the unwritten rule of the *Doctrine of Privity of Contract*[106] or *Privity Rule*. According to this rule, only the parties to a contract can request the performance of it or be pursued in order to perform it. According to the doctrine, the *Privity Rule* is used to distinguish between the rights arising from the law of contract and the law of property. According to this presentation, whereas the rights arising from property are universally opposable and '*binding on the world*', the rights drawn from contract are only binding on the other parties to the contract. These rights drawn from the contract can only form the subject of an action to enforce them or to require their respect if it is the parties themselves who are exercising the rights.[107] Even if the third parties are interested in the contract, they may not pursue performance of the contract[108] and may not be pursued.[109]

Over the course of a relatively long evolution,[110] exceptions to the *Privity Rule* have been admitted, notably in order to allow contracts to be entered into in favour of third parties and to allow these third parties to benefit from the advantages that it was con-

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is in conformity with the necessary implication of the stipulation' (translated D. BUSCH, E. H. HONDIUS et alii *op.cit.* p. 283).

103 '*Sont essentiellement en cause les seuls intéressés et que la collectivité comme les tiers restent au second plan*', P. ENGEL, *Traité … op.cit.* p. 103. – *Adde* P. GAUCH, W. R. SCHLUEP et P. TERCIER, *La partie générale du droit des obligations (sans la responsabilité civile)*, Schulthess, Zurich, 1982, t.2, n° 1579 onwards also deals with the principle of relativity of contracts.

104 P. ENGEL, *Traité … op.cit.* p. 417 onwards.

105 '*1. The party who, acting in his own name, has stipulated an obligation in favour of a third party has the right to require performance of that obligation for the benefit of the third party. II. The third party or his successors in title may also personally demand performance, when this was the intention of the parties or it is customary.*'

106 On this theory see G. H. TREITEL, *An outline of the Law of Contrat*, Oxford University Press, 6th edition 2004, pp. 97-101. – S. A. SMITH, *Atiyah's Introduction to the Law of Contract*, Clarendon Law Series, Oxford University Press, 6th edition, 2005, pp. 335 and 336.

107 For an examination of this distinction with respect to the doctrine of '*privity of contract*', see S. A. SMITH, *op.cit.*, p. 335: '*(…) Indeed, the principle [of Privity of Contract] has long been regarded as a distinguishing feature between the law of contract and the law of property. True proprietary rights are "binding on the world" in the lawyer's traditional phrase. Contractual rights, on the other hand, are (in the traditional law) only binding on, and enforceable by, the immediate parties to the contract (…)*'.

108 '(…) *The third party cannot enforce a benefit purposed to be granted by the contract* (…)' (C. ELLIOTT and F. QUINN, *op.cit.* p. 249).

109 C. ELLIOT and F. QUINN, *op.cit.* p. 247.

110 For the refusal of any exception to the doctrine of privity of contract, see Tweddle v. Atkinson (1861). – Beswick v. Beswick, (1968).

tractually envisaged would be conferred on them. In 1996 the *Law Commission* therefore wrote and disseminated a report specially dedicated to the question, entitled *Privity of Contract: Contracts for the Benefit of Third Parties*. This report lead to a major reform in the law, the *Contracts (Rights of Third Parties) Act 1999* which has reduced this aspect of the *Privity Rule* (the impossibility for third parties to demand performance of a contract which they are not parties to) to very marginal applications.[111] By virtue of this new law, third parties to the contract can enforce performance in two situations: when the contract expressly confers on them the possibility, or where the contract is entered into for the benefit of the third party.

2. Respect for the rights of third parties

6. A comparative analysis shows that with regard to a taking into account of third party rights, each national legal system maintains their own individual method. Nevertheless, there are certain common points amongst them. First, the majority of the legal systems do not recognise an express provision forbidding parties to impinge on third party rights. This can be explained by the fact that the above is simply a specific application of the fundamental principle, recognised by all the legal systems studied, which holds that no one can harm another. Following from this rule, each of the national legal systems recognises a more or less successful system for preserving third party rights.[112] In some legal systems, the effect of the contract with regard to third parties is particularly strongly regulated. In others it is only through the sanctioning of the violation of third party rights that these effects are taken into account.

7. French law, thanks to the work of legal scholars at the beginning of the 20th century, is certainly one of the legal systems where the effect of the contract with regard to third parties is explicitly regulated. In effect, thanks to the analyses carried out on the notion of opposability *(opposabilité)*,[113] it can be said that the contract, in so far as it is integrated in the legal order, constitutes a social fact that third parties make take into account. It is a question of the opposability of the contract to third parties. However, the study of this situation leads to the recognition that the contract is integrated into a legal order where third parties are themselves the holders of rights which must be respected. The opposability of third party rights to parties to the contract results in a limitation on freedom of contract: the parties cannot act in a way that would illegitimately undermine third party rights as their contract will produce, as a social fact, effects with regard to everyone. This principle, which is normally considered as being without textual basis, is the foundation

111 On this question, see notably G. H. TREITEL, *op.cit.* pp. 255-259.

112 In English law, it must be noted that the taking into account of third party rights does not give rise to general solutions or approaches as this would be to limit the freedom of contract of the parties.

113 See A. WEILL, *Le principe de la relativité des conventions en droit privé français*, thèse Strasbourg, 1938. – S. CALASTRENG, *La relativité des conventions, étude de l'article 1165 du code civil*, thèse Toulouse, Gaillac, 1939, p. 12. – See also E. JUILLE, *Effets des actes juridiques à l'égard des tiers*, thèse Lille, 1904. – L. DELCOURT, *De l'effet des actes juridiques à l'égard des tiers*, thèse Paris 1902. – R. DEMOGUE, *Traité des obligations*, tome VII, 1932, n° 702 s. – For a complete study of opposability, see J. DUCLOS, *L'opposabilité, essai d'une théorie générale*, thèse LGDJ, tome 179, 1984.

of several of French law's tools and techniques for dealing with third parties. Entering into a contract should not be a way of threatening third party rights. Thus, the parties cannot enter into a contract that compromises the performance of a right of a third party. The most frequent illustrations concern the situation where a debtor, already obliged to an initial creditor, enters into a contract which has the effect of compromising the performance of his obligation. While the debtor incurs liability in respect of his initial creditor, the case law holds that, with regards to the other party, *'every person who, with knowledge, helps another to breach his contractual obligations, commits a delictual fault in respect of the victim of the infraction'*.[114] A recent decision, which resulted in a similar outcome, was based on the notion of opposability itself.[115] There are many applications of this position. For example, a person, who knowingly enters into a contract in contempt of a non-compete clause which another party is subject to, will be liable as he has ignored the right of the beneficiary of the clause which was opposable to him.[116] Another example can be found in disputes relating to preliminary contracts *(avant-contrats)*, important to French law. For example, the contracting parties are not authorised to conclude a sale if it would violate a prior unilateral promise of sale contractually given by the seller. The sale would compromise the rights of the beneficiary of the unilateral promise of sale, which would not be allowed even though the beneficiary is a third party in respect of the purchaser.[117] Although, more often than not, the third party gets their opposable right from a contract they have entered into with one of the parties, this is not always the case. For example, the legally bound subject of an obligation to maintain or support sees his freedom of contract limited: he may not enter into a contract which leaves him unable to honour his obligation. Such a contract would, in effect, be fraudulent.

This position results more generally from the operation of Article 1167 of the Civil Code[118] which allows creditors, whatever the origin of their right, to attack the acts by which their debtor has compromised the performance of their rights. This is the *action paulienne*.[119] Here again, it is because respect for the creditor's right is imposed not only on the debtor, but more widely on everyone, that the debtor as well as the person who has entered into the contract with him sees their freedom of contract limited: they are not permitted to enter into a contract which compromises the performance of the creditor's right.

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114 *'Toute personne qui, avec connaissance, aide autrui à enfreindre les obligations contractuelles pesant sur lui, commet une faute délictuelle à l'égard de la victime de l'infraction'*, Cass. com. 11 October 1971, D. 1972, 120; 13 March 1979, D. 1980, 1, note Y. SERRA. – Civ. 1ère, 26 January 1999: Bull. civ. I. n° 32; RTD civ. 1999, p. 405 obs. JOURDAIN; *ibid*. p. 625 obs. MESTRE.

115 Cass. civ. 1ère, 17 October 2000, Bull. civ. I n° 246, D. 2001, p. 952, note BILLIAU and MOURY, JCP 2001 I. 338, n° 6 and following, obs. G. VINEY.

116 Cass. com., 13 March 1979, D. 1980, jurispr. p. 1, note Y. SERRA. – Cass. com., 3 May 2000, Contrats, conc. consom. 2000, comm. 111, obs. M. MALAURIE-VIGNAL; D. 2001, p. 1312, obs. Y. SERRA.

117 See for example Cass. civ. 3ème, 8 July 1975, Bull. civ. III n° 249.

118 Paragraph 1 states that creditors *'may also, on their own behalf, attack transactions made by their debtor in fraud of their rights'*.

119 On this, see L. SAUTONIE-LAGUIONIE, *La fraude paulienne*, thèse Bordeaux IV, 2006.

8. Italian law also acknowledges the effect of the contract with regard to third parties. Legal scholarship distinguishes between the direct and indirect effects of the contract in respect of third parties. The direct effects are only those created by the stipulation in favour of third parties.[120] The indirect effects are, on the one hand, those effects on third parties which result from the legal activity of another. This is for example the case with a contract for a lease which has effect with regard to the ultimate acquirer of the leased goods. On the other hand, the indirect effects are those which result from the contract being unlawful in respect of the third parties.[121] In addition, Italian law also sanctions, on a specific basis, the case of infringements of the rights of the specific third party who is the creditor of one of the parties. The *action révocatoire*, directed against fraudulent acts, is regulated in a detailed way by Articles 2901 to 2904 of the Civil Code.

9. Other legal systems regulate the effect of the contract with regard to third parties less rigorously.

This is the case with German law where there is no provision that limits freedom of contract in the name of third party rights.[122] Nevertheless, if a contract is entered into in violation of the rights of others (*Verträge zu Lasten Dritter)*, *'the contract can be declared void by an application of § 138 BGB […] when it constitutes a 'particularly brutal or unfair' act with regard to a third party and, according to the case law, a fraudulent collusion with a view to causing the failure of a pre-emption agreement will for example fulfil this condition'*.[123] The conditions required for such an avoidance are however very strict.

German law also protects the rights third party creditors.[124] § 161 BGB also details the consequences of a lack of necessary compliance with third party rights. It renders a

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120 M.-C. DIENER, *op.cit*. § 7. 3. 3.

121 *Ibid*.

122 However, one can find the basic elements which led to the recognition of the principle of opposability in French law in Ihering: See R. VON IHERING, *Etudes complémentaires de l'esprit du droit romain*: translation O. DE MEULENAERE, Paris, Marescq, 1903, p. 331 to 498, especially p. 335 and 337. This author distinguishes between the active and passive effects of rights. The active effects are those which the right produces for its holder. The passive effects are those which correspond *'to the limited state in which the right places the person or the thing [subject of the right] and which is characterised vis-à-vis the successor in title as legal subordination and vis-à-vis all other persons as a legal exclusion'*. This *'legal exclusion'* therefore expresses the effect of the rights with regard to third parties and the obligation on each person not to impinge on them.

123 *"La nullité du contrat peut être prononcée en application du § 138 BGB […] lorsqu'il constitue un acte 'particulièrement brutal ou déloyal' à l'égard d'un tiers et, selon la jurisprudence, une collusion frauduleuse en vue de faire échec à un pacte de préférence remplit par exemple cette condition*". R. Wintgen, *ètude critique de la notion d'opposabilité, Les effets du contrat à l'égard des tiers en droit français et allemand*, Lgdj 2004, Bibliothèque de droit privé t.426, n° 185 et n. 25 citing BGH NJW 64,540 et 85,2953 et Palandt BGB 61e éd. 2002 § 138 n° 61.

124 Originally, the *action paulienne* appeared to be an action in revocation regulated by the Bankruptcy Code created by the law of 10 February 1877. The scission of the two bodies of rules was instigated by the law of 21 July 1879. The Insolvency Code was reformed by a law of 5 October 1994 and entered into force on the 1st January 1999. The revocation of fraudulent acts outside of bankruptcy was also reformed by another law of 5 October 1994.

contract ineffective if it disregards the conditional right of another, even if that condition has not yet been realised.[125]

10. In the absence of any general regulation on the effects of contracts with regard to third parties, the majority of national legal systems nevertheless sanction the case where the rights of specific third parties who are creditors of one of the other parties are threatened. An action against fraud on the rights of creditors is indeed present in many legal systems.[126] In addition to the previously discussed French and Italian law, this is the case in Dutch law,[127] Spanish law,[128] Belgian law[129] and Quebec law.[130] This action can still be found in other legal systems even if it is not integrated in the provisions concerning contract law but those relevant to bankruptcy. This is the case in English law[131] and Swiss law.[132]

B. International law and Acquis communautaire

11. The **Vienna Convention** does not contain any provision stating that the parties may only contract for themselves.

In the same way, there is no provision that requires the parties to respect the rights of third parties. Admittedly, it is expressly envisaged that the seller must deliver the goods free from all third party rights (see especially Article 41: '*The seller must deliver goods which are free from any right or claim of a third party, unless the buyer agreed to take the goods subject to that right or claim*'[133]), but the rule, in the Convention, only concerns the relations between the parties. It does not allow third parties to act against the sale.

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125 § 161: '*If a person has disposed of a thing, and the disposition is subject to a condition precedent, any further disposition which he makes as regards the thing in the period of suspense is ineffective on the satisfaction of the condition to the extent that it would defeat or adversely affect the effect subject to the condition*'. This rule applies equally to cases where a time has been specified, by reference to Article § 163.

126 For a recent study of some European systems, see *La protección del crédito en Europa: la acción pauliana*, J. J. FORNER DELAYGUA (editor): Bosch, Barcelona, 2000.

127 Articles 3: 45 to 3: 48 BW. See A. S. HARTKAMP, *op.cit.* p. 158.

128 Article 1211 of the Civil Code, and Articles 1290 onwards.

129 Article 1167 of the Civil Code.

130 Articles 1631 to 1636 of the Civil Code.

131 The original text allowing creditors to act against fraudulent acts is *The Statute of Fraudulent Conveyances (13 Elizabeth, 1, c. 5) 1571*, which is still in force in some Common law countries. In England and Wales, it is now *The Insolvency Act 1986* which, in its provisions concerning bankruptcy, governs fraud on creditors' rights (see especially sections 423-425 concerning '*transactions defrauding creditors*', which reproduce the provisions of *The Statute of Fraudulent Conveyances 1571* in modern law).

132 See the law of 11 April 1889, part X. – In a more general sense, it is considered in Swiss law that fraud on the law is distinct from '*the abusive threat to the subjective right of another resulting from a contract or from statute (Vertragsumgehung) […] it is not that the law is hijacked for another purpose, but where the subject paralyses the subjective right of another contrary to good faith*', P. ENGEL, *Traité …, op.cit.* p. 282 onwards.

12. The requirement for the parties to take into account the right of third parties is present in **Community law**. According to one author, '*the contract can always be invoked against third parties and produces, on their part, all of its effects other than binding force, when it is not likely to be disadvantageous to them*',[134] which the decisions of the Court confirm.[135] In addition, European law on groups of companies, composed of harmonising Directives on the Company law of Member States, is largely centred on the protection of third parties to the contract constituting the company. For example, the first Directive of 9 March 1968[136] aims to explicitly ensure the '*protection of the interests of third parties*' with regard to companies limited by shares in so far as they only offer their authorized capital as guarantee,[137] and in order to do this it imposes, for example, the compulsory disclosure of some of the company's original documents.[138] Lastly, the ECJ has recognised that, within the framework of competition disputes,[139] all third parties[140] can assert the nullity of an agreement prohibited by Article 81 EC and can demand compensation for the harm suffered if there is a causal link between it and the prohibited agreement.[141] If the anti-competitive agreement can be called into question by third parties, it is because it unlawfully impinges on their rights.

C. Codifications by legal scholars

1. Relative effect of the contract

13. According to the various different projects, the principle of relative effect of the contract is either directly or indirectly stated.

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133 *Adde* Article 42 for the right or claim of a third party based on industrial property or other intellectual property.

134 '*Le contrat peut toujours être opposé aux tiers et produire à leur égard tous ses effets autre que la force obligatoire, lorsqu'il n'est pas susceptible de leur être défavorable*', H. ADIDA-CANAC, *Contribution à l'étude du droit communautaire des obligations*, *op.cit.*, especially, t. 2, n° 949.

135 For example ECJ, 26 February 1992, *Royal Belge v Robert Joris*, aff. C-333/90, *Rec.* I, p. 1135, cited by H. ADIDA-CANAC, *Contribution à l'étude du droit communautaire des obligations*, *op.cit.*, n° 949.

136 First Council Directive 68/151/EEC 9 March 1968, on co-ordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community, OJ L 65 14.3.1968, p. 8-12.

137 *Mémento Pratique Francis Lefebvre – Union européenne*, 2006-2007, *op.cit.*, especially n° 6806.

138 Article 2 of the Directive.

139 ECJ, 13 July 2006, Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA (C-295/04), Antonio Cannito v Fondiaria Sai SpA (C-296/04) and Nicolò Tricarico (C-297/04) and Pasqualina Murgolo (C-298/04) v Assitalia SpA, Aff. joint C-295/04 to C-298/04, Rec. 2006 page I-06619.

140 The consumer and the end-user of a service.

141 See the arguments of the above case.

In the **Proposals for Reform of the Law of Obligations and the Law of Prescription**, the principle is clearly stated by Article 1165 which holds that '*contracts bind only the contracting parties: they have no effect on third parties except in the situations and subject to the limitations explained below*'.[142]

In the **UNIDROIT Principles**, the principle only appears from an *a contrario* reading of Article 1.3. on the binding character of contract, which states that '*a contract validly entered into is binding upon the parties. […]*'. *A contrario*, it cannot therefore benefit or obligate other people. The stipulation in favour of a third party is expressly provided for by Articles 5.2.1 onwards.

Lastly, the principle according to which the parties only contract for themselves is implicitly posed in the **European Code of Contract Preliminary Draft**. Although Article 42 states that '*a contract has the force of law between the contracting parties*' it adds that it '*has effects for the benefit of third parties as laid down in the rules contained in this Chapter*'. This final part shows however the exceptional character of the effect of the contract with regard to third parties, limited to the case envisaged by Articles 72 onwards, that is to say the stipulation in favour of a third party.

2. Respect for the rights of third parties

14. The rights of third parties are taken into account as limits on the freedom of the parties to a lesser or greater extent depending on the project.

The **UNIDROIT Principles**, in the same way as PECL, are not overly preoccupied with third party rights. The section concerning '*third party rights*' (Articles 5.2.1. onwards) is only really concerned with the stipulation in favour of a third party. No provision deals with the effectiveness of the contract with respect to third party rights.

In the **Proposals for Reform of the Law of Obligations and the Law of Prescription** the choice was made to develop the provisions relating to *fraude paulienne*. As a result, specific third parties who are the creditors of one of the other parties are allowed to set aside the effects of the contract which threaten their right. Thus Article 1167 paragraph 1 states that '*in addition, a creditor can challenge in his own name any juridical act made by his debtor in fraud of his rights, although in the case of a non-gratuitous act he can do so only if he establishes that the other party contracting with his debtor knew of this fraud*'.[143]

However, it is without doubt the **European Code of Contract Preliminary Draft** which goes furthest in limiting freedom of contract by virtue of third party rights. Article 2 § 1 *in fine* states that '*the parties can freely determine the contents of the contract […] provided always that the parties do not aim thereby solely to harm others*'. By doing this, the project usefully states that the contact cannot be used by the parties as a way of harming others. Freedom of contract cannot go so far as to authorise such interference with the rights of others. This draft therefore prohibits fraud on third party rights in the same way that fraud on the law is ordinarily prohibited.

142 J. CARTWRIGHT and S. WHITTAKER, *op.cit.*

143 *Ibid.*

In addition, this draft project also sanctions the case where the parties have used the contract to undermine the rights of the specific third parties who are creditors of one of the parties. Thus, according to Article 154, the contract '*concluded between two parties with the intent of both to defraud the creditor of one*' is not opposable to the latter.

IV. Proposed text

Article 0-102: Respect for the freedom and rights of third parties
Each party can only contract for themselves, unless otherwise provided.
A contract can only produce an effect in as much as it does not result in an infringement of unlawful modification of third party rights.

Article 0-103: Freedom of the parties to modify or put an end to the contract

I. General presentation of the principle

1. The final article of the chapter on freedom of contract should specify how such freedom is exercised, not only when entering into or during the course of the contract, but also in cases of modification or termination of the contract. It is a question of clarifying whether this freedom allows the parties to release themselves, at their liking, from their contractual undertaking. None of the legal systems studied attribute such a wide interpretation as this to freedom of contract, at least not on an individual basis to each party. Just as the agreement of the parties is needed to form the contract, so an agreement is needed to modify it or bring it to an end.

2. It remains however to except the case of contracts for an indefinite period. In this case, the above rule must be reconciled with the principle prohibiting perpetual undertakings.[144] A contracting party cannot be indefinitely maintained in a contractual relationship for the reason that the other party refuses to bring the contract to an end. For these contracts it is suitable to uphold the classical analysis, that unilateral termination is possible.

The drafting of Article 0-103 therefore needs on the one hand to clarify the conditions of modification and termination of the contract, and on the other hand to allow unilateral termination in contracts of indefinite duration.

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144 The prohibition on perpetual undertakings is conceived of as a specific application, in contractual matters, of the principle encased in Article 4(1) of the European Convention of Human Rights which states that '*no one shall be held in slavery or servitude*'. See in this respect, *Principles of European Contract Law, Part I and II, op.cit.* p. 317.

II. Application of the principle in PECL

3. PECL do not contain any provisions dedicated to the possibility of parties ending the contract or modifying it. However, according to Article 1:107, entitled '*Application of the Principles by Way of Analogy*', the Principles (including Article 1.102 which deals with freedom of contract) apply '*with appropriate modifications to agreements to modify or end a contract (…)*'. It follows that the parties are free to modify or put an end to their contract. However, nothing is specified as to the scope of freedom of contract in this case.[145] There should therefore be a guiding principle relating to this question.

4. On the other hand, contracts of indefinite duration are the subject of a provision of PECL. Article 6:109 states that '*a contract for an indefinite period may be ended by either party by giving notice of reasonable length*'. The commentary indicates that the rule was conceived notably to avoid perpetual undertakings.[146] In so far as the object of the envisaged guiding principle is to clarify the scope of freedom of contract in the case of modification or termination of the contract, and not to govern the question of contracts of indefinite duration, there is no need to remove the current provision and place it within this chapter. It suffices to clarify that unilateral termination of contracts of an indefinite duration is possible.

III. Applications of the principle in comparative law

A. National laws

1. Modification and termination of the contract

5. With the exception of Dutch law, where no rule expressly states that the agreement of the parties allows for termination of the contract,[147] the majority of national laws admit that the agreement of the parties is sufficient to modify and to end a contract.

This is the case in Spanish law, and again in Italian law where Article 1372 paragraph 2 of the Civil Code allows the parties to bring the contract to an end by their agreement.

In French law, the possibility of modifying or ending the contract by common accord is simply an expression of the autonomy of will: when the wills are in agreement, together they may modify or undo the contract in the same way that they created the contract. This idea is present in the French Civil Code, in Article 1134 paragraph 2. According to this provision, contracts '*may be revoked only by mutual consent, or for causes authorized by law*'. Even if this provision only expressly deals with *mutuus dissensus*, it is unanimously accepted that it is also applicable to modifications of the contract.

In German law, '*the contract may disappear […] by the mutual consent of those who entered into it* (contrarius consensus): *the contracting parties undo and revoke, that which they previously did – we speak of Aufhebungsvertrag*[148]'. This rule results implicitly from § 311 I BGB.[149]

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145 **Acquis Group**: The fundamental principles proposed do not refer to the freedom to end or modify the contract.

146 *Principles of European Contract Law, Part I and II, op.cit.*, p. 317.

147 D. BUSCH, E. H. HONDIUS et alii *op.cit.* p. 278.

In English law, *agreement* is one possible cause of discharge of the contract.[150] The idea is the following: to undo the contract the same elements are required as to make it, namely consideration (a concept dealing with the balance and equivalence of the obligations and benefits[151]), and, in some circumstances, the correct formalities. The latter are required when the contract must be proved by writing.[152] The agreement of the parties is therefore not sufficient to modify or bring an end to the contract. It is necessary to comply with certain formalities which vary in their requirements depending on the modifications that one wishes to make.[153] According to the judgment given in *Morris v. Baron (1918)*, the requirement to respect formalities in the case of a contract which must be proved by writing depends on the extent to which the parties intend to alter their existing contractual relationship. The judges distinguished three situations:

– **partial discharge**: when, pursuant to a new agreement, the parties intend only to modify the terms of their previous contract, without importing any real substantial changes to their undertaking, then the agreement must be proved by writing. If this is not done, their original contract, in its original terms, remains applicable.
– **complete discharge**: if the parties intend to completely abandon their original contract and put an end to their contractual relationship, this release need not be formalised in writing.
– **fresh agreement**: if the intention of the parties is rather to unravel their original contract and replace it with a new agreement, simple verbal accord is sufficient to discharge the first contract, but the second must be proved in writing.

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148 '*Le contrat peut disparaître […] par le consentement mutuel de ceux qui l'ont conclu* (contrarius consensus)*: les contractants défont alors, révoquent, ce qu'ils avaient fait précédemment – on parle d'Aufhebungsvertrag*', M. Pédamon, *op.cit.* n° 245. – *Adde* n° 161: '*contractual regulation […] is irrevocable* (unwiderruflich) *unilaterally […]; only the mutual consent of the interested parties may destroy or modify it*'.

149 § 311 I BGB: '*In order to create an obligation by legal transaction and to alter the contents of an obligation, a contract between the parties is necessary, unless otherwise provided by statute.*'

150 For the different causes of *discharge of contracts* namely *performance, agreement, breach or frustration*, see C. ELLIOTT and F. QUINN, *op.cit.* p. 273 onwards. – For *agreement* in particular, *ibid.* p. 294 onwards.

151 For an explanation of the concept of consideration, see C. ELLIOTT and F. QUINN, *op.cit.* p. 79: '*(…) in English Law, an agreement is not usually binding unless it is supported by what is called consideration. Put simply, that each party must give something in return for what is gained from the other party, so if you wish to enforce someone's promise to you, you must prove that you gave something in return for that promise (…)*'. – On the similarities and differences between the concept of cause and consideration, see H. BEALE, A. HARTKAMP, H. KÖTZ, D. TALLON, *Cases, Materials and Text on Contract Law, Ius commune casebooks on the Common Law of Europe*, Hart Publishing 2002, pp. 127-154.

152 See for example the Law of Property Act 1925.

153 On the question of the impact and role of formalism, see BEALE, A. HARTKAMP, H. KÖTZ, D. TALLON *op.cit.* pp. 164-167.

2. Contracts of indefinite duration

6. The majority of national laws[154] hold that in the case of contracts of indefinite duration unilateral termination is allowed, subject only to compliance with a notice period, which normally corresponds to reasonable notice. The faculty to unilaterally terminate contracts of indefinite duration is generally seen as an expression of the prohibition of perpetual undertakings.

English law however recognises a slightly different system as it does not in principle refuse to recognise perpetual contracts. Nevertheless, a clause imposing an obligation to provide water at a fixed price throughout the entirety of the subsequent period was interpreted in the sense that the contract could be brought to an end by means of notice.[155]

In French law, termination is subject to compliance with a notice period. This notice period is not, on a general basis, provided for in any provision. However, some special provisions fix a notice period (for example, Article L 122-4 onwards of the Employment Code) or refer to common practice (for example Article 1736 of the Civil Code in respect of leases). In the absence of a text, the case law has intervened in some areas to require that the parties respect a 'reasonable' notice period.[156] In addition, the French case law requires that the termination is not abusive, notably in respect of the expectations of the other party.[157] The ability to unilaterally terminate contracts of indefinite duration, by means of compliance with a notice period, was recognised as a rule of constitutional value by a decision of the Conseil constitutionnel of 9 November 1999 concerning the law on Pacs *(Pactes civils de solidarité)*.[158]

In German law, *'in contracts for an indefinite period each party may, as in French law, unilaterally bring an end to the contractual relationship. The withdrawal is qualified as ordinary (odentliche Kündigung); the withdrawal need not, in principle, be reasoned but it must respect a*

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154 Austria: § 1117, 1118, 1162, 1210 ABGB; Belgium: see in particular, Cass. Belge, 22 November 1973, Arr. Cass. 327; Spain: Article 1732 for mandate, Article 1750 for the loan of an object, Article 1705 for companies, Article 1581 for rental leases; France and Luxembourg: Article 1780 para 1 Civil Code (hiring of services); Italy: Art. 2118 for the contract of employment; Portugal: Jorge 212; England and Wales: Staffordshire Area Health Authority v. South Staffordshire Waterworks Co (1978) 1 WLR 1387 (C.A.). – See also, *Principles of European Contract Law, Part I and II, op.cit.* p. 317.

155 See the case of Staffordshire Area Health Authority v. South Staffordshire Waterworks Co (1978) 1 WLR 1387 (C. A).

156 Ex: Cass. 1ère civ., 3 February 2004, Bull. civ. I, n° 34.

157 Cass. com. 5 October 2004, Bull. civ. IV, n° 181.

158 According to the Conseil, *'if contract is the law that is common to both parties, the freedom which follows from Article 4 of the Declaration of the right of man and the citizen 1789 justifies that a private law contract of indefinite duration can be broken off unilaterally by one or other of the contracting parties, although informing the other party to the contract and the reparation of any eventual harm resulting from the conditions of breaking off the contract are guaranteed; in this respect, because of the necessity of assuring, in certain contracts, the protection of one of the parties, the task of specifying the causes allowing such a withdrawal as well as the modalities of it, in particular compliance with a period of notice belongs to the legislator'*, (Cons. Const., 9 November 1999, RTDciv. 2000, p. 109, obs. J. MESTRE et B. FAGES).

period of notice […] fixed either by statute […] or by the contract'.[159] However, German law does not include the general principle of reasonable notice, but contains special rules for certain types of contract.[160]

In Spanish law, the case law allows, in a general fashion, unilateral termination when the contract was entered into without determination of its length, in so far as it is contrary to ones liberty to be indefinitely bound.[161] Legal writing[162] holds that the exercise of the unilateral right to terminate must conform to the requirements of good faith, which implies, in particular, the respect of a notice period.

7. Whilst the most common model is therefore that of unilateral termination of contracts of indefinite duration subject to a reasonable notice period, some foreign systems recognise a wider variety of rules.

Firstly, in Dutch law, in the absence of any legal or contractual provision, the revocable character of the contract of indefinite duration is uncertain, as is the question of whether it suffices to have a reasonable notice period.[163]

Generally, termination must comply with standards of reasonableness and equity. In deciding whether one party can bring an end to the contract, the judge bases his decision on the criteria in Article 6:258 BW[164] (termination for unforeseen circumstances), namely if the contracting party, according to the criteria of what is fair and reasonable, could anticipate the continuation of the contract. The incidence of unforeseen circumstances is not necessary:[165] the judge is able to take into account all circumstances[166] as well as the interests of the other contracting party.[167] If the contract is revocable, the standards of reasonableness and equity can, with regard to the circumstances, impose a requirement of giving sufficient reasons[168] and compliance with a reasonable notice period.[169]

Second, Italian law envisages the situation where one party may put an end to a contract without having any recourse to a judge in circumstances going beyond the case of contracts of indefinite duration. First, in the case of non-performance by the debtor, Article 1454 of the Italian Civil Code allows the creditor to serve notice to perform on the debtor before the expiry of a certain period of time under penalty of termination of

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159 *'Dans les contrats à durée indéterminée chacune des parties peut, comme en droit français, mettre fin unilatéralement au rapport contractuel. La résiliation est qualifiée d'ordinaire (odentliche Kündigung); elle n'a pas besoin en principe d'être motivée mais elle implique le respect d'un préavis […] fixé soit par la loi […] soit par le contrat*', M. PÉDAMON, *op.cit.* n° 256.

160 § 565 BGB for leases; § 620 (2), 622 and 624 for services; § 671 for mandates; § 723 for civil societies.

161 Sentencia de 14 de febrero de 1973.

162 MM. LUIS DIEZ-PICAZO and ANTONIO GULLON: *Sistema de derecho civil*, Vol. II *(El contrat en general. La relacion obligatoria. Contratos en especial. Cuasi contratos. Enriquecimiento sin causa. Responsabilidad extracontractual)*, 9ème éd., Tecnos, 2005.

163 D. BUSCH, E. H. HONDIUS et alii *op.cit.* p. 278 onwards.

164 Cited *infra*, Article 0-201(3).

165 Hoge Raad, 25 June 1999, Vereniging voor de Effecenhandel v. CSM, NJ 1999, 602.

166 Hoge Raad, 21 April 1995, Kakkenberg v. Kakkenberg, NJ 1995, 437.

167 Hoge Raad, 3 December 1999, Bouwer v. Nationale Nederlandel, NJ 2000, 254.

168 Hoge Raad, 3 December 1999, Maison Louis Latour v. De Bruijn Wijnkopers, NJ 2000, 120.

169 Hoge Raad, 23 December 1994, Lengs v. Banque Paribas Nederland, NJ 1995, 263.

the contract. If the obligation is not performed by the time laid down, the contract is terminated by operation of law, without recourse to the courts. Commentators see this as a potestative right, belonging to the creditor, allowing him to unilaterally end the contract.[170] Secondly, Article 1457 deals with the existence of a fixed term which can be considered essential to both parties. If, at the expiry of this term, the obligation has not been performed and the creditor has not let the debtor know within three days that he will accept a subsequent performance, the contract is automatically terminated. This article applies even if the term is not expressly envisaged in the contract.

Spanish law also recognises some specific situations where one party can unilaterally end a contract.[171]

Lastly, German law, which corresponds to the traditional model for contracts of indefinite duration,[172] recognises however in certain cases that termination can take place without notice. § 314 I BGB[173] envisages a unilateral power to terminate without notice for a compelling reason. It is therefore an extraordinary termination *(ausserordentliche Kündigung aus wichtigem Grunde)*. This article is the result of the codification of a Praetorian general principle.[174]

B. International law and Acquis communautaire

8. The **Vienna Convention** holds in Article 29(1) that *'a contract may be modified or terminated by the mere agreement of the parties'*.

9. **Community law** also recognises the principle of freedom to break the contract by mutual agreement of the parties. It should be noted that a party is not able to block the other party's right to terminate. Thus, according to the Directive on unfair commercial practices, *'any … barriers imposed by the trader where a consumer wishes to exercise rights under the contract, including rights to terminate a contract or to switch to another product or another trader'* are prohibited.[175]

An illustration of the power to unilaterally terminate contracts of indefinite duration subject to notice can be found in Directive 86/653/EEC of the Council of 18 December

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170 M.-C. DIENER, *op.cit.* § 16. 5. 2.

171 For example, Article 1700, 4° and 1705 concerning the dissolution of a company on the wishes of only one member or Article 1732, 1° and 2° , concerning mandate which refers to the revocation by the representee and the renunciation of the representor.

172 See *supra*.

173 § 314 I BGB: *'Each party may terminate a contract for the performance of a continuing obligation for a compelling reason without a notice period. There is a compelling reason if the terminating party, taking into account all the circumstances of the specific case and weighing the interests of both parties, cannot reasonably be expected to continue the contractual relationship until the agreed end or until the expiry of a notice period'*.

174 M. PÉDAMON, *op.cit.* n° 257; *Adde* W.-T. SCHNEIDER *'La codification d'institutions prétoriennes'*, La réforme du droit allemand des obligations (Colloque du 31 mai 2002 et nouveaux aspects), dir. C. WITZ et F. RANIERI, Soc. Législ. Comp. 2004 p. 43 onwards).

175 Art 9 (d) of Directive 2005/29/EC of the European Parliament and Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market.

1986 on the coordination of the laws of the Member States relating to self-employed commercial agents.[176] Its Article 15(1) states that *'where an agency contract is concluded for an indefinite period either party may terminate it by notice. (…)'*.

C. Codifications by legal scholars

1. Modification and termination of the contract

10. All of the studied projects include a provision which requires the agreement of the parties to terminate or modify the contract.

According to Article 1.3 of the **UNIDROIT Principles**, the parties may only modify or terminate the contract *'by agreement or as otherwise provided in these Principles'*.

In the **Proposals for Reform of the Law of Obligations and the Law of Prescription** Article 1134, paragraph 2 states that contracts *'can be modified or revoked only by the parties' mutual consent or on grounds which legislation authorises'*.[177]

In the same way again, Article 43 § 1 of the **European Code of Contract Preliminary Draft** holds that *'the contract can be altered, renegotiated or dissolved by mutual consent of the parties, or in the cases provided for in this Code or by national or Community provisions'*.

2. Contracts of indefinite duration

11. Whilst the **UNIDROIT Principles**[178] and the **European Code of Contract Preliminary Draft**[179] retain the classic position of unilateral termination of contracts of indefinite duration, the **Proposals for Reform of the Law of Obligations and the Law of Prescription** does not for its part dedicate a provision to this question.

Concerning the notice period which must precede termination, the **UNIDROIT Principles** envisage notice being given *'a reasonable time in advance'* while the **European Code of Contract Preliminary Draft** envisages a notice period which is *'in conformity with the nature of the contract, usage and good faith'*.

IV. Proposed text

Article 0-103: Freedom of the parties to modify or put an end to the contract

By their mutual agreement, the parties are free, at any moment, to terminate the contract or to modify it.

Unilateral termination is only effective in respect of contracts for an indefinite period.

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176 OJ n° L 382 31/12/1986 p. 17-21.

177 J. CARTWRIGHT and S. WHITTAKER, *op.cit.*

178 Article 5.1.8 *'Contract for an indefinite period'*: *'A contract for an indefinite period may be ended by either party by giving notice a reasonable time in advance'*.

179 Article 57 § 2: *'In contracts for continuous or periodic performance where there is no expiry time fixed by the parties, either party can set a time to end the contract by giving notice to the other party in conformity with the nature of the contract, usage and good faith'*.

Chapter 2:
Contractual Certainty

Article 0-201: Principle of binding force

I. General presentation of the principle

1. The second chapter of the Guiding Principles of European Contract Law is dedicated to contractual certainty. As is logical, the chapter opens with an article dedicated to the binding force of contract. Once again,[1] so as not to proceed by pure abstraction, it is important not only to define the principle of binding force but also to clarify its range.

With regards to a definition of binding force, it is possible to adopt a simple formula, inspired by those which can be found in numerous national laws (see *infra*).

With regards to the scope of binding force of contract, it is important to clarify what the consequences of the obligatory effect of the contract are for the parties. Naturally, the binding force of the contract requires the parties to perform all the obligations arising from the contract. However, they are also obliged to act fairly in a way that does not contradict the scope of their undertaking. The parties undertake to perform their contract but also to do nothing which may compromise that performance. Before detailing in chapter three the scope of contractual fairness,[2] it is important to mention now that the binding force of contract necessarily supposes that the parties adopt an attitude that does not contradict the undertaking that they have entered into.

Again with regard to clarifying the scope of the binding force of contract, it is equally important to determine if it is always an intangible principle or whether, in certain situations, it is possible to call it into question. This question is that of the revision of the contract for change of circumstances *(imprévision)*. Should we disregard the unforeseeable change of circumstances in order to promote at all costs the binding force of the contract, or is it admissible in this case to reconsider its absolute nature? The current content of PECL leads to admitting the reconsideration of the binding force of contract in cases of unforeseeable change of circumstance.

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1 See *supra* the presentation on Article 0-101.

2 See *infra*.

II. Application of the principle in PECL

A. Binding force of contract

2. The principle of binding force of contract is not as such explicitly stated within PECL. The commentary however frequently refers to it.[3] In the same way, many provisions of the Principles are nothing other than illustrations of the consequences of the binding force of contract.

This is certainly the case with Article 6:111 (1) according to which the parties must perform their obligations, even if the performance is more onerous that previously foreseen. This article states that *'a party is bound to fulfil its obligations even if performance has become more onerous, whether because the cost of performance has increased or because the value of the performance it receives has diminished'*. The commentary indicates clearly that this paragraph recalls the principle of the binding force of contract (or sanctity of contract).[4]

3. Other provisions demonstrate equally the obligatory character of the undertaking.

This is sometimes demonstrated by the imperative wording adopted by the provision in question: see for example Article 7:102, concerning the *'Time of Performance'* which states that *'A party* **has** *to effect its performance […]'*.

In other cases, the provisions state that the debtor is 'bound': see for example Article 10:101 (1) *'Obligations are solidary when all the debtors are* **bound** *to render one and the same performance'* (and for a similar example where the language is slightly different in the English, Article 9:201 (1) *'A party* **who is to** *perform'*).

With regard to the creditor, the binding force of contract is the basis of the *'right to performance'* of the contract.[5] See more specifically, Article 9:101 (1) *'The creditor is entitled to recover money which is due'* and 9:102 (1) *'The aggrieved party is entitled to specific performance of an obligation other than one to pay money […]'*.

Finally, in a general sense, the principle of the binding force of contract is at the origin of all the rules contained in Chapter 7 (Performance), Chapter 8 (Non-performance and Remedies in General) and Chapter 9 (Particular Remedies for Non-performance).

Since the principle of binding force of contract is the basis of numerous provisions of PECL, and yet there is no express statement of it, it is logical that it should be found within the Guiding Principles.[6]

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3 See *infra*.

4 *Principles of European Contract Law, Part I and II*, p. 323.

5 See the title of Section 1, Chapter 9 *'Right to Performance'*.

6 **Acquis Group**: The *'Binding force of contract'* figures amongst the seven fundamental principles elaborated by this working group.

(2) Binding force of contract: *'A contract will be enforced or recognised by law if it is based on the parties agreement, as this has been expressed by each to the other, and there is no basis for it to be treated as invalid or set aside'*.

B. Consequences of the obligatory effect of the contract

4. Since the contract has binding force, the parties are bound to perform all the obligations that arise from it, whether they have been expressly laid down or not. Article 6:102 states that the contract may contain implied obligations '*which stem from (a) the intention of the parties, (b) the nature and purpose of the contract, and (c) good faith and fair dealing*'. The commentary indicates that this text allows the filling of any gaps in the contract. For this, three factors are to be considered: the presumed intention of the parties (that which the parties, acting in good faith, would have agreed upon if they had negotiated), the nature and the purpose of the contract (the way in which it can best produce its effects) and good faith and fair dealing.

5. With regard to imposing a requirement of honest conduct on the parties, we must again look to Article 6:102. This article states in part (c) that implied obligations can include those which stem from good faith and fair dealing. As a result, this means that outside of the contractual provisions themselves, certain obligations weigh on the parties from the simple fact of good faith. An illustration of the duties which the parties are subject to in the name of good faith is given by Article 16: 102. According to this article, '*if fulfilment of a condition is prevented by a party, contrary to duties of good faith and fair dealing or co-operation, and if fulfilment would have operated to that party's disadvantage (or advantage), the condition is deemed to be fulfilled (or not to be fulfilled)*'. To regard the condition as fulfilled or not, according to the case, when a party was dishonestly involved in its failure (or achievement) is evidence of a willingness to promote the duties of good faith and cooperation.[7]

As a result of these different applications of the principle of binding force of contract it is clear that a mention of the obligatory character of the duty of contractual fairness must be inserted in the guiding principle.[8]

C. Unforeseeable change of circumstances

6. PECL contain an article concerning unforeseeable change of circumstances. According to Article 6:111, the parties are required to renegotiate the contract if a change of circumstances intervenes in the conditions envisaged by part (2) of the article. In the absence of modification or termination intervening within a reasonable period, the tribunal may itself modify or terminate the contract.

Article 6:111 '*Change of Circumstances*'

'*(1) A party is bound to fulfil its obligations even if performance has become more onerous, whether because the cost of performance has increased or because the value of the performance it receives has diminished.*

(2) If, however, performance of the contract becomes excessively onerous because of a change of circumstances, the parties are bound to enter into negotiations with a view to adapting the contract or terminating it, provided that:

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7 *Principles of European Contract Law, Part III, op.cit.*, p. 235.

8 **Acquis Group**: the working group on the fundamental principles proposed nothing on the subject of the scope of the principle of the binding force of contract.

(a) the change of circumstances occurred after the time of conclusion of the contract,
(b) the possibility of a change of circumstances was not one which could reasonably have been taken into account at the time of conclusion of the contract, and
(c) the risk of the change of circumstances is not one which, according to the contract, the party affected should be required to bear.

(3) If the parties fail to reach agreement within a reasonable period, the court may:
(a) terminate the contract at a date and on terms to be determined by the court; or
(b) adapt the contract in order to distribute between the parties in a just and equitable manner the losses and gains resulting from the change of circumstances.

In either case, the court may award damages for the loss suffered through a party refusing to negotiate or breaking off negotiations contrary to good faith and fair dealing'.

7. The commentary on this article indicates that the recognition of change of circumstances responds to an imperative of contractual justice and the practice shows how it would be dangerously inadequate to stick to a refusal of change of circumstances *(imprévision)*. The parties are however able to adapt the mechanism of renegotiation. The commentary also underlines the exceptional nature of revision.[9]

Since PECL choose, in contrast to some national laws (see *infra*), to admit the revision of the contract in the case of unforeseeable change of circumstances, it is important that the guiding principle dedicated to the principle of binding force itself states this limit to the intangibility of the contract.[10] It is possible to envisage a concept of '*unforeseeable change of circumstances*' since it is defined by Article 6:111.

III. Applications of the principle in comparative law

A. National laws

1. Binding

8. The principle of binding force of contract is recognised as a fundamental principle in the majority of the national legal systems studied.[11] We can distinguish though between those systems where the principle is the subject of an express provision and those where it is recognised despite the silence of statute.

The legal systems which explicitly commit to this principle all do so in a similar way. Thus Article 1134 paragraph 1 of the French Civil Code states that '*agreements lawfully entered into take the place of the law for those who have made them*'[12] while Article 1091 of the Spanish Civil Code holds that '*obligations arising from the contract have the force of law*

9 *Principles of European Contract Law, Part I and II, op.cit.* p. 324.

10 **Acquis Group**: The working group has not proposed the inclusion of revision for change of circumstances in the fundamental principles applicable to contract.

11 Note however that Dutch law does not evoke this principle as such.

12 '*Les conventions légalement formées tiennent lieu de loi à ceux qui les ont faites*'.

between contracting parties'[13] and Article 1372 paragraph 1 of the Italian Civil Code states that '*the contract has the force of law between the parties*'.[14]

9. In other legal systems, the binding force of contract appears as more of a general principle.

In German law, '*the BGB, which does not contain any general provision on the effects of contract analogous to Article 1134 […] of the Civil Code […] nonetheless implicitly establishes the binding force of contract – its irrevocability*'.[15] Legal scholarship employs the expression '*contractual regulation*'.[16]

In Swiss law, the rule according to which the contract is the law of the parties '*dominates the principle of contractual fidelity* (pacta sunt servanda) *even though it is not expressly stated in the Code of Obligations*'.[17]

10. Whichever the legal system studied, it appears that the contract's conditions of validity are defined by the law and imply, in particular, that the contracting parties cannot derogate from a mandatory law. More fundamentally, the link established between the binding force of contract and the law signifies that the contract draws its force, not from the will of the parties, but from the law.

However, this basis of the principle of binding force of contract has not always been so widely admitted and has given rise to numerous scholarly debates. This is particularly so in French law.

The original basis, in French law, of the principle of the binding force of contract religious: fidelity to the given promise results fundamentally from moral preoccupations. Thereafter, the justification was found in the theory of autonomy of the wills from which it results that the will is all powerful and can only be bound by creating its own law. However, the later decline of this theory, at least in its absolute sense, saw the theory of the will condemned as the exclusive basis of the binding force of contract. Indeed, the majority are in agreement today in rejecting an overly radical conception of the autonomy of the will '*as it results in the abandonment of an essential part of social relations to the absolute discretion of legal subjects*'.[18] It is therefore a relative conception that must be retained: the autonomy of the will is nothing more than '*the power, left to individuals, to organise their transactions as they want, within the limits fixed by objective law*'.[19] From this

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13 Civil Code Article 1091: '*las obligaciones que nacen de los contratos tienen fuerza de ley entre las partes contratantes*'.

14 '*Il contratto ha forza di legge tra le parti*'.

15 '*Le BGB, qui ne contient aucune disposition générale sur les effets du contrats analogue [à l'] art. 1134 […] C. civ. n'en consacre pas moins implicitement […] la force obligatoire du contrat – son irrévocabilité*', M. PÉDAMON, *op.cit.* n° 150.

16 M. PÉDAMON, *op.cit.* n° 161 citing Larenz.

17 '*Domine le principe de fidélité contractuelle (pacta sunt servanda) quand bien même il n'est pas expressément énoncé dans le Code des obligations*', P. ENGEL, *Traité …, op.cit.* p. 97 et passim, not. p. 454; idem P. TERCIER, *Le droit des obligations*: Schulthess Juristiche Medien SA, Zurich, 1999, n° 178 (citing Article 1134 of the Civil Code and the UNIDROIT Principles …), n° 413 and 728.

18 J. FLOUR et J.-L. AUBERT et E. SAVAUX, *Droit civil, les obligations, vol. I: l'acte juridique*, Paris, 10e éd. A. COLIN, 2002, n° 110.

perspective, the principle of the binding force of contract rests on a positivist foundation, according to which binding force comes, not from the promise, but from the value that the law, or more precisely Article 1134 of the Civil Code, attributes to that promise. It remains however to ask why the law recognises such a value to the contract. Many explanations are proposed. In addition to the classic moral commanding respect of the promise given, binding force can be justified by the idea of the party relying legitimately on the promise that he has accepted.[20] It can also be justified by the idea of justice and social utility, implying, in particular, legal certainty from which follows compliance with the individual expectations of the parties.[21] It can also be justified by the idea of a compromise between the individual wills of the parties and the *volonté générale*, that is to say between the interest of the parties and the general interest; ultimately, between the roles respectively conferred on the will of the parties and the law.

2. Consequences of the obligatory effect of the contract

11. The majority of national legal systems hold that the binding force of contract requires the parties to perform not only their express obligations but also those implied obligations which result from the contract. Not all the systems however make reference to this notion of implied obligations.

This formula is directly inspired by English law which refers to '*implied terms*'. The commentary on Article 6:102 PECL confirms the influence of the *Common Law*.[22] However, the Common Law does not include good faith and fair dealing in the factors allowing identification of the *implied terms*. It also has recourse to such additions to the contract only if it is necessary to give economic efficiency to the contract, or if the implied obligation is so obvious that it goes without saying.

Rather than referring to implied terms, many legal systems refer to the consequences that equity, common practice or statute *(l'équité, l'usage ou la loi)* give to the obligation according to its nature. This is the case in French law.[23] It is the same in Italian law which states however that one may only refer to common practice and equity when the law is silent.[24] In Spanish law, Article 1258 of the Civil Code is slightly different since it states that the contract requires '*not only the performance of that which was expressly agreed, but also all the consequences which, according to its nature, conform to good faith, custom and statute*'.[25] Dutch law contains similar provisions. Article 6:248 (1) BW states that the contract does not produce only those legal effects agreed by the parties,

19 '*La faculté laissée aux sujets d'organiser leurs échanges comme ils l'entendent, dans les limites fixées par le droit objectif*', J. FLOUR et J.-L. AUBERT et E. SAVAUX, *op. loc. cit.*

20 G. ROUHETTE, *Contribution à l'étude critique de la notion de contrat*, Paris 1965.

21 J. GHESTIN, *Les obligations. Le contrat: formation*, 2e éd. LGDJ, 1988.

22 *Principles of European Contract Law, Part I and II, op.cit.* p. 305. For Scotland, *ibid.*

23 Article 1135 of the Civil Code.

24 Article 1374 of the Civil Code.

25 Civil Code Article 1258: los contratos obligan desde su perfección '*no solo al cumplimiento de lo expresamente pactado, sino también a todas las consecuencias que, según su naturaleza, sean conformes a la buena fe, al uso y a la ley*'. Article 57 of the Commercial Code contains similar provisions with regard to commercial obligations.

but also those that, according to the nature of the contract, result from statute, common practice or the requirements of reasonableness and equity (in the absence of statute or common practice).[26] Article 6:248 (1) BW therefore has an interpretive function and a role in completing the contract.[27] From a terminological point of view, the provision refers to reasonableness and equity rather than good faith in order to prevent any confusion with the subjective notion of good faith; here it is a question of objective good faith, based on the duty of the parties to observe the standards of reasonableness and fair dealing. We can, in this sense, understand the terms good faith, reasonableness and equity as synonymous.[28]

In German law, the system is different. Where there are gaps, the case law develops a 'normative' (in cases of obscurity), 'constructive', or 'completive' interpretation of the contract *(ergänzende Vertragsauslegung)*.[29] The judge discovers and takes into consideration that which, in the light of the aim of the contract, the parties would have said if they had anticipated and regulated the matter in question in conformity with the requirements of good faith and business practice.[30] Here, '*we take into consideration the two parties' points of view, so as to determine a fair balance of interests* (gerechter Interessenausgleich) *which they would have reached by acting reasonably and in good faith*'.[31]

12. In addition, the majority of national legal systems impose an obligation on the parties to behave fairly, from which they cannot withdraw.

On this point, Italian law goes a particularly long way. According to Italian legal scholarship, the principle of binding force of contract directly requires the parties to conduct themselves in good faith. It is considered that the binding force of contract requires the parties '*adopt behaviour corresponding to the undertaking entered into*'.[32] In particular, some authors distinguish between the efficacy of the contract and the effects of the contract. If the latter consists of the rights and obligations arising from the contract, the efficacy of the contract, which exists from the moment of entering into the contract, indicates the attitude of the parties so that these effects can occur. This distinction can therefore explain the fact that each party to the contract under a condition is bound to not compromise the rights of the other party to the contract *pendente conditione*[33] (Article 1358 of the Civil Code).

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26 '*A contract has not only the juridical effects agreed by the parties, but also those which, according to the nature of the contract, result from law, usage or the requirements of reasonableness and equity*' (translation in D. BUSCH, E.H. HONDIUS et alii, *op.cit.* p. 33).

27 D. BUSCH, E.H. HONDIUS et alii *op.cit.* p. 242, 264.

28 D. BUSCH, E.H. HONDIUS et alii, *op.cit.* p. 49; A. S. Hartkamp *op.cit.* p. 138. – *Adde* Article 6: 2(1) BW '*A creditor and debtor must, as between themselves, act in accordance with the requirements of reasonableness and equity*' (translation D. BUSCH, E.H. HONDIUS et alii, *op.cit.* p. 48) (ibid. p. 49). – For the whole provision, see *infra* under Article 0-301.

29 M. PÉDAMON, *op.cit.* n° 163 onwards.

30 See BGH, 18 December 1954, BGHZ 16. 71, 76, cited by M. PÉDAMON, *op.cit.* n° 166.

31 '*On prend en considération le point de vue des deux parties, de manière à dégager le règlement équilibré de leurs intérêts* (gerechter Interessenausgleich) *auquel elles seraient parvenues en agissant raisonnablement et de bonne foi*', M. PÉDAMON, *op.cit.* n° 165.

32 '*A tenir une conduite correspondant à l'engagement conclu*', M.-C. DIENER, *op.cit.* § 7.1.1.

33 M.-C. DIENER, *op.cit.* § 7.1.2.

In French law, Article 1134 paragraph 3 states that contracts *'must be performed in good faith'*. The obligation of contractual fairness flows from this requirement, from which the case law draws numerous obligations, such as the obligation to inform or the obligation to co-operate.[34]

German law also contains an obligatory duty of fairness.[35] The principle of good faith in § 242 BGB[36] performs, in order to determine the content of the contractual obligation, a gap-filling function *(Ergänzungsfunktion)*. This *'consists in what the case law, drawing on § 242, has drawn progressively [and] independently […] of any common will; a network of ancillary obligations* (Nebenpflichten) *whose terminology is however unclear and varied according to different authors'*.[37] Two categories exist:

– The *Nebenleistungspflichten*: obligations with a narrow link to the principal duty, *'which are concerned with guaranteeing a performance that will satisfy the interests of the creditor'*.[38]
– The *Schutzpflichten* or *Verhaltenspflichten (obligations of behaviour)*: obligations of reciprocal protection, *'aimed at preserving the patrimonial situation (die Güterlage) [of each party] from any harm'*.[39] They are envisaged by the new § 241 II BGB.[40]

Lastly, in Swiss law, the duty of fairness can be understood as an additional ancillary duty. *'Accessory duties must be distinguished from the duty to perform properly understood […] By 'accessory duties' it is meant the rules of behaviour which follow implicitly from the contract and which compliment the principal duties […] They require the debtor to conduct himself in accordance with the rules of good faith (Article 2 CCS) and to respect the absolute rights of the other party to the contract.*[41] In the same way, in the absence of a supplementary non-mandatory rule, it is the judge's task to *'imagine a hypothetical will of the parties […] following from the rules of good faith (Article 2 CCS)'*.[42]

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34 See *infra* section III.

35 M. PÉDAMON, *op.cit.* n° 167 onwards.

36 Performance in good faith: *'An obligor has a duty to perform according to the requirements of good faith, taking customary practice into consideration'*.

37 *'Consiste en ce que la jurisprudence, s'appuyant sur le § 242, a dégagé progressivement [et] indépendamment […] de toute volonté commune, un réseau d'obligations accessoires* (Nebenpflichten) *[…] dont la terminologie est d'ailleurs mal fixée et varie selon les auteurs'*.

38 *'Ont pour objet de garantir une exécution propre à satisfaire les intérêts du créancier'*. Example: the seller is required to insure the goods being sold during their transport to the place of delivery, to deliver the accessory documents which are necessary in order to use the goods, and to inform the buyer of the risks of that use.

39 *'Tendent à préserver de tout dommage la situation patrimoniale (die Güterlage)'*.

40 Especially § 241 II BGB: *'An obligation may also, depending on its contents, oblige each party to take account of the rights, legal interests and other interests of the other party'*.

41 *'De l'obligation d'exécuter proprement dite, il faut distinguer les devoirs accessoires […] On entend par là les règles de comportement qui découlent implicitement du contrat et complètent les obligations principales […] Ils obligent le débiteur à avoir un comportement compatible avec les règles de la bonne foi (article 2 CCS) et respectueux des droits absolus du cocontractant'*, P. Tercier, *op.cit.* n° 698.

42 *'Imaginer une volonté hypothétique des parties […] à partir des règles de la bonne foi (article 2 CCS)'*, *ibid.* n° 724. – *Adde* P. ENGEL, *Traité …, op.cit.* p. 237 onwards on the completion of the contract (distinct from its interpretation) and citing the Federal Tribunal: *'the judge should fill the gap according to the sense and purpose of the contract, in determining how, in good faith, the parties*

13. Although the scope of the duty of fairness will be examined principally in chapter III,[43] it is already possible to note that the example previously seen as to the duty of the parties not to interfere in the fulfilment (or non-fulfilment) of the condition can be found in the majority of national laws. Such an interference in the fulfilment of the condition is widely sanctioned: in French law: Article 1178 of the Civil Code; German law: § 162 BGB; Italian law: Articles 1358 and 1359 paragraph 1; Spanish law: Article 1119 paragraph 1 of the Civil Code. English law often considers the interference of the party as a breach of an implied term but does not go so far as to consider that the condition has been satisfied or has failed to be satisfied.[44] It seems that Irish law takes a very similar position: the courts only interfere where there is an express or implied obligation to do or not to do something.[45]

3. Unforeseeable change of circumstances

14. The question of the intangibility of the contract in the face of unforeseeable change of circumstances certainly divides different national legal systems. While the majority of Member States recognise a revision of the contract, the others either limit revision to exceptional cases or even reject it outright.

15. Many legal systems recognise the revision of the contract where there is an unforeseeable change of circumstances in a general sense, either based on special provisions, or based on more general provisions such as good faith.

In Germany, the modification of the contract in the case of a change of circumstances results from the corrective function *(Korrekturfunktion)* of the principle of good faith in § 242 BGB on the content of the contractual relationship. Originally this was a Praetorian creation. Since the 1920s, the case law has taken advantage of the general provisions of the BGB, especially § 242 in order to *'liberate itself from the rule of intangibility of contract and to progressively construct a system of contractual revision for change of circumstance by drawing on the famous Oertmann theory of'* 'Wegfall der Geschäftsgrundlage' (disappearance of the foundation of the contract)",[46] established by the *Reichsgericht* (Tribunal of the Empire).[47] The contract can be terminated or modified if its continuation would produce results that would be intolerable and incompatible with law and justice.[48] The statute modernising the law of obligations of 26 November 2001 *(Gesetz zur Modernisier-*

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would have acted, in view of all the circumstances (ATF 90/1964 II p. 235, 244-245 = JT 1965 I p. 138, 145)'.

43 See *infra*.

44 *Principles of European Contract Law, Part III*, *op.cit.* p. 236.

45 *Principles of European Contract Law, Part III*, *op.cit.* p. 236.

46 *'S'affranchir de la règle de l'intangibilité des conventions et de bâtir progressivement un système de révision des contrats pour cause d'imprévision en s'inspirant de la fameuse théorie d'Oertmann dite du* 'Wegfall der Geschäftsgrundlage' *(disparition du fondement de l'acte juridique)'*, M. PÉDAMON, *op.cit.* n° 15, see also n° 24.

47 RG, 3 February 1922, RGZ, 103. 328, 332.

48 See BGH 25 May 1977, NJW 1977. 2262, 2263 and 13 November 1975, NJW 1976. 565, 566.

ung des Schuldrechts)[49] explicitly adopted (and altered) this Praetorian theory in the new § 313 BGB[50] *(Störung der Geschäftsgrundlage)*.[51] However, in § 313 BGB, the adaptation of the contract for change of circumstances applies as much to the disappearance of the contractual basis as to the original absence of the contractual basis.[52]

In Austria, § 936, 1052 and 1170 (a) ABGB constitute the basis of the rule according to which a change of circumstances can, under certain conditions, affect the validity of the contract.[53]

In Denmark, Finland and Sweden, the courts accept that a change of circumstances can form the basis of a modification of the contract.[54]

Italian law recognises that the binding force of contract can be called into question in many cases, analysed by legal scholarship as situations based on a functional defect in the cause: even though the cause was present at the formation of the contract, it can not be carried out in accordance with the original will of the parties because of the occurrence of supervening events.[55] Article 1467 of the Italian Civil Code envisages the judicial termination of the contract when the performance of it has become excessively costly due to

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49 BGB1. 2001 p. 3138-3185.

50 Interference with the basis of the transaction: '*(1) If circumstances which became the basis of a contract have significantly changed since the contract was entered into and if the parties would not have entered into the contract or would have entered into it with different contents if they had foreseen this change, adaptation of the contract may be demanded to the extent that, taking account of all the circumstances of the specific case, in particular the contractual or statutory distribution of risk, one of the parties cannot reasonably be expected to uphold the contract without alteration.*

(2) It is equivalent to a change of circumstances if material conceptions that have become the basis of the contract are found to be incorrect.

(3) If adaptation of the contract is not possible or one party cannot reasonably be expected to accept it, the disadvantaged party may withdraw from the contract. In the case of continuing obligations, the right to terminate takes the place of the right to withdraw.'

Note that '*circumstances which became the basis of a contract*' signifies those circumstances '*that should be implied by the common will of the parties without having been formally integrated in the contract itself. Amongst these circumstances it is possible to cite the maintenance of monetary stability, the equivalence of the benefit and counter-benefit, the constancy of the stipulated price, the possibility of getting identical goods … but also the persistence of the legislation in force, obtaining a building permit … the list is not limited*', (M. PÉDAMON, *op.cit.* n° 172).

51 See also W.-T. SCHNEIDER *'La codification d'institutions prétoriennes'*, La réforme du droit allemand des obligations (Colloque du 31 mai 2002 et nouveaux aspects), dir. C. WITZ et F. RANIERI, Soc. Législ. Comp. 2004, p. 44 onwards. *'The adaptation of the contractual relationship of obligation to change of circumstance (Anpassung an die veränderten Umstände) rests on a specific provision, even if it continues to root itself in § 242'*, (M. PÉDAMON, *op.cit.* n° 170).

52 See M. PÉDAMON, *op.cit.* n° 171 onwards; P. SCHLECHTRIEM *'The German Act to Modernize the Law of Obligations in the Context of Common Principles and Structures of the Law of Obligations in Europe'* Oxford University Comparative Law Forum, 2002, Oxford U Comparative L Forum 2.

53 *Principles of European Contract Law, Part I and II, op.cit.* p. 328.

54 *Principles of European Contract Law, Part I and II, op.cit.* p. 328.

55 M.-C. DIENER, *op.cit.* § 16. 1. 2. – G. MIRABELLI, *Dei contratti in generale*, in Comm. cod. civ.' Torino, 1980, p. 654-655. – F. Gazzoni, *Manuale di diritto privato*, 2000, p. 1005.

the occurrence of the extraordinary and unforeseeable event. The article is only aimed at contracts where performance is successive or continuous and contracts where the performance is deferred, and it excludes aleatory contracts. Legal scholarship adopts an extensive conception of the domain of this article and applies it to all contracts where performance is not immediate.[56] In respect of where only one party is obliged, Article 1468 excludes termination but allows the debtor to ask the judge for his obligation to be reduced or for the modalities of his performance to be modified.[57]

In the Netherlands, Article 6:258 BW[58] applies the principle of good faith in order to allow termination or modification in a case of change of circumstances.[59] In contrast to German law, the unforeseeable circumstances must be future i.e. posterior to the conclusion of the contract.

16. Other national legal systems only rarely accept modifications of the contract for unforeseeable change in circumstance.

In Spain, the case law has always been reticent in respect of *rebus sic stantibus* clauses, requiring, for their implementation, '*extraordinary*' and '*radically unforeseeable*' changes in the circumstances which existed at the moment of entering into the contract, leading to a '*exorbitant*' disproportion between the rights and obligations of each party. If a less radical way of preserving the contract cannot be found,[60] the case law allows the courts to terminate the contract where the circumstances, independently of the wills of the parties,

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56 M.-C. DIENER, *op.cit.* § 16. 11. 2.

57 Compare with Article 1256 of the Civil Code which envisages the release of the debtor if the performance of the obligation becomes impossible for a reason which is not attributable to him. If the impossibility is only temporary the debtor will remain bound in principle but he will not answer for any delay in performance. The debtor may be released if, by reason of the duration of the impossibility, he can no longer be considered as bound in respect of the obligation, or if performance is no longer of interest to the creditor.

58 '*1. The judge may, at the request of one of the parties, modify the effects of the contract or terminate the whole or part of it owing to unforeseeable circumstances of such nature that, according to the criteria of reasonableness and equity, the other party can not expect the integral maintenance of the contract. The modification or termination may be accorded with retrospective effect.*

2. Modification or termination is not pronounced in so far as the circumstances invoked by the applicant, from the nature of the contract or from generally recognised opinion, lie with him.

3. For the application of this article, anyone who has received a right or obligation from the contract is treated as a party to the contract.'

The '*mild application*' of this provision illustrates '*that the case law has been prudent in the attribution of the new discretionary powers. This power has been interpreted as a remedy of last resort by Dutch case law*', E. HONDIUS 'Les bases doctrinales du nouveau code néerlandais', Traditions savantes et codifications Colloque Poitiers, 8-10 septembre 2005, Aristec, dir. C. OPHÈLE et P. REMY, Université de Poitiers, diff. Lgdj 2007, p. 264.

59 See D. BUSCH, E.H. HONDIUS et alii, *op.cit.* p. 287 onwards.

60 MM. DIEZ-PICAZO et GULLON (*op.cit.* p. 251) refer to the revision of the contract or different performance.

prevent the realisation of the objective which was fixed by the parites when contracting.[61]

In Switzerland, there exists '*no general provision on the effects of a change of circumstances on the contract. The contractual regime remains fundamentally dominated by the principle of contractual fidelity:* pacta sunt servanda'.[62] On the other hand, there are certain express provisions for some special contracts (for example Article 476 I CO[63] on deposits; Article 373 II CO[64] in respect of work contracts; Article 527 CO[65] in respect of life-annuities and contracts of support for life). The case law does however admit, under strict conditions, the setting aside of the intangibility of the contract. '*In the absence of a statutory provision, the Federal Tribunal has given, in this repect, some fairly clear guidance in a case of 10 October 1933: 'the upheaval brought to the relationship between the benefit and counter-benefit, occurring as a result of change in circumstances, should be a reason for termination or modification of the contract when the upheaval is large, manifest and excessive'*.[66] Nevertheless, the *clausula rebus sic stantibus*, '*has these last decades been received with much caution. There is little unity of opinion on the conditions, ways, means and consequences of imprévision. Except for express provisions for certain special contracts, imprévision is sometimes dealt with by interpreting the contract […] more generally by the principle of good faith and fair*

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61 Sentencias de 30 de junio de 1948, 9 de diciembre de 1983 and 20 de abril de 1994.

62 '*Aucune disposition générale relative aux effets du changement des circonstances sur le contrat. Le régime des conventions reste fondamentalement dominé par le principe de la fidélité contractuelle:* pacta sunt servanda', P. ENGEL, *Traité … op.cit.* p. 787, who *ibid.* p. 179 sees in it a general principle of law.

63 '*The bailee may return the deposited chattel before the expiration of the fixed period only if unforeseen circumstances prevent him from keeping the chattel either safely or without prejudice to himself*', Swiss-American Chamber of Commerce, Swiss Code of Obligations (English Translation of the Official Text), Zurich, 2005.

64 '*I. If the compensation has been precisely stipulated in advance, the contractor is obligated to complete the work for this sum and may not claim an increase even if he had more labor or larger expenditures than had been foreseen.*

II. If, however, extraordinary circumstances which could not have been foreseen or which were excluded from the assumptions made by both parties, impede the completion or render it exceedingly difficult, the judge may, in his discretion, authorize an increase in the price or dissolution of the contract …', Swiss-American Chamber of Commerce, *op.cit.*

65 '*I. The grantee as well as the grantor may unilaterally cancel the contract if its continuation has become intolerable because of violation of the duties owed or if other valid reasons make its continuation excessively onerous or impossible*', Swiss-American Chamber of Commerce, *op.cit.*

66 '*à défaut d'une disposition légale, le Tribunal fédéral a donné à cet égard, dans un arrêt du 10 octobre 1933, une orientation assez claire: 'le trouble apporté au rapport entre la prestation et la contre-prestation, survenu par suite d'un changement des circonstances, doit être un motif de résolution ou de modification du contrat lorsque ce trouble est grand, manifeste et excessif*', ATF 59/1933 II p. 372, 378 cited by P. ENGEL, *op.cit.* p. 787.

dealing [Article 2 CCS[67]], finally by the creative capacity of the judge when faced by a gap in the law [Article 1 CCS[68]]'.[69]

17. Finally, some legal systems reject outright any modification of the contract due to unforeseeable change of circumstances.

In Belgium and France, in principle no modification of the contract is allowed, except, in French law, in the area of administrative contracts.[70]

In England and Wales, the debtor has no recourse based on a change of circumstances[71] unless it results in impossibility.[72] The only possible exception *(frustration of the venture)* may follow from one isolated decision[73] where a change in circumstance rendered the contract pointless.

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67 On the recourse to Article 2 CCS, 'application of the principles of objective good faith and misuse of a right', see P. ENGEL, *Traité … op.cit.* p. 791 onwards. Citing A. VON TUHR: *'It is recognised that the principle' 'pacta sunt servanda' 'is itself limited by the superior principle of good faith. However, it is contrary to good faith to maintain the obligations imposed on the debtor by the contract if the circumstances have changed to the extent that in exchange for his performance the debtor will not receive any counter-performance or only a derisory counter-performance. The debtor is therefore allowed to terminate the contract if the other party does not accept an equitable solution' […] This opinion is shared by the majority of Swiss legal scholarship and case law which bases the theory of imprévision on the principles of good faith and abuse of law'.*

68 *'I. The Law must be applied in all cases which come within the letter or the spirit of any of its provisions. II. Where no provision is applicable, the judge shall decide according to the existing Customary Law and, in default thereof, according to the rules which he would lay down if he had himself to act as legislator.*
III. Herein he must be guided by approved legal doctrine and case law', S. WYLER, B. WYLER, The Swiss Civil Code, St Gallen, 2000.

69 *'… Ces dernières décennies, a été accueillie avec beaucoup de circonspection. Il n'y a guère d'unité de vues à propos des conditions, des voies et moyens et des conséquences de l'imprévision. Hormis les dispositions expresses sur certains contrats spéciaux, on opère parfois par l'interprétation du contrat […] plus généralement par le principe de la bonne foi [article 2 CCS], enfin par le pouvoir créateur du juge en face d'une lacune de la loi [article 1 CCS]*', P. ENGEL, *Traité … op.cit.* p. 787 onwards. – On revision for change of circumstances and the basis and the legal completion of a contract containing gaps, the change of circumstances being unforeseeable, P. TERCIER, *op.cit.* n° 727 onwards.

70 CE 30 March 1916, arrêt Gaz de Bordeaux, D. 1916. 3. 25.

71 For a report and explanation of this state of facts, see H. BEALE, A. HARTKAMP, H. KÖTZ, D. TALLON, *Cases, Materials and Text on Contract Law, Ius commune casebooks on the Common Law of Europe*, *op.cit.* p. 630.

72 Davis Contractors Ltd v. Fareham UDC [1956] AC 696 (H. L.)

73 Krell v. Henry [1903] 2 KB 740 (C.A.): See in this respect *Principles of European Contract Law, Part I and II, op.cit.* p. 328. – We can also cite a case where the judge released the parties from the contract subject to the provision that they negotiate a new one in order to adapt their initial contractual will to the unforeseen change of circumstances (see Stafforshire Area Health Authority v. Staffordshire Staffs Waterworks Co [1978]). – For a detailed analysis of the case, see H. BEALE, A. HARTKAMP, H. KÖTZ, D. TALLON, *op.cit.* pp. 621 to 623.

18. Nonetheless, within the systems which reject any setting aside of the binding force of contract, this approach is contested by certain writers and groups of scholars, and there have been some notable evolutions. We will take French law as an example.

In French law, the idea of a prohibition on revision for change of circumstances *(imprévision)* was established in the famous case *Canal de Craponne*, affirming that *it is not the role of the tribunals, however just their decision may appear to be, to take into consideration the time and the circumstances in order to modify the parties 'agreement'*.[74]

This approach is traditionally based on the principle of binding force of contract which would command the intangibility of the contract. However, some argue in favour of the theory of imprévision, precisely because of the binding force of contract. Saint Thomas of Aquinas considered that the impossibility of performing ones promise as a result of an unforeseeable change of circumstances could not be seen as a lie or an infidelity. The Doyen CARBONNIER wrote: *'on the contrary, business matters could gain certainty if the parties were certain of being able to obtain an equitable revision of the contract in the case of a really unforeseeable upheaval'*.[75] Moreover, if we admit that the cause of the contract is the particular purpose and utility that the contract has for each of the parties, we can deduce from it that the contract only keeps its binding force whilst its content conforms to this purpose. From this perspective, the binding force of contract could justify the fact that, in the event of imprévision, the parties are obliged to renegotiate.[76]

The reasoning in terms of binding force of contract therefore leads to an impasse since for some it leads to a recognition of the theory of *imprévision* and for others its refusal. *'Some argue that the intangibility of the contract serves certainty and reliance, others argue the exact opposite'*.[77] In addition, the debate has moved on from arguments of legal technique to arguments of legal policy: on the one hand the fear of judicial interventionism or a general imbalance of the economy *'by a chain reaction impossible to limit or even to predict'*[78] to which the admission of the theory of imprévision would lead, and on the other hand the idea of commutative justice which renders morally illegitimate a profoundly imbalanced contract by reason of an unforeseen event.

Moreover, the legislator has tempered the rejection of the theory of *imprévision* in certain respects, for example Article L 131-5 of the Intellectual Property Code allows the

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74 *'Il n'appartient pas aux tribunaux, quelque équitable que puisse leur paraître leur décision, de prendre en considération le temps et les circonstances pour modifier les conventions des parties'*, Cass. Civ. 6 March 1876: DP 1876, 1, 193, note GIBOULOT; H. CAPITANT, F. TERRÉ et Y. LEQUETTE, *Les grands arrêts de la jurisprudence civile*, t. 2, Dalloz 2000, n° 163.

75 *'Les affaires au contraire pourraient bien gagner en sécurité si les parties étaient certaines de pouvoir obtenir une révision équitable du contrat, en cas de bouleversement réellement imprévisible'*, J. CARBONNIER, *Droit civil. Les obligations*. PUF coll. Quadrige, n° 1065.

76 G. WICKER, *Force obligatoire et contenu du contrat*, in *Les concepts contractuels français à l'heure des Principes du droit européen des contrats*, ss dir. de P. REMY-CORLAY and D. FENOUILLET, Dalloz 2003, éd. Thèmes, commentary p. 152 onwards.

77 *'Les uns soutiennent que l'intangibilité du contrat sert la sécurité et la confiance, les autres exactement le contraire'*, L. Aynès, *L'imprévision en droit privé*, RJ com. 2005, p. 397.

78 *'Par un jeu de réaction en chaîne impossible à limiter et même à prévoir'*, J. FLOUR et J.-L. AUBERT et E. SAVAUX, *op.cit.*, n° 410.

author of an creative work, having ceded their exploitation rights and suffering a prejudice of more that 7/12ths due to insufficient foresight, to provoke the revision of the contract.

In the same way, the judiciary do sometimes take *imprévision* into consideration. Thus, they reduce the remuneration of certain service providers, in particular the *mandataire* (agent).[79] Most notably, they have recently placed an obligation on some contracting parties to renegotiate in the case of a change of circumstances which totally upsets the contractual context.[80] Admittedly, these were specific solutions, following the example of legal provisions, and they do not suffice to reverse the principle of rejection of the theory of imprévision. In addition, by imposing only an obligation to renegotiate on the parties, the judiciary does not assume the power to revise the contract. Nevertheless, some see in this most recent case law the beginning of an evolution towards the recognition of the theory of *imprévision* in substantive French law.

B. International law and Acquis communautaire

19. The **Vienna Convention** does not formally state the principle of the binding force of a contract of sale. It can nevertheless be inferred from the prohibition on unilateral termination of the contract (see Article 29: the contract *'may be modified or terminated by the mere agreement of the parties'*). It can also be inferred from the fact that the extent of the parties obligations can be found in the contract and the Convention.[81]

The parties are bound to perform the implied obligations arising from the contract. According to Article 9 (2) *'The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned'*. We find a specific application of this principle in Article 35: in order that the seller complies with his obligation that the goods must conform, he must not only comply with the express specifications of the contract (Article 35 (1)) but also with minimum standards of quality (Article 35 (2)).

The Convention does not appear to recognise revision of the contract for unforeseeable change of circumstances.[82]

20. In respect of **Community law**, contractual certainty can be defined as a specific expression, applied to contract, of the general principle of legal certainty which is re-

79 Cass. civ. 29 January 1867: DP 1867, 1, 53; H. CAPITANT, F. TERRÉ and Y. LEQUETTE, *Les grands arrêts de la jurisprudence civile*, t. 2, Dalloz 2000, n° 266.

80 Cass. com. 3 November 1992: JCP 1993, éd. G, II, 22614, obs. G. VIRASSAMY; RTD civ. 1993, 124, obs. J. MESTRE; 28 November 1998: Défrenois 1999, 371, obs. D. MAZEAUD; RTD ci. 1999, 98, obs. J. MESTRE.

81 See Article 30 for the seller *'The seller must … as required by the contract and this Convention'*. *Adde* Article 53 for the buyer.

82 Article 79 deals with possible causes of exoneration (force majeure). A change of circumstances does not constitute a fact that exonerates the debtor. – The question is however discussed: see *Principles of European Contract Law, Part I and II, op.cit.* p. 328.

cognised as one of the general principles of Community law, which are themselves established by Article 6 of the Treaty on the European Union and recognised as applicable in the Community legal order by the ECJ *'because they are applied in all legal systems'*.[83]

The principle of binding force of contract is widely recognised in the Community legal order, if only to confirm the respect that the Member States must give to their Community undertakings. In contractual affairs, the principle is *'consubstantial with the very notion of contract itself, which the ECJ impliedly recognised when it decided that, in referring to an 'agreement', Article 228 § 1 paragraph 2 of the EEC Treaty meant to use the term in a general sense to indicate any undertaking entered into by the subjects of international law and having binding force*.[84] Many illustrations of the principle appear in secondary legislation, particularly within the ambit of the European law on groups of companies. Thus for example, Article 7 of Directive 68/151/EEC[85] concerning the protection of the interests of members and others, describes the method of dealing with company transactions entered into at the time of the formation of the company, and therefore before it had a legal personality: *'the persons who acted shall, without limit, be jointly and severally liable therefor'*.[86] This provision is simply applying the consequences of the binding force of contract.

The requirement that the parties comply with the duties arising from contractual fairness is also found. This principle is found in institutional Community law in the form of the principle of cooperation laid down by Article 10 of the EC Treaty.[87] In secondary law, we find express references to the implementation of this principle, often coupled or assimilated with the notion of good faith. According to Directive 86/653/EEC on the coordination of the laws of the Member States relating to self-employed commercial agents, each party to the contract of agency must *'act dutifully and in good faith'*,[88] whether they are the agent[89] or the principal.[90] In internal market law, the ECJ has also awarded a

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83 *'Parce qu'ils sont en vigueur dans tous les systèmes de droit'*, *Mémento Pratique Francis Lefebvre – Union européenne*, 2006-2007, Francis Lefebvre, 2005, especially n° 153.

84 *'Consubstantiel à la notion même de contrat, ce que reconnaît implicitement la CJCE lorsqu'elle juge qu'en se référant à un 'accord', l'article 228 § 1 al. 2 du traité CE entend utiliser ce terme dans un sens général, pour désigner tout engagement pris par des sujets de droit international et ayant une force obligatoire'* H. ADIDA-CANAC, *Contribution à l'étude du droit communautaire des obligations*, *op.cit.*, especially, t. 2, n° 791, on the subject of an opinion of the ECJ of 11 November 1975, opinion 1/75, *Rec.* p. 1355.

85 First Council Directive 68/151/EEC of 9 March 1968 *on co-ordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community*, OJ n° L 065 14/03/1968 p. 0008-0012.

86 Article 7 of the above Directive.

87 On the definition of this principle see *infra* Section III 'contractual fairness'.

88 Article 3 and restated in Article 4 of Directive 86/653/EEC of the Council of 18 December 1986 *on the coordination of the laws of the Member States relating to self-employed commercial agents* OJ n° L 382 31/12/1986 p. 17-21.

89 Article 3 § 1 of the above Directive.

90 Article 4 § 1 of the above Directive.

special place to fairness in contractual matters, since it has made *'the fairness of commercial transactions'*[91] an *'overriding reason relating to the public interest'*[92] allowing the justification of obstacles to free movement. In addition, the legislator has taken this creation of the case law and has applied it to secondary legislation.[93] The principle of fairness therefore appears widely as a general principle of the Community law of contract throughout the whole of the contractual process.[94]

In very specific circumstances, an unforeseeable change of circumstances which compromises the proper performance of the contract for the parties can form the basis of an exception to the principle of binding force, whether we are talking about the manifestation of imprévision or the incidence of force majeure. Indeed, according to the ECJ, such an exception should be admitted even if the basis is not the same in the different Member States with their diverse legal traditions.[95] It is the concept of force majeure, encompassing diverse standards[96] such as unforeseeability, impossibility and exteriority, which seems to form the basis of the exception to the operation of binding force and it is thus this notion that is used by the Court as a legal basis, *'its meaning must be determined by reference to the legal context in which it is to operate'*.[97]

C. Codifications by legal scholars

1. Binding force of contract

21. As with the majority of the national laws,[98] the different projects studied all commit, using a similar formula, to the principle of the binding force of contract.

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91 For example, point 28, ECJ, 13 December 2005, *SEVIC Systems AG*, C-411/03, *Rec.* 2005 p. I-10805.

92 See in particular, *Mémento Pratique Francis Lefebvre – Union européenne*, 2006-2007, *op.cit.*, n° 1581.

93 For example, Article 4 point 8 proposing a definition of the 'overriding reasons relating to the public interest' and giving examples, including that of 'fairness of trade transactions', Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, OJ L 376 27/12/2006, p. 36-68.

94 In this respect see H. ADIDA-CANAC, *Contribution à l'étude du droit communautaire des obligations*, *op.cit.*, t.2, especially n° 830 *in fine*. See *infra* Section III 'Contractual fairness'.

95 ECJ, 13 October 1993, *An Bord Bainne Co-operative Ltd et Compagnie Interagra SA v. Intervention Board for Agricultural Produce*, C-124/92, *Rec.* 1993 page I-05061, see point 11 *'the concept of force majeure is not limited to absolute impossibility but must be understood in the sense of abnormal and unforeseeable circumstances, outside the control of the trader concerned, the consequences of which, in spite of the exercise of all due care, could not have been avoided except at the cost of excessive sacrifice'*.

96 H. ADIDA-CANAC, *Contribution à l'étude du droit communautaire des obligations*, *op.cit.*, especially t. 2, n° 901 onwards.

97 Point 10, ECJ, 13 October 1993, *An Bord Bainne Co-operative Ltd et Compagnie Interagra SA v. Intervention Board for Agricultural Produce*, above.

98 See *supra*.

Within the **UNIDROIT Principles**, the principle of binding force of contract is posed by Article 1.3 which states that *'a contract validly entered into is binding upon the parties. It can only be modified or terminated in accordance with its terms or by agreement or as otherwise provided in these Principles'*.

However, this principle can also be inferred from the rule stated in Article 6.2.1. *'Contract to be observed'* which states that *'where the performance of a contract becomes more onerous for one of the parties, that party is nevertheless bound to perform its obligations subject to the following provisions on hardship'*.

Within the **Proposals for Reform of the Law of Obligations and the Law of Prescription**, the principle of binding force of contract is dealt with under the title of *'The Effects of Contracts'* in Article 1134 paragraph 1 which states, in accordance with the classic position, that *'contracts which are lawfully concluded take the place of legislation for those who have made them'*.[99] The principle can also be indirectly found in Article 1165, on *'The Effects of Contract as regards Third Parties'*, which states that *'contracts bind only the contracting parties […]'*.[100]

Finally, Article 42 of the **European Code of Contract Preliminary Draft**, concerning *'Effects on contracting parties and in favour of third parties'* holds that *'A contract has the force of law between the contracting parties […]'*.

2. Consequences of the obligatory effect of the contract

22. The different projects all hold that the binding force of contract has an equal effect on implied terms and obligations as it does on explicit obligations. In addition, a reference to good faith or equity can always be found.

In the **UNIDROIT Principles**, the distinction between express and implied obligations is found in Article 5.1.1 which states that *'The contractual obligations of the parties may be express or implied'*. Article 5.1.2 further clarifies that implied obligations are those which follow from *'the nature and purpose of the contract'*,[101] *'practices established between the parties and usages'*,[102] *'good faith and fair dealing'*[103] and *'reasonableness'*.[104]

In the **Proposals for Reform of the Law of Obligations and the Law of Prescription** the principle of the binding force of contract applies outside of the simple express content of the contract by virtue of the two paragraphs of Article 1135. Paragraph 2 states that *'notably, contracts should be supplemented by customary terms, even if they are not expressed'*.[105] Paragraph 1 adds *'contracts create obligations not merely in relation to what they expressly provide, but also to all the consequences which equity, custom or legislation give to them according to their nature'*.[106]

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99 J. CARTWRIGHT and S. WHITTAKER, *op.cit.*

100 *Ibid.*

101 Article 5.1.2 (a).

102 Article 5.1.2 (b).

103 Article 5.1.2 (c).

104 Article 5.1.2 (d).

105 J. CARTWRIGHT and S. WHITTAKER, *op.cit.*

106 *Ibid.*

Within the **European Code of Contract Preliminary Draft**, the principle of binding force of contract applies outside the express obligations of the contract as a result of Article 32 concerning '*implied terms*' of the contract. This article states in § 1 (c): '*in addition to the express terms the contract includes terms which must be considered impliedly intended by the parties on the basis of previous business negotiations, the circumstances, and general and local usage*'.[107] The provision is also aimed at the declarations of the parties during the pre-contractual period[108] and the custom for contracts entered into in the commercial sector.[109]

In addition, this draft project impliedly envisages the duties induced by contractual fairness in Article 32 § 1 (b): '*in addition to the express terms the contract includes terms which stem from the obligation of good faith*' and in Article 44: '*the effects of a contract derive not only from the agreement made between the parties but also from the provisions in this Code, national and Community provisions, usage, good faith and equity*'.

3. Unforeseeable change of circumstances

23. While the **UNIDROIT Principles** and the **European Code of Contract Preliminary Draft** both admit the judicial revision of the contract in the case of unforeseeable change of circumstances, the **Proposals for Reform of the Law of Obligations and the Law of Prescription** remain faithful to the classic conception of French law and do not admit it.

In the **UNIDROIT Principles**, the question of unforeseeable change of circumstances is governed by Article 6.1.2, 6.2.2 and 6.2.3. It is laid down that in cases of hardship (which is defined by Article 6.2.2[110]), the party who is the victim can demand to renegotiate the contract with the other party, and the judge can terminate the contract or adapt it to the circumstances with a view to restoring its equilibrium (Article 6.2.3[111]).

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107 *Adde* Article 32 (1) (d) which adds that the contents of the contract also includes those clauses which '*must be considered necessary in order that the contract can have the effects intended by the parties*'.

108 Article 32 (2).

109 Article 32 (3).

110 According to Article 6.2.2 *(Definition)*: '*There is hardship where the occurrence of events fundamentally alters the equilibrium of the contract either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished, and*
(a) the events occur or become known to the disadvantaged party after the conclusion of the contract;
(b) the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract;
(c) *the events are beyond the control of the disadvantaged party; and*
(d) the risk of the events was not assumed by the disadvantaged party.'

111 *According to Article 6.2.3 (Effects): '(1) In case of hardship the disadvantaged party is entitled to request renegotiations. The request shall be made without undue delay and shall indicate the grounds on which it is based.*
(2) The request for renegotiation does not in itself entitle the disadvantaged party to withhold performance.

In the **European Code of Contract Preliminary Draft**, the question of change of circumstances is governed by Article 157. The text is long and obscure.[112] In substance it admits however a contractual renegotiation of the contract *'if extraordinary and unforeseeable events have previously happened which have made performance excessively onerous'* (see Article 97(1)). In the absence of such a renegotiation, the text allows the judicial revision of a contract that has become profoundly unbalanced.

On the other hand, the **Proposals for Reform of the Law of Obligations and the Law of Prescription**, do not admit judicial revision of the contract for unforeseeable change of circumstances. To counter such situations the proposals prefer to encourage parties to make their own provisions and to stipulate renegotiation clauses in their contract. These clauses would deal with the case where it comes about that as a result of the circumstances the initial contractual equilibrium is disturbed to the point that the contract loses all point for the other party. Thus, Article 1135-1 states that *'in contracts whose performance takes place successively or in instalments, the parties may undertake to negotiate a modification of their contract where as a result of supervening circumstances the original balance of what the parties must do for each other is so disturbed that the contract loses its point for one of them'*.[113] In the absence of such a clause, no revision is provided for but one of the parties may demand of the judge that he order a renegotiation.[114] In the case of failure of renegotiation, judicial revision is excluded, but a unilateral power of termination is awarded to the parties.[115]

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(3) Upon failure to reach agreement within a reasonable time either party may resort to the court.
(4) If the court finds hardship it may, if reasonable,
(a) terminate the contract at a date and on terms to be fixed, or
(b) adapt the contract with a view to restoring its equilibrium.'

112 *'1. If extraordinary and unforeseeable events have happened, as are indicated in Art 97 para 1, the party who intends to avail himself of the right to renegotiation there provided must send to the other party, with all necessary information, a declaration requesting negotiation to be considered also specifying, if the request is not to be void, the different terms and conditions that he proposes in order to keep the contract alive. To this declaration the provisions of Art 21 and Art 36 para 2 shall apply. 2. No action can be brought before six (three) months have elapsed, calculated from receipt of the declaration, in order to enable the parties to settle the matter out of court. The right to apply to the court for the urgent reliefs contained in Art 172 is unaffected.*
3.
(…)
4. If the parties are unable to agree within the time specified at para 2, the person entitled must, within a further sixty days if his right is not to be lost, present his request for renegotiation to the court following the rules of procedure applicable in the place where the contract is to be performed.
5. After evaluating the circumstances and taking into consideration the interests and the requests of the parties, the court, if necessary with expert assistance, can alter or dissolve the contract as a whole or as to the unperformed part and, if needed and it is appropriate, order restitution and award compensation for loss.'

113 J. CARTWRIGHT and S. WHITTAKER, *op.cit.*

114 Article 1135-2 states that *'in the absence of such an express term, a party for whom the contract loses its point may apply to the President of the* tribunal de grande instance *to order a new negotiation*'.

115 Article 1135-3 states that *'where applicable, these negotiations should be governed by the rules provided by Chapter I of the present Title. In the absence of bad faith, the failure of the negotiations gives rise to a right in either party to terminate the contract for the future at no cost or loss'*.

IV. Proposed text

Article 0-201: Principle of binding force
A contract which is lawfully concluded has binding force between the parties.
In addition to the performance of the contractual obligations, each party is bound to comply with the duties which can be implied from the principle of contractual fairness.
In the course of performance, the binding force of the contract can be called into question if an unforeseeable change of circumstances seriously compromises the usefulness of the contract for one of the parties.

Article 0-202: Right to performance

I. General presentation of the principle

1. Within this chapter, the second article should clarify the scope of binding force of contract in respect of the obligations of the debtor and the rights of the creditor. Two questions must be answered.
– what can the creditor claim?
– what can the debtor be held to?
It is a question of settling the issue of performance of the contract. The principle of binding force of contract itself supposes that performance conforms to the content of the contract. It follows that the modalities of performance (time, place of performance …) should conform to the contract terms. Equally, it follows that the mode of performance should also respect the contractual provisions. If the contract envisages the payment of a sum of money, it is this sum that the debtor should pay. But if the contract, and it is here that we see the majority of the difficulties, envisages the provision of a service, it is important to specify whether the debtor must necessarily perform in kind or whether an equivalent performance is equally admissible. Thus, a guiding principle dedicated to the right to performance should clearly state if PECL make performance in kind the rule, or in fact whether equivalent performance is allowed. The provisions contained within PECL lead to the adoption of a principle of performance in kind, following the example of the countries influenced by Roman law and in contrast to the Common Law countries.[116] Such a choice does not in the least imply that performance in kind is always imposed on the debtor. Indeed the exceptions are laid down by Article 9: 102 (2) of PECL. But these exceptions should not be found within a guiding principle, which should simply state the general rule.[117]

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116 See *infra*.

117 **Acquis Group**: The working group on fundamental principles has not proposed anything on the right to performance.

II. Application of the principle in PECL

2. The right to performance of the contract is expressly recognised by Section 1 of Chapter 9 of PECL. The commentary indicates that this section states the right to compel performance of the contract[118] without however referring to a principle of performance in accordance with the contract.

The principle of performance in accordance with the contractual provisions is recognised and applied by several PECL provisions. For example:

- performance should take place at the location *'fixed by or determinable from the contract'*, see Article 7:101 (1) *a contrario*.[119]
- performance should take place on the date *'fixed by or determinable from the contract'*. This is stated by Article 7:102 *'Time of Performance'*: *'A party has to effect its performance:*
  (1) if a time is fixed by or determinable from the contract, at that time'.
- a party may in principle refuse an earlier performance, subject to the exception: *'where acceptance of the tender would not unreasonably prejudice its interests'*, see Article 7:103 *'Early performance'*, especially (1).[120]
- the creditor should accept a performance in accordance with the obligation proposed by the other party: see Articles 7:110 and 7:111.[121]

3. The principle of performance of the obligation as laid down by the contract is equally applicable to obligations to pay a sum of money as to obligations other than to pay sums of money.

In respect of obligations to pay a sum of money, Article 9: 101 (1) holds that *'the creditor is entitled to recover money which is due'*. The commentary clearly indicates that the

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118 *Principles of European Contract Law, Part I and II*, *op.cit.* p. xxxviii.

119 See Article 7: 101 (1): *'If the place of performance of a contractual obligation is not fixed by or determinable from the contract it shall be […]'*.

120 See Article 7: 103 (1): *'A party may decline a tender of performance made before it is due except where acceptance of the tender would not unreasonably prejudice its interests'*.

121 See Article 7: 110 *'Property Not Accepted'*: *'(1) A party who is left in possession of tangible property other than money because of the other party's failure to accept or retake the property must take reasonable steps to protect and preserve the property.*
(2) The party left in possession may discharge its duty to deliver or return:
(a) by depositing the property on reasonable terms with a third person to be held to the order of the other party, and notifying the other party of this; or
(b) by selling the property on reasonable terms after notice to the other party, and paying the net proceeds to that party.
(3) Where, however, the property is liable to rapid deterioration or its preservation is unreasonably expensive, the party must take reasonable steps to dispose of it. It may discharge its duty to deliver or return by paying the net proceeds to the other party.
(4) The party left in possession is entitled to be reimbursed or to retain out of the proceeds of sale any expenses reasonably incurred.'
Article 7:111 *'Money Not Accepted'*: *'Where a party fails to accept money properly tendered by the other party, that party may after notice to the first party discharge its obligation to pay by depositing the money to the order of the first party in accordance with the* law *of the place where payment is due'*.

possibility of requiring the payment of the promised sum of money is an application of the principle *'pacta sunt servanda'*.[122]

In respect of obligations other than to pay sums of money, the principle of performance in kind is posed by Article 9: 102 (1) which states that *'the aggrieved party is entitled to specific performance of an obligation other than one to pay money, including the remedying of a defective performance'*.

Paragraph 2 of the article specifies however the exceptions to the principle of performance in kind. Thus, performance in kind is refused when *'performance would be unlawful or impossible'* (a), or *'performance would cause the obligor unreasonable effort or expense'* (b), or *'the performance consists in the provision of services or work of a personal character or depends upon a personal relationship'* (c), or *'the aggrieved party may reasonably obtain performance from another source'* (d).[123] According to the commentary, the choice operated in favour of the principle of performance in kind for obligations which do not concern a sum of money is a way of assuring the principle of binding force of contract.[124]

III. Applications of the principle in comparative law

A. National laws

4. It is convenient to distinguish, within the different national laws of the Member States of the European Union, between the countries influenced by Anglo-Saxon law and the countries influenced by Roman law.

5. Within the Anglo-Saxon inspired countries, although the binding force of contract is well recognised, it is not understand as necessarily imposing performance in kind. An equivalent means of performance is considered equally respectful of the obligatory character of the contract.

For example, in English law there are two types of solution available to the creditor who is faced by the non-performance of the contract and the resulting: *common law remedies* (which are applicable as a matter of law) and *equitable remedies* (measures which may be pronounced by the judge but without the injured party being able to require it[125]). The enforced performance in kind of the contract *(specific performance)* is one of the second types of remedy. When the contract is concerned with an obligation to do something, the granting of specific performance is in practice very rare. To obtain specific performance, it must be proved that, taking into account the nature of the obligation and the harm suffered by the party demanding specific performance, damages will not constitute adequate recompense *(damages must be inadequate)*. This is the case when the demander cannot easily obtain the same service/benefit as envisaged by the contract, whether it is a question of delivery of specific/unique goods[126] or an obligation to do

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122 *Principles of European Contract Law, Part I and II*, *op.cit.* p. 393.

123 Compare Article 15: 104 (4) on restitution: *'If restitution cannot be made in kind for any reason, a reasonable sum must be paid for what has been received'*.

124 *Principles of European Contract Law, Part I and II, op.cit.* p. 395.

125 These measures are described as '(…) *provided by the discretion of the court* (…)'. They are *'discretionary remedies'*.

something *(replacement goods or performance)*. However, in spite of the discretionary power of the judge in this matter, it is considered that specific performance of the contract cannot be ordered where it would lead to consequences of exceptional hardship for the defendant. This was the approach chosen in the case of Patel v. Ali (1984).[127] In the name of equity, the judge can also refuse specific performance when the contract was entered into as a result of the use of dishonest practices, even if the lack of contractual fairness was not sufficient to avoid the contract as a vice affecting on of its constituent elements. This was the case in Walters v. Morgan (1861).[128] Lastly, in English law, an order for specific performance is thought to be impossible when it threatens the individual liberty of the contracting party (see in particular Ryan v Mutual Tontine Association, 1893;[129] compare *contra* Posner v. Scott-Lewis, 1986[130]).

6. On the other hand, within the Romanist countries, the principle of performance in kind is widely recognised. This is particularly so in the legal systems which have remained close to Roman law.[131]

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126 See in this respect a case concerning the sale of a Chinese vase, Vice-Chancellor's Court Falcke v. Gray (1859): '(…) *where there is a contract to sell goods which are unique, specific performance may be ordered (…)*'. On this case see, H. BEALE, A. HARTKAMP, H. KÖTZ, D. TALLON, *op.cit.* pp. 678 to 680.

127 In this case, the applicant had solicited the ordering of specific performance of a contract for the sale of a house. The request took four years to be examined by the court and, during this time, the husband of the seller was declared bankrupt and the seller herself became incapable. As a result, it was imperative that she was able to remain near her friends and family, and to require her to move would have led to exceptionally severe consequences. Consequently, the court refused to order specific performance of the obligation to deliver the property and only required the payment of damages.

128 In this case, the defendant, who had just acquired some land, had agreed to award the applicant a mining concession over the land. When the holder of the concession solicited specific performance of the obligation incumbent on the defendant to allow him to exploit the land, the court rejected his claim on the basis that, in entering into the contract for the concession, the party had intended to take advantage of the ignorance of the defendant as to the real value of the concession.

129 In this case, the contract for the lease of an apartment contained a clause which stipulated that a concierge would always be present in the building. It transpired that the concierge, who had another job, was often absent from the building in which the apartment was situated. The court refused to award specific performance of this clause in the contract on the grounds that it could only be realised by putting in place constant surveillance of the employee in question, which was a measure which exceeded the requests that the court was able to satisfy.

130 The reticence of the court is more or less marked depending on the facts of the case. In a factually similar case to the above, specific performance was ordered: the obligation to monitor and to supervise was placed on the defendant in so far as it concerned a building of a higher standing and the constant presence of a concierge was something that the residents were entitled to expect.

131 In addition to the laws studied *infra*, see for Belgium, Cass. 30 January 1965, Pas. I.58; 5 January 1968, Pas. I.567; for Portugal: Article 817 Civil Code: cited *in Principles of European Contract Law, Part I and II, op.cit.* p. 399.

Thus, in principle, French law awards the creditor the right to obtain from the debtor the enforced performance in kind of the unperformed obligation, whilst at the same time retaining the possibility of tempering the right e.g. with grace periods that the judge may award to the debtor, in accordance with Article 1244-1 of the Civil code.

It is generally recognised that the right to compel performance in kind rests on the binding force of contract since it is a question of allowing the creditor to obtain that which was agreed in the contract.[132] The approach adopted is therefore based on Article 1134 of the Civil Code, to which it is convenient to add other provisions, such as Article 1184 paragraph 2 which states that '*the party towards whom the undertaking has not been fulfilled has the choice either to compel the other to fulfil the agreement when it is possible, or to request its avoidance with damages*' and Article 1 of the law of 9 July 1991 dealing with the reform of civil procedures for performance according to which '*any creditor may, in the conditions laid down by statute, require his defaulting debtor to perform his obligations towards the creditor*'.[133]

The very existence of a principle of performance in kind gives rise to discussions in French legal writing because of the interpretation sometimes given to Article 1142 of the Civil Code. In announcing that '*any obligation to do or not to do resolves itself into damages, in case of non-performance on the part of the debtor*', this text seems in fact to exclude, for obligations to do and not to do, any enforced performance in kind. In reality the principle posed by this provision must be nuanced, or even inverted. The basis of Article 1142 of the Civil Code leads to the limiting of the scope of the article so that it only applies to those obligations where enforcing performance in kind would lead to a threat on the personal liberty of the debtor. Traditionally the example used is of the painter who cannot be forced to paint a picture. Article 1142 of the Civil Code has therefore become a provision of exception, the principle of enforced performance in kind being the principle. Nevertheless, where preparatory contracts are concerned, and contrary to the opinion of the majority of legal scholarship, the case law has maintained a literal interpretation of the text. Thus, it considers that the beneficiary of a unilateral promise of sale, who exercises the option during the time frame envisaged by the contract but after the retraction of the promise by the promisor, cannot obtain forced performance of the promised sale but damages alone. In order to justify this approach, the judges base their decision on the exact letter of Article 1142 of the Civil Code; they consider that it is a question of the non-performance of an obligation to do something, that of the promisor maintaining their offer.[134] An identical approach is adopted for the violation of a pre-emption agreement.[135] However, an evolution can be identified. In a case of 26 May 2006[136] the court admitted the possibility of annulling a contract of sale entered into in violation of a pre-emption agreement whilst at the same time requiring proof that the third party acquirer had knowledge of the existence of the pre-emption agreement and of the intention of its beneficiary to take advantage of it. It remains to be seen whether this evolution is a sign of the abandonment of a literal interpretation of Article 1142 of the Civil Code in respect of preliminary contracts.

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132 N. MOLFESSIS, *Force obligatoire et exécution: un droit à l'exécution en nature?*, RDC 2005/1, p. 40.

133 '*Tout créancier peut, dans les conditions prévues par la loi, contraindre son débiteur défaillant à exécuter ses obligations à son égard*'.

134 Cass. civ.3ème, 15 December 1993: Bull. civ. III, n° 174.

135 Cass. civ. 3ème, 30 April 1997: Bull. civ. III, n° 96.

136 Cass. ch. mixte, 26 May 2006: Bull. mixt., n° 4.

Other articles of the French Civil Code complete the above system and allow the creditor to obtain performance of the obligation as envisaged by the contract. Thus, Article 1144 of the Civil Code reinforces this right to performance, as, by stating '*a creditor may also, in case of non-performance, be authorized to have the obligation performed himself, at the debtor's expense*', it recognises performance in kind by a third party. In the same way, Article 1143 of the Civil Code, concerning obligations not to do something, states '*a creditor is entitled to request that what has been done through breach of the undertaking be destroyed*'. We must however underline that the question of determining whether these articles relate to performance in kind or reparation in kind is debated by legal scholars. In French law, only those remedies that are classed as performance in kind are binding on the judge. On the other hand, he remains free to choose the mode of reparation – in kind or by equivalent – which seems to him to be the most adequate.

In Italian law, the obligation to perform the contract in accordance with its terms arises from Article 1218 of the Civil Code which obliges the debtor who has not performed exactly what was due to repair the damage that has resulted unless he can establish that the non-performance or the delay was not attributable to him. Article 1453 of the Civil Code also offers the creditor the choice, in the case of non-performance, of demanding the performance or the rescission of the contract. The right to compel performance in kind is in addition legally recognised as belonging to the creditor of an obligation to deliver a thing (Article 2930), an obligation to do something (Article 2931), and an obligation to not do something (Article 2933). Article 2932 contains an original provision as it concerns the enforced performance of an obligation to enter into a contract,[137] where that contract is the subject of a preliminary contract (a contract fixing the essential elements of a contract to come). A creditor in this situation has the option of asking the judge for a judgment which would have the same effects as the yet to be concluded contract.[138]

Spanish law recognises that the creditor has a right to require that their debtor performs that which was agreed in the contract. Articles 1096 and 1098 of the Spanish Civil Code envisage enforced performance in kind. However, the Spanish Civil Code does not clearly state whether the creditor can opt for forced performance in kind or performance by equivalent.[139] Legal scholarship tends however to consider that the creditor must demand performance of the obligation and that it is only when this is impossible that reparation by equivalent will suffice. In other terms, the latter appears to be a subsidiary remedy.[140] However, the courts can refuse performance in kind if it is not reasonable to order it having regard to the circumstances.[141] It also results from Article 1098 of the Civil Code that when the obligation in question is an obligation to do or not to do, it is impossible to obtain forced performance in kind.

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137 M.-C. DIENER, *op.cit.* § 3. 22.

138 M.-C. DIENER, *op.cit.* §. 3.16. This rule does not apply to the preliminary contracts of real contracts because the judgement can only compensate a defect in consent and not the failure to hand-over the thing, which is necessary to the formation of a real contract: there is a legal impossibility arising from the text (*op.cit.* § 3. 20.3: opinion of the majority of legal scholarship).

139 See in this respect, MM. DIEZ-PICAZO et GULLON, *op.cit.* p. 209.

140 See in this respect, Sentencias de 24 de Abril de 1973, 24 de abril y 27 de febrero de 1995.

141 See in this respect, *Principles of European Contract Law, Part I and II, op.cit.* p. 400 and the references cited there.

7. The right to performance in kind can equally be found in the Germanic family of legal systems.[142]

In Dutch law, the principle of performance in kind is expressly established by Article 3:296 (1) BW.[143] This provision '*gives the creditor the right to enforce any obligation or duty in court, whether or not the debtor is in default in performing the obligation. The idea behind this general right of action is that the right to (specific) performance follows from the contract itself, and is therefore not a consequence of non-performance. […] Furthermore, the court is in principle obliged to award such a claim*'.[144] In addition, the judge is in principle bound to accept the creditor's demand – unless the restrictions envisaged by the provisions and resulting from the law are applicable, or the nature of the obligation or a decision of justice requires its refusal.[145] Forced performance is as equally applicable to the principal obligation as to the accessory obligations of the debtor.[146]

However, the creditor does not have an absolute right to performance in kind. It is important to take into account the prohibition on abuse of a right in Article 3:13 BW. The exercise of a right, such as performance in kind, is abusive if the creditor cannot exercise it reasonably, in view of the balance of interests which could be disturbed as a result of its exercise. From these rules we can draw the conclusion that the creditor cannot solicit performance in kind if this remedy would constitute an unreasonable charge for the debtor and if performance in kind would be no more beneficial to the creditor than any other mode of performance. In a recent case,[147] the Hoge Raad was thus able to decide that, where it is possible, the creditor can opt for performance in kind rather than damages. Nonetheless, the case adds that the creditor is bound by the requirements of reasonableness and equity, which implies that when exercising this option he should take into account the legitimate and justifiable interests of the debtor. This case can be analysed as an application of the requirement of proportionality.

In German law, the primacy of performance in kind is not expressly posed, but it is generally admitted.[148] We can deduce this rule from § 241 I BGB[149] and *a contrario* from § 275 BGB[150] on the exclusion of '*the duty of performance*'.[151] In this case, the debtor is

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142 In addition to the legal systems studied *infra*, see for Austria: § 918-919 ABGB; for Denmark: § 21 Sale of Goods Act; for Finland: § 23 Sale of Goods Act; for Sweden: § 23 Sale of Goods Act: cited by *Principles of European Contract Law, Part I and II, op.cit.* p. 399.

143 '*Unless the law, the nature of the obligation or a juridical act produce a different effect, the person who is obliged to give, to do or not to do something vis-à-vis another is ordered to do so by the judge upon the demand of the person to whom the obligation is owed*'. Translated in D. BUSCH, E.H. HONDIUS et alii, *op.cit.* p. 348.

144 D. BUSCH, E.H. HONDIUS et alii, *op.cit.* p. 348 onwards on '*Art. 3:296 (which is placed in Book 3, Patrimonial Law in General, Title 11, Right of Action)*'.

145 *Ibid.* p. 349 and 354 onwards.

146 *Ibid.* p. 354.

147 Hoge Raad, 5 January 2001, Multi Vastgoed v. Nethou (NJ 2001).

148 R. ZIMMERMANN, *The New German Law of Obligations …*, *op.cit.* p. 43 onwards.

149 '*By virtue of an obligation an obligee is entitled to claim performance from the obligor. The performance may also consist in forbearance*'.

150 '*(1) A claim for performance is excluded to the extent that performance is impossible for the obligor or for any other person.*

(2) The obligor may refuse performance to the extent that performance requires expense and effort

freed from his primary obligation (the *primäre Leistungspflichten)* and if necessary a secondary obligation (the *sekundäre Leistungspflichten*) will be substituted.[152]

8. Lastly, in Swiss law, the subject of varying influences, the principle according to which the debtor must perform his obligation as it is laid down by the contract results implicitly[153] from Article 97 I CO.[154] This provision is the implicit foundation beneath the establishment of the principle of performance in kind.[155] '*As long as performance is possible, the creditor has the right to act to require performance in kind, such as it was promised*'.[156]

B. International law and Acquis communautaire

9. In the **Vienna Convention**, the right to performance in accordance with the contract terms of a contract for sale is not formulated in a general sense. The principle is nevertheless at the origin of the rule according to which '*the seller must deliver the goods, hand over any documents relating to them and transfer the property in the goods, as required by the contract and this Convention*' (Article 30). More specifically, this obligation implies a requirement to deliver the goods on the agreed date (Article 33 (a)) and also to deliver the goods '*which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract*' (Article 35 (1)).[157] Equally,

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which, taking into account the subject matter of the obligation and the requirements of good faith, is grossly disproportionate to the interest in performance of the obligee. When it is determined what efforts may reasonably be required of the obligor, it must also be taken into account whether he is responsible for the obstacle to performance.

(3) In addition, the obligor may refuse performance if he is to render the performance in person and, when the obstacle to the performance of the obligor is weighed against the interest of the obligee in performance, performance cannot be reasonably required of the obligor.

(4) The rights of the obligee are governed by sections 280, 283 to 285, 311a and 326.'

151 M. PÉDAMON, *op.cit.* p. 230. – *Adde* P. SCHLECHTRIEM '*The German Act to Modernize the Law of Obligations in the Context of Common Principles and Structures of the Law of Obligations in Europe*' Oxford University Comparative Law Forum, 2002, (http://ouclf.iuscomp.org/articles/schlechtriem2.shtml); R. ZIMMERMANN, *The New German Law of Obligations*, *op.cit.* p. 49 onwards.

152 For the situations where the duty to perform is excluded, see M. Pédamon, *op.cit.* n° 204 onwards.

153 See P. ENGEL, *Traité …*, *op.cit.* p. 619. – *Adde* P. TERCIER, *op.cit.* n° 81, 211 onwards, 770.

154 '*If the performance of an obligation cannot at all or not duly be effected, the obligor shall compensate for the damage arising therefrom, unless he proves that no fault at all is attributable to him*', Swiss-Amercian Chamber of Commerce, *op.cit.*

155 P. TERCIER, *op.cit.* n° 213 onwards.

156 '*Tant que l'exécution est possible, le créancier a le droit d'agir en exécution pour obtenir la prestation en nature, telle qu'elle a été promise*', P. ENGEL, *Traité … op.cit.* p. 697.

157 See also Article 34: '*If the seller is bound to hand over documents relating to the goods, he must hand them over at the time and place and in the form required by the contract. If the seller has handed over documents before that time, he may, up to that time, cure any lack of conformity in the documents, if*

it is once again the principle of performance in conformity which justifies the fact that the purchaser is bound to pay the price on the date fixed by the contract (Article 59).

Performance in kind of the obligations incumbent on the seller is posed by Article 46 (1) of the Convention: *'the buyer may require performance by the seller of his obligations unless the buyer has resorted to a remedy which is inconsistent with this requirement'*. However, Article 28 states that *'if, in accordance with the provisions of this Convention, one party is entitled to require performance of any obligation by the other party, a court is not bound to enter a judgement for specific performance unless the court would do so under its own law in respect of similar contracts of sale not governed by this Convention'*.

10. In respect of **Community Law**, the principle of performance in accordance with the contractual provisions can be compared to the principle of conformity with the contract, which *'may be considered as common to the different national legal traditions'*.[158] It is directly linked to the general principle of legitimate expectations: the latter principle, of German origin, was established in the Community legal order by the ECJ.[159] The principle of conformity appears in particular in the sphere of Directive 1999/44 *on certain aspects of the sale of consumer goods and associated guarantees*,[160] according to which *'the goods must, above all, conform with the contractual specifications'*.[161] As laid down by Article 2 of this text, this is an obligation on the part of the seller who benefits from a simple presumption of the goods' conformity to the contract.[162]

Following on from this principle is the fact that performance in kind is a right, as is envisaged by Article 3 of the Directive which states that *'in the case of a lack of conformity, the consumer shall be entitled to have the goods brought into conformity free of charge by repair or replacement (…) or to have an appropriate reduction made in the price or the contract rescinded with regard to those goods'*.[163] This contractual obligation of conformity aims, within the sphere of the internal market, to reinforce the consumer's expectations and therefore attaches *'less [to] the behaviour of the debtor than to the satisfaction of the creditor'*.[164]

C. Codifications by legal scholars

11. Although each project treats the question of a right to performance differently, it appears that the primacy of performance in kind is retained as the principle in each.

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the exercise of this right does not cause the buyer unreasonable inconvenience or unreasonable expense. However, the buyer retains any right to claim damages as provided for in this Convention'.

158 Whereas 7 of the Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees OJ L 171' 07/07/1999 p. 12-16.

159 See *infra* Section III 'Contractual fairness'.

160 Above Directive.

161 Whereas 7, above.

162 Article 2, above Directive.

163 Article 3 § 2, above Directive.

164 *'Moins [au] comportement du débiteur qu'[à] la satisfaction du créancier'*, H. AUBRY, *L'influence du droit communautaire sur le droit français des contrats*, *op.cit.*, n° 86.

The principle appears relatively clearly in the **UNIDROIT Principles**. First, a '*right to performance*' of the contract is recognised by Section 2 of Chapter 7 concerning non-performance. Secondly, while Article 7.2.1 treats the performance of monetary obligations in the classic sense, Article 7.2.2 states that '*where a party who owes an obligation other than one to pay money does not perform, the other party may require performance*', before however going on to enumerate the different exceptions to the principle of performance in kind.

In the **European Code of Contract Preliminary Draft**, the right to performance in accordance with the contractual provisions is established in both a positive and a negative sense. Firstly Article 75, concerning the modalities of performance, envisages that '*each of the parties is bound to perform exactly and completely all the obligations laid on him by the contract*'. The terms '*exactly and completely*' clearly underline the fact that the obligation must be performed in conformity with the terms laid down by the contract. Moreover, the provision adds that '*in rendering due performance the debtor must conform to what has been agreed by the parties […]*'. Second, Article 78 establishes, not a right to performance for one of the parties, but a prohibition on the other party unilaterally changing the modalities of performance of the obligation. Thus Article 78 (1) states '*the debtor cannot free himself from the obligation by a performance different from that which is due, even if of equal or greater value, unless the creditor consents*'. In addition, the project clearly shows the priority awarded to performance in kind. In principle, in the case of non-performance, it is envisaged that the creditor has the right to obtain '*performance in specific form*' of the obligation, that is to say specific performance (performance in kind) of the obligation.[165]

On the other hand, there is no article in the **Proposals for Reform of the Law of Obligations and the Law of Prescription** which states the creditor's right to performance. However, the principle follows implicitly from Article 1134 paragraph 1 according to which '*contracts which are lawfully concluded take the place of legislation for those who have made them*'.[166] Although the proposals do not contain a provision stating the primacy of performance in kind, the principle seems nonetheless to have been retained for each category of obligation.

Thus, for the obligation to give, the principle is that of performance in kind (Article 1152, paragraph 3). For the obligation to do, Article 1154, paragraph 1 states: '*if possible the obligation to do is to be performed in kind*'.[167] However, the provision continues in paragraph 4, '*in the absence of performance in kind, an obligation to do gives rise to damages*'.[168] The rule is different for the obligation not to do, taking into account the impossibility of returning to a non-performance which has already been realised. Thus, '*a failure to observe an obligation not to do gives rise to damages by operation of law […] without prejudice to the creditor's right to claim performance in kind for the future*'[169] (Article 1154-1). Finally, for obligations to give for use, the principle is that of performance in kind (Article 1155 *in fine*).

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165 Article 111.

166 J. CARTWRIGHT and S. WHITTAKER, *op.cit.*

167 *Ibid.*

168 *Ibid.*

169 *Ibid.*

IV. Proposed text

Article 0-202: Right to performance
Each party can demand from the other party the performance of the other party's obligation as provided in the contract.

Article 0-203: Rights and duties of third parties

I. General presentation of the principle

1. While contractual certainty presumes that the parties will honour the contract, it is nevertheless insufficient if third parties are able to ignore the legal situation arising from the contract. In fact, the binding force of contract must impose itself on third parties. Third parties cannot be allowed to compromise the contract and act such that its performance is endangered. Once again, it is a question of understanding and applying the consequences of integrating the contractual situation in the general legal order.[170] Although we have seen that the parties must honour the rights of third parties, it is equally important that third parties honour the situation created by the contract. The contractual situation is in effect invocable by and against third parties, which gives rise to rights and duties on their behalf.

We will start with an examination of the duties created. As with any fact which can be invoked against them, third parties are bound not to do anything that harms the contractual situation. Specifically, they are bound not to compromise the performance of the contract. Thus, for example, they must not help the debtor to shirk or evade his contractual obligations. This is an expression of the general duty not to harm others: although they are not parties to the contract, third parties are no less bound to honour the rights created by the contractual situation.

In respect of the rights created by the contractual situation, third parties may take advantage of the situation created by the contract as with any fact which can be invoked by them. The contractual situation is in effect a juridical fact which can be invoked as proof in just the same way that it can be a fact generating liability. It can be a fact generating liability in the situation where a third party attempts to hold one of the parties liable because the poor performance of the contract has harmed his right. In this case, the third party is not invoking the binding force of the contract, which only binds the parties, but the effect of the legal situation.

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170 See *supra* the general presentation of Article 0-102 and the incidence of the opposability of third party rights on freedom of contract.

II. Application of the principle in PECL

2. In so far as the Principles of European Contract do not specifically deal with the effect of the contract on third parties,[171] the proposed guiding principle[172] cannot find support in any existing provisions. However, it should once again be recalled that a general system of contract law regulation cannot just disregard the legal situation of third parties. It therefore appeared necessary to create a guiding principle which clarifies the rights and duties of third parties in respect of the contractual situation. Of course, since they are, by necessary implication, not parties to the contract, the rights of these third parties must not go so far as to allow them to claim performance of the contract.

III. Applications of the principle in comparative law

A. National laws

3. The treatment of the rights and duties of third parties is different within the different national legal systems studied. Within the Common law systems, as with those influenced by German law, it is generally admitted that the contract only produces effects between the parties, and the situation of third parties is rarely studied. Therefore, there is no distinction between binding force *(contenu obligationnel)* and the effect of the contractual situation *(opposabilité)*. The approach is different once again in those systems that are today essentially still based on Roman law. There we generally distinguish between binding force and the invocability of the contract *(opposabilité)*, even where the latter concept is not described in those terms.

4. In the Common law systems, and in particular in English law, the question of the rights and duties of third parties is hardly ever considered. In English law, the only reference of note is to the relative effect of the contract, which results from the rule named the *Privity Rule* or the *Doctrine of Privity of Contract*.[173] As a result, the question of third party rights is only approached from the angle of exceptions to the rule of privity of contract.[174]

5. In the same way, within the German-influenced systems, it is ordinarily acknowledged that the contract does not produce effects as regards third parties, which means there is no question of whether rights and duties can arise in their regard.

Thus, in Germany, '*the relative effect of contract extends far since third parties, in theory, do not have regard to contracts entered into between others: the harm that they can cause to*

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171 See *supra* on Article 0-102.

172 **Acquis Group**: The working group has proposed nothing on the subject of the rights and duties of third parties.

173 For an examination of this rule see, G. H. TREITEL, *An outline of the Law of Contract*, Oxford University Press, 6th edition 2004, pp. 97 to 101. – S. A. SMITH, *Atiyah's Introduction to the Law of Contract*, Clarendon Law Series, Oxford University Press, 6th edition, 2005, pp. 335 and 336.

174 For these exceptions, see *supra* on Article 0-102.

contractual rights is not in itself unlawful, it does not fall under the ambit of § 823 I BGB[175]*; however it can be justiciable under § 826, or even § 1 of the 1909 law on unfair competition if the contested behaviour is seen as contrary to morality*'.[176] However, this residual system protecting the contract from the acts of third parties is not thought to be sufficient by some legal scholars.[177] With regard to third party rights, outside the specific case of contracts for the benefit of third parties,[178] German law recognises the '*contract for the protection of third parties* (Vertrag mit Schutzwirkung für Dritte)'.[179] This Praetorian creation is now codified in § 311 II BGB.[180] It concerns a '*contract by virtue of which the debtor does not promise to provide a service to a third person, but to be bound by an obligation to guarantee and to protect the interests of certain third parties in the same conditions as those of the other party to the contract, that is to say the creditor*'.[181] It is illustrated, for example, by the obligation of security and protection incumbent on a lessor, a taxi-driver, the lessor of a concert hall. '*The purpose of the institution is to provide the third party victim of physical or material harm with the right to invoke, on a personal level, the contractual liability of the debtor rather than his delictual responsibility*'.[182]

Dutch law is relatively similar to German law on this question. The general principle is that the contract only produces effects between the contracting parties and those who

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175 '*(1) A person who, intentionally or negligently, unlawfully injures the life, body, health, freedom, property or another right of another person is liable to make compensation to the other party for the damage arising from this.*

(2) The same duty is held by a person who commits a breach of a statute that is intended to protect another person. If, according to the contents of the statute, it may also be breached without fault, then liability to compensation only exists in the case of fault.'

176 '*La relativité contractuelle va […] très loin puisque les tiers n'ont pas à tenir compte en principe des contrats qui ont été conclus par d'autres: l'atteinte qu'ils peuvent porter au droit contractuel d'autrui n'est pas en soi illicite, elle ne tombe pas sous le coup du § 823 I BGB; elle peut être justiciable cependant du § 826, voir du § 1 de la loi de 1909 sur la concurrence déloyale si le comportement litigieux apparaît comme contraire aux bonnes mœurs*', M. PÉDAMON, *op.cit.* n° 151 n. 6.

177 See, MünchKomm/KRAMER n° 22 onwards, cited by M. PÉDAMON, *op.cit.* n° 151 n. 6.

178 See *supra* under Article 0-102.

179 '*Contrat à effet de protection pour les tiers* (Vertrag mit Schutzwirkung für Dritte)', M. PÉDAMON, *op.cit.* n° 159.

180 '*An obligation with duties under section 241 (2) may also come into existence in relation to persons who are not themselves intended to be parties to the contract*'.

181 '*… Contrat en vertu duquel le débiteur ne promet pas de fournir une prestation à une tierce personne mais est tenu de l'obligation de garantir et de protéger les intérêts de certains tiers dans les mêmes conditions que ceux du cocontractant c'est-à-dire du créancier.*'

182 '*Le but de l'institution est d'accorder au tiers victime d'un dommage corporel ou matériel le droit d'invoquer à titre personnel la responsabilité contractuelle du débiteur plutôt que sa responsabilité délictuelle*', M. PÉDAMON, *op.cit.* n° 159. The basis of this concept is disputed: for some it was a question of a 'completive interpretation' of the contract conforming with the fiction of the will, while for others it was the principle of good faith of § 242 BGB, the origin of numerous accessory obligations. Nowadays the basis is statutory – § 311 III cited above. – Compare R. ZIMMERMANN *The New German Law of Obligations, op.cit.* p. 3 n.14: '*The duty to have regard to the other party's rights and interests which may result from the content of an obligation (§ 241 II BGB); and the existence, in some cases, of such duties on the part of third parties […] § 311 III BGB implies the*

are assimilated to them.[183] The third party taking advantage of and benefiting from the contract is not a possibility that is envisaged. The question of third parties' duties is not considered as the principle that the contract cannot impose obligations on those who are not party to it entails that it is never an issue.

Lastly, the situation in Swiss law is a little different. Although the rights and duties of third parties are not fully recognised, the effect of the contract on third parties is not however totally ignored, certain authors even arguing that its recognition should be even wider. In respect of third party rights and the harm caused by a contractual failure to perform, if no express general provision exists, '*statute [nevertheless] settles some special cases of reparation of the harm caused to a third party by conferring on them a direct action against the author*'.[184] However, the question is whether these special cases are exceptions to the principle or applications of the principle, applicable by analogy.[185] With regard to the duties of third parties, it is traditionally admitted that '*third parties are under no duty to comply with relative law as they are with absolute duties […]*'.[186] This approach is however sometimes criticised as contrary to good faith.[187] *It is possible to ask […] whether the principle*

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existence of such duties also vis-à-vis third parties; whether the provision can thus be regarded as a statutory legal basis for the contract with protective effect vis-à-vis third parties is disputed'.

183 A. S. HARTKAMP, *op.cit.* p. 160 onwards.

184 '*La loi résout [néanmoins] quelques cas spéciaux de réparation du dommage causé à un tiers et confère à celui-ci une action directe contre l'auteur*', P. ENGEL, *Traité … op.cit.* p. 20.

185 *Adde* P. GAUCH, W.R. SCHLUEP and P. TERCIER, '*La partie générale du droit des obligations (sans la responsabilité civile)*': Schulthess, Zurich, 1982, t.2 n° 1578 onwards: '*The principle of relative effect of contract prohibits third parties from inferring rights from the violation of a relationship to which they are not party. It results from this that they can only claim damages in so far as the author of the harm incurs extra-contractual libaility in their respect (Article 41 of the Code of Obligations and the related provisions). […] The principle of relative effect is not opposed to the admission of third party action when the contract directly confers rights on the third party as it is (also) aimed at their protection (Vertrage mit Schutzwirkung zugunsten Dritter). Such a clause may follow expressly or impliedly from the agreement. It is also a question of knowing if, independently of these situations, it is possible in certain cases for a third party to act against the debtor in contractual liability. Legal scholarship and case law appear to recognise this, in particular in the event of indirect representation or when risks are transferred to third parties (Article 185 Code of Obligations).*'

186 '*Les tiers n'ont pas le devoir de respecter le droit relatif, comme ils l'ont pour le devoir absolu […]*', P. ENGEL, *Traité …, op.cit.* p. 19.

187 P. ENGEL, *ibid.* – *Adde* p. 454: According to the author, third parties who incite the debtor to breach his contractual obligation '*would be accessory to an unlawful act from the moment they participated in the violation of the principle of contractual fidelity. In a certain way [the parties] have created a rule, which must be respected by third parties in the same way as statute; from intentional participation to participation by negligence, the threshold is often insensitive; as a result, the specific duties are added to the universal duties; no one is expected to disregard the law, no one is expected to disregard the claims of others. It is undeniable that in certain situations this assimilation does not shake a notion of justice; in others it can excessively increase the predominance of one party, not only towards their partner but also towards third parties; it can favour commercial enquiry, economic espionage, the inflation of duties […] paradoxically, the risk is large in replacing the relativity of contracts with the relativity of law. In any case, this is a choice for the legislator. In this way the law against unfair*

of objective good faith (Article 2 CCS[188]) does not subject the third party who has knowledge of a creditor's right […] to the respect of that right, or at the very least to the duty not to disturb it. Violating the superior principle of good faith should be considered as an unlawful act in the sense of Article 41 I CO[189]'. Nevertheless, '*the Federal case law follows in the footsteps of the dominant legal scholarship: […] the Federal Tribunal express themselves thus: […] the claim deriving from a relationship of obligation, for example that which derives from a contract, offers the typical example of a relative right as it rests on a specific relationship between determined persons and can only be invoked against the debtor and not a third party who is a stranger to the contract. For many decades the Federal Tribunal therefore refused to qualify the violation by a third party of rights arising from a contract as an unlawful act according to Article 41 I CO […] On the other hand, inciting the violation of contractual obligations and the exploitation of this violation can be contrary to morality in the sense of Article 41 II CO*[190] '*and thus will render the third party liable in damages. However, this supposes specific circumstances which justify an extension of liability, for example when the contract is breached with the intention to harm and the third party knows this*'.[191]

6. The question is treated very differently in the countries that have been influenced by Roman law. It is generally admitted that the contractual situation generates rights and duties on the part of third parties.

In this respect, the most complete legal system is without doubt the French legal system.

French law recognises that the contract gives rise to a legal situation, a social fact which everyone must take account of even if they are outside the contract and therefore not a contracting party. This is the principle of 'opposability' of the contract. The opposability of the contract is nothing more than a consequence of the insertion of the contract and its provisions in the general legal order, in a relationship of interdepen-

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competition of 19 December 1986, Article 4, deems unfair the fact of inciting a client to break a contract with a view to entering into another one with him'.

188 Cited *infra*.

189 '*Whoever unlawfully causes damage to another, whether wilfully or negligently, shall be liable in damages*', Swiss-American Chamber of Commerce, *op.cit.*

190 '*Equally liable for damages is any person who wilfully causes damage to another in violation of bonos mores*', Swiss-American Chamber of Commerce, *op.cit.*

191 '*Il est permis de se demander […] si le principe de bonne foi objective (article 2 CCS) n'assujettit pas le tiers qui connaît l'existence d'un droit de créance […] au respect de ce droit, à tout le moins au devoir de ne pas le perturber. [Or] violer le principe supérieur de la bonne foi doit être considéré comme un acte illicite au sens de l'article 41 I CO*'. [Néanmoins] '*la jurisprudence fédérale emboîte le pas à la doctrine dominante: […] Le Tribunal fédéral s'exprime ainsi: […] La prétention dérivant d'un rapport d'obligation, par exemple celle qui découle d'un contrat, offre l'exemple typique d'un droit relatif, parce qu'elle repose sur une relation particulière entre des personnes déterminées et ne peut être invoquée qu'à l'encontre du débiteur, et non d'un tiers qui n'y participe pas. Depuis des décennies, le TF a donc refusé de qualifier d'acte illicite au sens de l'article 41 I CO la violation par des tiers des droits découlant d'un contrat […] En revanche, l'incitation à violer des obligations contractuelles et l'exploitation de cette violation peuvent être contraires aux mœurs au sens de l'article 41 II CO et contraindre le tiers à réparation. Cela suppose toutefois des circonstances particulières qui justifient pareille extension de la responsabilité, par exemple lorsque le contrat est violé avec l'intention de nuire et que le tiers le sait*', P. ENGEL, *Traité …, op.cit.* p. 19.

dence.[192] Although no provision of the Civil Code lays down the principle of invocability, it is nonetheless unanimously admitted and is found in substantive law in two forms: the opposability of the contract to third parties, and the opposability of the contract by third parties.

The possibility of invoking the contract against third parties, which has been expressly recognised by the Cour de cassation as a general principle of law,[193] means that third parties must respect the situation that the contracting parties wanted to establish. In this way, the opposability of the contractual situation against third parties appears as the *'necessary compliment to the binding force of contract'*[194]*: the contract would run the risk of being deprived of all efficacy if third parties were able to ignore or abuse at their whim the situation created by the contract*[195]*. The opposability of the contract to third parties is clearly shown when the contract creates or transfers a right in rem (which is characterised by the fact that it must be respected by all):* subject to the publicity rules for land transactions, the purchaser will be able to invoke the right in rem he acquires from the purchase of the building against everyone. The opposability of the contract to third parties imposes an obligation on them to not compromise the rights arising from the contract. A third party may not enter into a contract when the effect of the contract would be to prevent the other party from performing his prior undertakings. *'Every person who, with knowledge, helps another to breach their contractual obligations, commits a delictual fault in respect of the victim of the infraction'*.[196] More generally, a third party, in the absence of any fault on the part of the original party, can be liable if they endanger the performance of that party's contract.[197] However, the third party can only be reproached for such an attack if the contract was indeed invocable against him. Also, it is recognised that opposability requires the third party to have real or imputed knowledge (e.g. in the case of obligatory publicity) of the contract.[198]

The opposability of the contract by third parties means that, against the parties, the former can take advantage of *'the situation resulting from performance of the contract as well as the contractual situation itself'*.[199] Thus, *'although they cannot be considered either creditor or debtor, third parties to a contract can invoke to their benefit, as a juridical fact, the situation*

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192 See, G. WICKER, *La sanction délictuelle du manquement contractuel ou l'intégration de l'ordre contractuel à l'ordre juridique général*, RDC 2007/2, p. 593. – *Adde* the references cited *supra* under Article 0-102.

193 Cass. civ. 1ère, 17 October 2000: Bull. civ. I, n° 246.

194 *'Complément nécessaire de la force obligatoire du contrat', J. GHESTIN, C. JAMIN and M. BILLIAU, Les effets du contrat: LGDJ, 3e éd. 2001, n° 724.*

195 F. TERRÉ, P. SIMLER and Y. LEQUETTE, *op.cit.* n° 490.

196 *'Toute personne qui, avec connaissance, aide autrui à enfreindre les obligations contractuelles pesant sur elle, commet une faute délictuelle à l'égard de la victime de l'infraction'*, Cass. com., 13 mars 1979: Bull. civ. IV, n° 100.

197 Cass. com. 8 June 1993: Bull. civ. IV n° 228. – V. encore Cass. civ. 1ère, 26 January 1999: Bull. civ. I n° 32; D. 1999, som. com. p. 263, obs. P. DELEBECQUE; RTD civ. 1999, p. 405, obs. P. JOURDAIN.

198 Equally, it the opposability of the contract which justifies the fact that a third party can be sanctioned for entering into a fraudulent act with a debtor where he compromises the creditor's right from an earlier contract. Compare the applications of the action paulienne and its associated disputes in French law, cited *supra* under Article 0-102.

created by the contract'.[200] To this end, third parties can invoke the poor performance of a contract which has caused them harm. The question is then whether simple unawareness or poor performance of the contractual obligation on the part of the debtor is classed as a sufficient fault in the sense of Article 1382 of the Code Civil to engage his civil liability towards third parties (necessarily delictual because of the doctrine of relative effect of contracts), or if it is necessary to establish an independent delictual fault, considered totally separately from the contract. In other words, it is a question of the relativity of contractual fault. In the first instance, the case law was favourable to such relativity, considering that the third party could only obtain satisfaction if they established a failure on the part of the debtor to comply with a generally applicable duty. For example, this was the case where the manufacturer of a dangerous product saw his liability engaged towards a third party user of the product on the basis of a failure to comply with the general duty not to harm others. For some people, this solution was imposed because '*allowing a third party to invoke the contractual fault of the debtor is in effect allowing him to claim, to his advantage, the benefit of a contract to which he is not a party. In other words, it is, under cover of opposability of contract, a direct attack on the principle of relative effect of contracts*'.[201] In addition, the contrary solution would be unjust as '*the third party would be able to benefit from the contract in all cases without having assumed any of the limits that the contracting party is normally subject to. The third party would not therefore have to limit his demand to foreseeable damage and any limitation clauses would not be invocable against him*'.[202] For others, the solution was questionable because the third parties who take advantage of the non-performance of the contract '*do not claim in any way to introduce themselves into the contractual relationship of obligation: they limit themselves to asserting the fact of non-performance, in the same way that any third party can invoke the factual situation created by the contract, whether it has been performed or not*', the more so as '*the very fact that the third party has suffered harm as a result of the contractual failure appears to imply a violation of the duty not to harm another in the sense of Article 1382 of the Civil Code*'.[203] A divergence of case law then appeared within the Cour

199 '*… Tant de la situation résultant de l'exécution du contrat que de la situation contractuelle elle-même*', G. WICKER, cited above, n° 9.

200 '*S'ils ne peuvent être constitués ni débiteurs ni créanciers, les tiers à un contrat peuvent invoquer à leur profit, comme un fait juridique, la situation créée par le contrat*', Cass. com., 22 October 1991: Bull. civ. IV, n° 302.

201 '*… Permettre à un tiers d'invoquer la faute contractuelle du débiteur, c'est en effet lui permettre de réclamer à son profit le bénéfice d'un contrat auquel il n'est pourtant pas partie. Autrement dit, c'est, sous couvert d'opposabilité du contrat porter directement atteinte au principe de l'effet relatif des contrats*', F. TERRÉ, PH. SIMLER and Y. LEQUETTE, *op.cit.*, n° 495.

202 '*Le tiers pourrait bénéficier dans tous les cas du contrat sans avoir à assumer aucune des limites opposables au seul contractant. Le tiers n'aurait ainsi pas à limiter sa demande aux dommages prévisibles et il ne pourrait pas se voir opposer les éventuelles clauses limitatives de responsabilité*', M. FABRE-MAGNAN, *Les obligations*, PUF coll. Thémis, 2004, n° 173.

203 '*Ne prétend en aucune façon s'introduire dans le rapport d'obligation contractuel: il se borne à faire valoir le fait de l'inexécution, comme tout tiers peut invoquer la situation de fait constituée par le contrat, qu'il soit ou non exécuté, [d'autant que] le fait même que le tiers ait subi un dommage en conséquence du manquement contractuel paraît bien impliquer une violation du devoir de ne pas nuire à autrui au sens de l'article 1382* (C. civ.)', J. FLOUR et J.-L. AUBERT and E. SAVAUX, *Droit civil, les obligations, vol. III: le rapport d'obligation*, Paris, 4e éd. A. Colin, 2006, n° 183.

de cassation. On the one hand, the Commercial Chamber only recognised the delictual liability of the defaulting debtor towards third parties on the condition that the third party establish the existence of a specific delictual fault, distinct from the contractual failure.[204] On the other hand, the first Civil Chamber adopted the position that a contractual failure itself constituted a delictual fault in respect of third parties.[205] The Assemblée plénière settled the matter by deciding in favour of the second solution, in affirming that '*a third party to a contract may invoke, on the basis of delictual liability, a contractual failure to the extent that this failure has caused him harm*'.[206]

The opposability of the contract by third parties is not limited to situations where the third party is attempting to engage the liability of the parties to the contract. It also allows third parties to escape from an obligation that they would otherwise themselves be held to. Thus for example, the debtor's guarantors can invoke against a creditor who is pursuing them the contract by which the creditor transferred his rights to another.[207] It also allows third parties to invoke the contract in the name of proof as '*the relative effect of contracts does not prevent the* juges du fond *from searching agreements, which do not pertain directly to one of the parties in the case, for information which may illuminate their decision*'.[208] By invoking the contract in the name of proof, the third parties '*do not [propose] to invoke a direct and beneficial link with the right, but only to draw from the contract to which they are not a party simple information likely to generate presumptions favourable to their cause*'.[209]

7. Other countries, equally based on Roman law, also take into account the effect on the contract on the part of third parties.

In Spanish law, third parties must respect the legal situation which the contract gives rise to: this requires them, if they are aware, to not create any ties with a party to the contract which could lead to the performance of the contract becoming difficult or even impossible.[210]

In Italian law, although the effect of the contract is envisaged from the angle of binding force, and therefore only affects third parties in the specific cases laid down by statute,[211] it is nonetheless recognised that third parties should not endanger the performance of the contract. For example, when a third party acquires goods in disregard of a beneficiary's right under a preliminary contract, the majority of legal scholarship and case

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204 Cass. com., 5 April 2005: Bull. civ. IV, n° 81.

205 Cass. civ. 1ère, 18 May 2004: Bull. civ. I, n° 141.

206 '*Le tiers à un contrat peut invoquer, sur le fondement de la responsabilité délictuelle, un manquement contractuel dès lors que ce manquement lui a causé un dommage*', Cass. Ass. Plén., 6 October 2006: Bull. ass. plén., n° 9. On this case, see the contribution in RDC 2007/2, p. 537 onwards.

207 Cass. com., 22 October 1991: Bull. civ. IV, n° 302.

208 '*L'effet relatif des contrats n'interdit pas aux juges du fond de rechercher dans les actes étrangers à l'une des parties en cause des renseignements de nature à éclairer leur décision*', Cass. civ. 1ère, 18 juillet 1996: Bull. civ. I, n° 221.

209 '*… Ne se [propose] pas de dégager de l'acte auquel il n'avait pas été partie, un lien de droit à son profit mais seulement d'y puiser de simples renseignements susceptibles d'engendrer des présomptions favorables à sa cause*', Cass. req., 27 July 1896: DP 97, 1, 327.

210 Sentencias de 23 de marzo de 1921, 16 de febrero de 1973, 26 de mayo de 1995 y 27 de marzo de 1984.

211 Article 1372 para 3 of the Civil Code.

law holds the third party liable for having threatened the beneficiary's right by their complicity in the debtor's non-performance of the contract.[212] This is simply an application of the rule according to which the third party cannot endanger the performance of the contract. Although such a general principle is not explicitly established in Italian law, recent developments in the case law, supported by a wide section of legal scholarship,[213] show movement in this direction. It has also been recognised,[214] that the holder of a right or claim can hold liable a third party who was an accessory to the debtor's non-performance, subject nevertheless to establishing bad faith or fault on their part.

B. International law and Acquis communautaire

8. The question of the rights and duties of third parties is not dealt with by the **Vienna Convention**. This is clear from the definition of the domain of the Convention in Article 4 which states that the Convention '*governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract*'. Consequently, it does not govern the effects of a contract of sale in respect of third parties.

There do not seem to be any illustration of the duties arising from the opposability of the contract to third parties in **Community Law**.

C. Codifications by legal scholars

9. Within the different projects studied, the question of the rights and duties of third parties is, according to the project, ignored entirely, developed, or considered occasionally.

The **UNIDROIT Principles** do not contain any provision on the rights and duties of third parties relative to the contractual situation.

Within the **European Code of Contract Preliminary Draft**, the rights and duties of third parties are occasionally taken into account. Although there is no provision that establishes that the contract can be invoked by and against third parties in a general sense, the principle is indirectly recognised. Indeed, Article 154 details numerous cases where the contract cannot be invoked. For example, '*contracts concluded either in violation of a prohibition aimed at protecting specific persons or in contravention of requirements of form or publicity made for the benefit of third parties*' cannot be invoked against third parties. This approach is taken because third parties can only be obliged to respect a contract if it can be set against them. Yet this is not the case where the possibility of invoking the contract is subordinated to the fulfilment of publicity measures. In addition, the consequences of the contract being invocable by and against third parties are followed in Article 161. Because of this invocability, third parties are able to rely on the contract and act on this

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212 M.-C. DIENER, *op.cit*. § 3.12.11. – F. GAZZONI, *La trascrizione immobiliare*, in Comm. cov. Civ. diretto da P. SCHELSINGER, Milano, 1998, p. 550-551. – G. CASELLA, *La doppia alienazione immobiliare: un dibattito sempre aperto*, in Riv. Dir. civ. 1993, II, p. 517 onwards, especially p. 533. – C.M. BIANCA, *La responsabilità*, Milano, 1994, p. 606.

213 See in this respect, M.-C. DIENER, *op.cit*. note 113.

214 Cass. sez. Un. 12 November 1988, n. 6132, in Foro it. 1989, I, col. 742.

reliance in consequence. However, if the validity of the contract is questioned, the invalidation of the contract, whatever its form, could affect the third parties' situation. The above article protects third parties in this situation by providing that each party is liable for the harm that, as a result of their conduct, a third party suffered as a result of having relied in good faith on the appearance of the contract.[215] For this reason the contractual liability of the parties can be brought into play (Article 162 onwards). It is because third parties can take advantage of the contractual situation that the parties are, if necessary, bound to indemnify them in cases of invalidation.

However, it is without a doubt within the **Proposals for Reform of the Law of Obligations and the Law of Prescription** that the question of the rights and duties of third parties is most thoroughly developed. Although the French Civil Code does not currently contain any provision expressly establishing the concept of opposability, the project proposes to introduce it within the section concerning '*the Effects of Contracts as regards Third Parties*'. Article 1165-2 states thus that '*contracts may be invoked by and against third parties; the latter must respect them and can take advantage of them, though they do not have a right to require their performance*'.[216] This provision thus imposes a duty on third parties, to respect the contract, and establishes a right, that of taking advantage of the contract. This right cannot be confused with the rights of the parties as third parties are unable to claim performance of the contract.

IV. Proposed text

Article 0-203: Rights and duties of third parties
A contract creates a situation which third parties must respect and upon which they may rely without being able to require performance.

Article 0-204: Principle favouring the maintenance of the contract

I. General presentation of the principle

1. It has been seen that contractual certainty supposes that the contract has binding force between the parties.[217] However, it remains to be clarified whether one of the parties can count on the maintenance of the law formed by the contract when something makes the contract susceptible to destruction. Here it must be decided whether we should

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215 *1. In all cases of non-existence, nullity, avoidance, ineffectiveness, inability to raise defences, rescission, dissolution and withdrawal, each party is liable for damage caused through his conduct to third parties who have in good faith relied on the appearance of the contract thus made if it has afterwards had a different effect or had no effect.*
2. Compensation to third parties for loss is governed by the provisions of Art 162 ff to the extent that they can be applicable.

216 J. CARTWRIGHT and S. WHITTAKER, *op.cit.*

217 See *supra* Article 0-201.

dedicate a principle to favouring the maintenance of the contract.[218] This principle would apply in order to prefer the approach that conserves the effectiveness of the contract to one that would lead to its destruction. This choice can be seen in three types of case:
– when the contract is subject to interpretation
– when the validity of the contract is threatened
– when the performance of the contract is threatened.

2. In these different situations, contractual certainty does not require that the most favourable approach to the validity of the contract be systematically retained. For example, the party for whom, because of the delay of the other party, performance of the promised service has lost all point is not subject to the enforced maintenance of the contract. In the same way again, it could be harmful, in particular financially, to maintain the contractual relationship when the creditor could easily obtain the service that he has failed to obtain from his debtor from another party. On the other hand, there is certainly a case for preferring the maintenance of the contract when the performance of the contract would allow for the satisfaction of one of the parties' essential needs or when it is determining of their professional activity. In conclusion, the principle preferring the maintenance of the contract should apply every time the destruction of the contract would harm the legitimate interests of one of the contracting parties.

II. Application of the principle in PECL

3. Without it being the subject of a particular article within PECL, numerous applications of the principle favouring the maintenance of the contract can be seen throughout the text. These applications are found in the three areas mentioned above.

A. Interpretation of the contract

4. The establishment of the principle favouring the maintenance of the contract in the matter of interpretation is realised by Article 5: 106, concerning *'Terms to be given (full) effect'*. According to the provision, *'an interpretation which renders the terms of the contract lawful, or effective, is to be preferred to one which would not'*.

B. Validity of the contract

5. The principle favouring the maintenance of the contract can be illustrated by the situation where a modification of the contract will allow the nullity of the contract to be averted. This is the case in matters of mistake[219] or the taking of an excessive benefit or

[218] **Acquis Group**: The working group has proposed nothing on the subject of a principle favouring the maintenance of the contract.

[219] Article 4:105 PECL: *'Adaptation of Contract'*: *'(1) If a party is entitled to avoid the contract for mistake but the other party indicates that it is willing to perform, or actually does perform, the contract*

an unfair advantage.[220] It can be noted that the commentary on the above mentioned articles does not expressly refer to the principle favouring the maintenance of the contract in order to justify the possibility of adapting the contract, but to the opportunity for one of the parties to maintain the contract whilst at the same time obtaining its modification.[221] This is in reality admitting that it is convenient to 'save' the contract when one of the parties has an interest in it.

6. When the validity of the contract is threatened, the principle of favouring the maintenance of the contract can again be seen in the situations where partial destruction of the contract is preferred to total destruction: although unable to maintain the entire contract, it is possible to maintain a part of it. This is the case when only the clauses affected by mistake, fraud, duress or excessive benefit are sanctioned. It is only if it is unreasonable to maintain the whole contract that it should be avoided in its entirety.[222] As above, the commentary justifies the approach by invoking the opportunity and benefit of maintaining the contract for the party who is not at the route of the problem.[223] The commentary adds that, when only a secondary element of the contract is affected, *'it may not be necessary or desirable to permit the party affected to avoid the whole contract if it is feasible to allow it to avoid just the term involved and this would not result in the contract being unbalanced in its favour'*.[224] It follows that if the point of the contract for the parties and the balance between them is preserved, then there is reason to prefer partial nullity to total nullity, and therefore to call into play the principle favouring the maintenance of the contract.

The same mechanism of partial nullity is applied in cases of illegality of the contract. According to Article 15:103, *'(1) If only part of a contract is rendered ineffective under*

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as it was understood by the party entitled to avoid it, the contract is to be treated as if it had been concluded as the that party understood it. The other party must indicate its willingness to perform, or render such performance, promptly after being informed of the manner in which the party entitled to avoid it understood the contract and before that party acts in reliance on any notice of avoidance.
(2) After such indication or performance the right to avoid is lost and any earlier notice of avoidance is ineffective.
(3) Where both parties have made the same mistake, the court may at the request of either party bring the contract into accordance with what might reasonably have been agreed had the mistake not occurred.'

220 Article 4:109 (2) and (3) PECL: '*(2) Upon the request of the party entitled to avoidance, a court may if it is appropriate adapt the contract in order to bring it into accordance with what might have been agreed had the requirements of good faith and fair dealing been followed.*
(3) A court may similarly adapt the contract upon the request of a party receiving notice of avoidance for excessive benefit or unfair advantage, provided that this party informs the party who gave the notice promptly after receiving it and before that party has acted in reliance on it'.

221 See in this respect, *Principles of European Contract Law, Part I and II, op.cit.* p. 263, commentary on Article 4:109 PECL.

222 Article 4:116 '*Partial avoidance*': '*If a ground of avoidance affects only particular terms of a contract, the effect of an avoidance is limited to those terms unless, giving due consideration to all the circumstances of the case, it is unreasonable to uphold the remaining contract*'.

223 See *Principles of European Contract Law, Part I and II, op.cit.* p. 279.

224 *Ibid.*

Articles 15:101 or 15:102, the remaining part continues in effect unless, giving due consideration to all the circumstances of the case, it is unreasonable to uphold it'. The Principles thus offer the option, when a contract is only partially affected by illegality, to preserve the remainder, at least in so far as the solution does not appear unreasonable. The commentary states that such a partial preservation of the contract can only occur on consideration of:

– whether the contract can exist independently of the invalidated part;
– whether the parties would have entered into a contract dealing only with the non-invalidated parts; and,
– what the effect of partial invalidity would be on the balance between the parties' reciprocal obligations.[225]

C. Performance of the contract

7. PECL contain many rules making it possible to substitute a term for one which is contained in the contract, in order to evade nullity or failure of the contract. In this respect, the commentary clearly indicates that Articles 6:104 to 6:107 '*create rules which can be used to' save 'the contract in those cases in which it seems reasonable to do so because it is probable that the parties meant there to be a binding contract*'.[226]

It is therefore the case, for example, that if the price or any other term of the contract is fixed in an unreasonable manner,[227] it is replaced by a reasonable substitute term.[228] This is the same if the price were to have been determined by reference to an unsatisfactory term: the Principles envisage other modes of determining the price by way of substitution.[229]

8. When non-performance of the contract gives rise to the possibility of its destruction, by way of termination, the various approaches used by the Principles show once again that, whenever possible, the validity of the contract, be it total or partial, is to be preferred.

Thus, the principle favouring the maintenance of the contract commands that there is no termination of a contract when the element of non-performance is minor. It is

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225 *Principles of European Contract Law, Part III, op.cit.* p. 221.

226 *Ibid.* p. 307.

227 The commentary insists on the necessity of characterising a price as 'grossly unreasonable': *Principles of European Contract Law, Part I and II, op.cit.* p. 310.

228 See Article 6:105 PECL: '*Where the price or any other contractual term is to be determined by one party whose determination is grossly unreasonable, then notwithstanding any provision to the contrary, a reasonable price or other term shall be substituted*'.
In the same way, Article 6:106 (2) PECL: '*If a price or other term fixed by a third person is grossly unreasonable, a reasonable price or term shall be substituted*'.

229 Article 6:107 PECL: '*Where the price or any other contractual term is to be determined by reference to a factor which does not exist or has ceased to exist or to be accessible, the nearest equivalent factor shall be substituted*'. Another example, Article 6:106 (1) PECL: '*Where the price or any other contractual term is to be determined by a third person, and it cannot or will not do so, the parties are presumed to have empowered the court to appoint another person to determine it*'.

although the right to terminate the contract exists only *'if the other party's non-performance is fundamental'*.[230] The commentary indicates clearly that in some cases the termination of the contract can be too severe for the debtor. This is particularly the case *'when other remedies such as damages or price reduction are available these remedies will often safeguard the interests of the aggrieved party sufficiently so that termination should be avoided'*.[231]

We see however that the principle favouring the maintenance of the contract has a clearly defined domain as it supposes the absence of any fundamental non-performance. The cases in which non-performance will be considered fundamental are expressly laid down by the Principles. It is therefore the case that non-performance is considered fundamental if, *'strict compliance with the obligation is of the essence of the contract'*[232] or, *'the non-performance substantially deprives the aggrieved party of what it was entitled to expect under the contract, unless the other party did not foresee and could not reasonably have foreseen that result'*,[233] or *'the non-performance is intentional and gives the aggrieved party reason to believe that it cannot rely on the other party's future performance'*.[234] Together these situations lead to the exclusion of the principle favouring the maintenance of the contract as the contractual equilibrium has been disturbed: the contract has lost all point for the one party or he has lost all confidence in his fellow party.

Yet even when there is a fundamental non-performance, the principle favouring the maintenance of the contract can still come into play, not with regards to the principle of the sanction, but with regards to its extent. Therefore, there is no reason to terminate the whole of the contract if it can be performed *'in separate parts'*.[235]

9. The commentary on Article 6:111 provides another illustration of the influence of the principle favouring the maintenance of the contract on the approaches adopted by PECL. Where there has been a change of circumstances, if the parties have not modified or terminated the agreement within a reasonable time-frame, the judge may be approached. In this case, although the provision provides that the court has the choice between termination or modification of the contract, the commentary indicates that *'in accordance with the purpose of the provision, [the court's] first aim should be to preserve the contract'*.[236]

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230 Article 9:301 (1) PECL: *'A party may terminate the contract if the other party's non-performance is fundamental'*.

231 *Principles of European Contract Law, Part I and II, op.cit.* p. 409.

232 Article 8:103 (a) PECL.

233 Article 8:103 (b) PECL.

234 Article 8:103 (c) PECL.

235 See in this respect, Article 9:302 PECL: *'If the contract is to be performed in separate parts and in relation to a part to which a counter-performance can be apportioned, there is a fundamental non-performance, the aggrieved party may exercise its right to terminate under this Section in relation to the part concerned. It may terminate the contract as a whole only if the non-performance is fundamental to the contract as a whole'*.

236 *Principles of European Contract Law, Part I and II, op.cit.* p. 326.

III. Applications of the principle in comparative law

A. National laws

10. The study of the different national legal systems reveals that, in the same way as in PECL, the principle favouring the maintenance of the contract is more of an underlying principle forming the basis of the varied approaches of substantive law than a general principle as such. It is noticeable that the different applications of this principle within PECL can also be found in these various national legal systems.

1. Interpretation of the contract

11. In matters of interpretation, the majority of the systems studied recognise a rule which favours the effective interpretation of the contract.

Sometimes the rule results from a legal provision.[237] However, it should be noted that these rules are not necessarily mandatory rules. This is the case in French law for example. Article 1157 of the Civil Code which states the principle of useful interpretation is simply a tool for the judiciary, who conserve their sovereign power of interpretation.[238] It follows that the judge can always choose to prefer an interpretation which leads to the destruction of the contract to one that allows for its preservation. The only limit to this judicial power comes from the fact that if the contract is denatured by the interpretation this will be sanctioned. The Cour de cassation oversees the interpretive process to the extent that it ensures that the judge does not, in the name of interpretation of the contract, modify the sense or the content of the contract when there is no ambiguity.

In other legal systems the rule of useful interpretation comes from the case law. This is the case in German law.[239] Even though § 157 BGB states that '*contracts are to be interpreted as required by good faith, taking customary practice into consideration*', and therefore does not impose an interpretation in favour of the efficacy of the contract, the case law nevertheless adopts '*the rule in favour of full effect*'.[240]

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237 See *Principles of European Contract Law, Part I and II, op.cit.* p. 297: France, Belgium, Luxembourg: Article 1157 Civil Code; Spain: Article 1284 Civil Code; Italy: Article 1367 Civil Code; Portugal: Article 237 Civil Code (indirectly).

238 Cass. civ. 1ère, 6 March 1979: Bull. civ. I n° 81: Articles 1156 onwards formulate non-mandatory rules with regards to the interpretation of the contract.

239 *Adde* according to the *Principles of European Contract Law, Part I and II, op.cit.* p. 297: Austria: OGH, 4 December 1985: JBl 1987, 378. – England: NV Handel Smits v. English Exporters Ltd (1955): 2 Lloyd's Rep. 317, C. A. and Chitty, § 12-064. – The laws of Scotland and Ireland are very similar. – *Compare* for Swiss law, P. TERCIER, *op.cit.* n° 716: some of the rules of interpretation have been created by practice (and not by statute), amongst them the rule of interpretation that invites the judge '*to privilege the approach that bests allows the protection of the contract* (in favorem negotii)'.

240 '*La règle en faveur du plein effet*', BGH (Cour fédérale de justice) 3 March 1971, NJW 1971, 1035, cited by *Principles of European Contract Law, Part I and II, op.cit.* p. 297.

2. Validity of the contract

a) Admission of judicial modification of the contract

12. Applications of the principle favouring the maintenance of the contract can be found in the legal systems which recognise that the contract can be modified judicially in order to avoid its nullity.

In the case of a mistake shared by both parties, that is to say when both parties have made the same mistake before entering into the contract, some legal systems allow the judge to adapt the contract to reflect the actual will of the parties at the critical time.[241] However, this approach is not unanimously recognised. Some legal systems refuse to confer a similar power of adaptation of the contract on their courts.[242]

More widely, in the case of a less important mistake, whether it is shared or not, some legal systems allow the judge to modify the contract. Thus Article 6: 230 (2) BW gives the Dutch courts the general power to modify the contract at the request of one or other of the parties, rather than avoid it.[243] In Finland, Sweden and Norway, the court can adapt the contract on the basis of the disappearance of presupposed facts or on the basis of the general clause contained in § 36 of the law on contract, but only if demanded by the victim of the mistake.[244] In Austria, § 872 ABGB allows the adaptation of contracts in cases of non-essential mistake, in order to render the contract in conformity with what would have been agreed between the parties if there had been no mistake.[245] In Swiss law, '*the dominant legal scholarship recognises that the contract can be partially invalidated if the mistake is as to only one of the composite elements […]*[246] *The Federal Tribunal applies Article 20 II CO by analogy […] If it appears that the mistaken party would not have entered into the contract at all if he had known the reality, the whole contract may be invalidated;* [but] *if it appears that both parties would have entered into the contract on the correct basis in that situation, the contract will be modified to the extent desired*'.[247]

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241 See *Principles of European Contract Law, Part I and II, op.cit.* p. 247: This is the case in Germany, Spain and Portugal in particular.

242 *Ibid.* This is the case in France, England and Wales, and Scotland.

243 See *Principles of European Contract Law, Part I and II, op.cit.* p. 247.

244 *Ibid.*

245 *Ibid.*

246 When the error is fundamental, according to Article 25 CO the party in error *'is bound by a contract as it was understood by him, as soon as the other party consents thereto'* as *'a party is not permitted to avail himself of an error if this is contrary to good faith'*, (Swiss-American Chamber of Commerce, *op.cit.*).

247 *'La doctrine dominante admet l'invalidation partielle du contrat si l'erreur ne porte que sur un de ses éléments […] Le Tribunal fédéral applique par analogie l'article 20 II CO […] S'il apparaît que l'*errans *n'eût pas conclu du tout s'il avait connu la réalité, il est en droit d'invalider tout le contrat;* [mais] *s'il apparaît que les deux contractants eussent conclu sur une base corrigée en fonction de la situation exacte, le contrat sera modifié dans la mesure voulue'*, P. ENGEL, *Traité … op.cit.* p. 341 citing illustrations in the case law. – *Compare* in respect of *dol incident* (a minor wilful misrepresentation or fraud) (P. ENGEL, *Traité, op.cit.* p. 359 onwards): since 1955, the Federal Tribunal has recognised that *dol incident* allows total rescission of the contract, *'but that, if the dishonesty related to a clause that was truly accessory, the judge could examine whether, even without the mis-*

Lastly, outside the sphere of contracts vitiated by mistake, when a party has taken an excessive benefit or unfair advantage of the other party's situation, some laws accord the judge the power to adapt the contract in order to suppress the resulting inequality, even though the traditional approach would be the avoidance of the contract.[248]

b) Judicial replacement of the invalid clauses of the contract

13. As within PECL, many legal systems envisage the replacement of contractual clauses which can threaten the validity of the contract.

This is also the case where the unreasonable price, fixed by one of the parties[249] or a third party,[250] is replaced by a reasonable price. In the same way, some legal systems recognise the replacement of the third party charged with determining the price,[251] or the replacement of a defaulting reference factor.[252]

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representation, the injured party would not have entered into the contract under the same conditions, and the Federal Tribunal add:' however, the right to attack the contract must be exercised according to the rules of good faith; when the rescission of the contract would appear to go too far in a case where the misrepresentation is only incidental, the judge may refuse rescission and limit himself to reducing the performance required of the injured party to the level that would have been acceptable had he not been deceived' (ATF 81/1955 II p. 213, 219)'.

248 See in this respect, *Principles of European Contract Law, Part I and II, op.cit.* note on Article 4:109, p. 265. This is the case in: Austria: § 935 ABGB (laesio enormis); France: Article 1681 Civil Code (lésion) – Luxembourg: Article 1118 Civil Code (lésion in certain circumstances); Portugal: Article 283 (1) and (2) Civil Code; Netherlands: Article 3:54 BW; Denmark: § 31 Dansk lov; Belgium: in such a case the case law accepts reduction as a sanction for the abuse of rights. See, by way of illustration, Cass. 18 February 1988, RW 1988-89. 1226, Arr. Cass. n° 375.

249 See *Principles of European Contract Law, Part I and II, op.cit.* notes on Article 6:105 PECL, p. 311, for the reduction in the excessive charges by *mandataires* according to case law in French and Belgian law.

250 See *Principles of European Contract Law, Part I and II, op.cit.* p. 312 onwards, notes on Article 6:106 PECL: – Germany: § 317 (1) BGB. –England and Wales: see Sudbrooke Trading Estate Ltd v. Eggleton [1983] AC 493, HL. (The intervention of the judge is only allowed where the intervention of the third party was subsidiary and accidental); Greece: Article 371 Civil Code and AP 678/1977, NoB 26 (1978) 360-361; Ireland: See Cotter v. Minister of Agriculture (H. Ct. 15 October 1991, unpublished); Italy: Article 1349 (1) Civil Code; Portugal: Article 400 Civil Code; Scandinavian countries: § 36 of the law on contract; But some laws do not admit this: England and Wales: See Collier v. Masson (1858) 25 Beav. 200; France: Com. 6 June 1950, Bull. II' n° 205.

251 See *Principles of European Contract Law, Part I and II, op.cit.* p. 312: – Belgium: See M.L. and M.E. STORME TPR 1985. 732 n° 15 and 16. – Netherlands: the approach is based on general principles, Article 6: 2 and 6: 248 BW. Normally though, the contract is declared void if the designated third party does not fix the price: – Germany: § 319 (2) BGB. – England, Wales and Scotland: s. 9 (1) of the Sale of Goods Act 1979. – Spain: for a sale, Article 1446 (2) Civil Code (the provision is interpreted restrictively). – France and Luxembourg: Article 1592 Civil Code – Greece: Article 373 Civil Code – Italy: Article 1349 (2) Civil Code.

252 See *Principles of European Contract Law, Part I and II op.cit.* p. 314 onwards, notes on Article 6: 107 PECL: Germany: this is a *Wegfall der Geschäftsgrundlage*, § 242 BGB; Denmark: the case is

14. Here it is possible, without a doubt, to make a comparison with English law, which proceeds, by way of interpretation, to compliment the obligations arising from the contract so that they are not deprived of any meaning. In the case of uncertainty over whether an informal undertaking was really desired by the parties, even in a tacit sense, the judge submits their reasoning to a '*business efficacy test*'. According to this test, all the undertakings necessary in order for the contract to be efficiently performed, or those which can show their clear business efficacy, are considered as having been desired by the parties. This approach notably prevailed in the case of *The Moorcock* (1889): the judges placed an obligation that had not been expressly envisaged by the contract on one of the parties, without which the contract would have had no real efficiency, to the extent that it would be deprived of all point.[253] The rule was then clarified in the cases of Reigate v. Union Manufacturing (1919) and Trollope and Colls Ltd v North West Regional Hospital Board (1973). Thus, even in cases where the parties are silent as to the particular point in question and where there is no written clarification on the question, an obligation will necessarily form part of the contract if the contract cannot be validly performed without it.

c) Preference for partial invalidity

15. The principle favouring the maintenance of the contract can be found in several legal systems which hold that, when a cause of invalidity affects a part of the contract which is not essential to the whole, the contract can be maintained with the exception of the vitiated part.

This can be the case whatever the cause of the invalidity. For example, in Swiss law,[254] according to Article 20 II CO,[255] '*if such defect only affects particular parts of the*

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analysed as the non-realisation of an implied condition ('failure of assumptions'). The missing factor is replaced by the nearest equivalent one (Supreme Court of Denmark, 15 June 1977, UfR 1977 641); Netherlands: See § 6: 258 BW.

In the absence of a specific provision, several legal systems base their approach to missing or inadequate reference factors on the interpretation of the contract and the principle of good faith and fair dealing in order to allow the replacement of the clause. England and Wales: provided that the clause was simply a way of fixing the price or some other element; Austria: on the basis of § 194 ABGB; Belguim, see Cour de Bruxelles, 29 October 1962, JT 1963 102. – *Adde* Spain, Greece and Portugal.

253 On *The Moorcock* and the business efficacy test see H. BEALE, A. HARTKAMP, H. KÖTZ, D. TALLON, *op.cit*. p. 585 to 588.

254 *Adde*, for the Netherlands: Article 3:41 BW: '*The nullity of part of a juridical act does not affect the rest of the act, to the extent that, taking into consideration the content and necessary implication of the act, the parts are so inextricably related so as not to be severable*' (D. BUSCH, E.H. HONDIUS et alii *op.cit*. p. 231).

255 '*I. A contract providing for an impossibility, having illegal contents, or violating bonos mores, is null and void.*

II. If such defect only affects particular parts of the contract, however, then only those parts shall be null and void, unless it is to be presumed that the contract would not have been concluded without the defective parts', Swiss-American Chamber of Commerce, *op.cit*.

contract, however, then only those parts shall be null and void, unless it is to be presumed that the contract would not have been concluded without the defective parts'.[256] However, this approach is not generally recognised: in other legal systems the avoidance of the contract applies, in principle, to the whole of the contract. This is the case in the Nordic countries (Norway, Sweden, Finland), even if in Finland the case law has recognised partial avoidance (KKO 1961 II 100 and 1962 II 80).[257] It is the same in English, Scottish and Irish law, where the principle is avoidance of the contract as a whole.[258] In German law, § 139 BGB holds the contract to be void in its entirety, unless the contracting parties would have wanted to maintain the rest of the contract.

Partial invalidity can also be adopted when the contract is partially unlawful.[259]

By way of example, we can cite the numerous situations of partial invalidity *(nullité)* recognised by French law. In consumer law for example, Article L 132-1 of the Consumer Code strikes out '*clauses which aim to create or result in the creation, to the detriment of the non-professional or the consumer, of a significant imbalance between the rights and obligations of the parties to the contract*'. '*The removal of the clause appears to be the best protection for the consumer who is generally not interested in the extinction of the contract*'.[260] In the same way, the legislator sanctions those clauses that are unlawful because of their excessive character, not by declaring the contract invalid in its entirety but by reducing the excess, which can be analysed as partial invalidity by a reduction of the excessive quantity.[261] Thus Article 920 of the Civil Code states '*dispositions either inter vivos or mortis causa, which exceed the disposable portion shall be abated to that portion at the time of the opening of the succession*'.

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256 It is the same where there is a problem with the form. According to Article 11 CO, '*I. In order to be valid, a contract is only required to be in a particular form if the law so requires. II. In the absence of a contrary provision concerning the significance and effect of using a particular form required by law, the validity of the contract shall depend upon whether or not such form was used*', Swiss-American Chamber of Commerce, *op.cit.*

257 See *Principles of European Contract Law, Part I and II, op.cit.* p. 280.

258 *Ibid.* See as an illustration TSB Bank plc v. Camfield [1995] 1 W.L.R. 430, C.A.

259 See *Principles of European Contract Law, Part III, op.cit.*, p. 222, notes on Article 15: 103 PECL: Germany: § 139 BGB and § 134 BGB. § 134 BGB poses the rule according to which the contract is void in its entirety unless the prohibition can be accomplished by partial avoidance; England and Wales: see Chitty § 17-185 onwards; Austria: the scope of partial avoidance is determined by the statutory rule that has been violated. It is not essential to know if it would be reasonable to maintain the contract for the benefit of one of the parties; Belgium: Article 1217 and 1218 Civil Code; Greece: Article 181 Civil Code; Italy: Italian law recognises a general principle favouring the maintenance of the contract by virtue of which the invalidity of certain clauses will not lead to the avoidance of the contract where the law contains rules that can be substituted by operation of law for the invalid clauses (Article 1419 para 1 of the Civil Code); but if it appears that the contracting parties would not have entered into the contract had it not contained these invalid clauses, the invalidity of these clauses will lead to the avoidance of the contract as a whole (Article 1149 para 2 of the Civil Code).

260 '*L'éradication de la clause apparaît comme la meilleure protection du consommateur qui n'a généralement pas intérêt à la disparition du contrat*', Y. PICOD, Rép. Dalloz, see *Nullité*, 2004, n° 98.

261 F. TERRÉ, PH. SIMLER and Y. LEQUETTE, *op.cit.*, n° 421.

In the absence of an express provision the case law sometimes adopts partial invalidity. In general, the agreement is only declared invalid by the courts in its entirety where the unlawful clause was the impulsive and determining factor of the wills of the contracting parties. Where the contrary applies, only the unlawful clause is struck out.[262] If the unlawful clause appears to be of a character that determined the wills of the parties, the lower court judges are in principle bound to pronounce the total invalidity of the agreement.[263] However, the judge also takes into consideration the requirements of public policy, which can lead to the pronunciation of partial invalidity, despite the presence of the decisive character of the unlawful clause. In general it is a question of not dissuading the beneficiary of protected status from denouncing the unlawful nature of the clause. For example, in the 'Chronopost'[264] case, the judges, basing themselves on the absence of cause, struck out the limitation clause on the basis that it contradicted the scope of the undertaking entered into, despite the fact that if appeared to be determining of the wills of the parties. Thus, *'in order to avoid the resulting unlawfulness turning against the party who it was intended to protect, the judges search for the most effective solution which is provided by the survival of the contract, with the clause that has been judged unlawful amputated from it'*.[265] More recently, the judiciary have begun to use the concept of partial falsity of cause as a method of reducing an excessive sum, thereby avoiding the nullity of a *reconnaissance de dette* exceeding the real value of the acknowledged debt. On this occasion, the judges affirmed that *'the partial falsity of cause does not lead to the invalidation of the obligation, but to its reduction to the extent of the subsisting fraction'*.[266] The scope of this case remains however disputed.

d) Alternatives to invalidity

16. Some legal systems recognise approaches which allow contracts tainted by a cause of invalidity to be 'saved'.

We can cite for example the practice of conversion by reduction which is defined as *'an invalid act, but which fulfils the requirements for the validity of another act, producing a similar result which conforms to the intention of the parties is, in this way, valid, one can even say validated'*.[267] This is recognised in Italian law[268] in particular, where legal scholarship

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262 Cass. Civ. 3e' 13 February 1969: JCP 1969, II, 15942.

263 Cass. com., 27 March 1990: Bull. civ. IV, n° 93.

264 Cass. com. 22 October 1996: Bull. civ. IV, n° 261.

265 *'Pour éviter que la sanction de l'illicite ne se retourne contre celui qu'on entend protéger, les magistrats recherchent la mesure la plus efficace qui passe par la survie du contrat, amputé de la clause jugée illicite'*, Y PICOD, *above*, n° 97.

266 *'La fausseté partielle de la cause n'entraîne pas l'annulation de l'obligation, mais sa réduction à la mesure de la fraction subsistante'*, Cass. civ. 1er, 11 March 2003: Bull. civ. I., n° 67.

267 *'Un acte nul, mais qui remplit les conditions requises pour la validité d'un autre acte, produisant un résultat semblable et conforme à l'intention des parties est, dans cette mesure, valable, on peut même dire validé'*, F. TERRÉ, PH. SIMLER and Y. LEQUETTE, *op.cit.*, n° 422.

268 Article 1424 of the Civil Code.

sees it as an application of the principle favouring the maintenance of the contract.[269] The concept exists equally in German law,[270] Swiss law,[271] Dutch law[272] and French law. The latter, like the others, also recognises the regularisation of the contract which allows the parties to suppress the invalid cause of the contract, for example by complying with the compulsory formalities that until then have been in default.[273]

It is also possible to add the case of affirmation. This is the practice whereby the holder of an action to avoid the contract renounces the exercise of his right. Although renunciation only applies in his favour, it nevertheless remains the case that where he is the only holder of the right to avoid the contract, his affirmation removes all risk of its invalidity.

3. Performance of the contract

17. When it comes to non-performance of the contract, the principle favouring the maintenance of the contract can be evidenced by the restrictive conditions to which termination of the contract is subordinated. In many of the legal systems studied it is only recognised in cases of fundamental non-performance,[274] or at least a serious non-performance. This is the case in England and Wales, Ireland and Scotland, which is entirely logical as the concept of fundamental non-performance originally comes from the *Common law.*[275]

In Germany, the entire contract can only be terminated if the creditor has lost all interest in performance in cases of non-performance or defective performance.[276] The

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269 M.-C. DIENER, *op.cit.* § 14.10.

270 § 140 BGB: *'If a void legal transaction fulfils the requirements of another legal transaction, then the latter is deemed to have been entered into, if it may be assumed that its validity would be intended if there were knowledge of the invalidity'*.

271 Conversion by reduction is not stated by the Code of Obligations, *'but legal writing and case law recognise it as a rule of general application […] The principle of favour negotii requires that the invalid act be replaced with a valid act if there is reason to admit that the parties would have entered into such an act if they had known of the invalidity of the act which they had in mind'*, (P. Engel, *Traité … op.cit.* p. 265 onwards concerning vices of form and citing illustrations from the case law).

272 Article 3:42 BW. – see D. BUSCH, E.H. HONDIUS et alii, *op.cit.* p. 232. The mechanism was created by the Hoge Raad in 1944, see A.S. HARTKAMP, *op.cit.* p. 155.

273 *Compare* Article 3: 58 BW which also envisages an a posterioiri consolidation when a condition of validity, which has been in default since the contract was entered into, is completed afterwards (A.S. HARTKAMP, *op.cit.* p. 155).

274 See in this respect, *Principles of European Contract Law, Part I and II, op.cit.* p. 366 onwards, notes on Article 8:103 PDEC.

275 *Ibid.*

276 *Principles of European Contract Law, Part I and II, op.cit.* p. 418. – *Adde* in the case of the breach of an obligation of protection in the sense of § 241 II BGB: termination is covered by § 324 BGB *(If the obligor, in the case of a reciprocal contract, breaches a duty under section 241 (2), the obligee may withdraw from the contract if he can no longer reasonably be expected to uphold the contract)*. It is also that case *'that the maintenance of the contract and the continuation of contractual relations can no longer be required from the creditor'*, (M. PÉDAMON *op.cit.* n° 233; compare. *ibid.* n° 227 with

creditor cannot terminate the contract where the breach of the obligation is insignificant (§ 281 paragraph 1 and 323 paragraph 5 BGB).[277] In cases of delay, termination is only possible is the delay is 'qualified' (§ 376 and 326 (2) HGB[278]). Legal scholarship however takes pains to underline that *"in the situation where the party has not performed as stipulated in the contract, the aggrieved party may not terminate the contract, if the breach of the obligation is insignificant. It is notable that the German legislator has given up, despite the submissions made on the subject, following the same system as the Vienna Convention according to which the termination of the contract is only possible if the breach of the seller's obligation was 'fundamental' according to Article 25 […] In German law, every significant breach of the obligation suffices"*.[279]

In Austria, § 918 (2) and 920 ABGB require fundamental non-performance. In the contract of sale, if the goods sold are defective, the purchaser can rescind the contract with the exception of where the defect is insignificant, (§ 932 (1) ABGB[280]). In the case of delay, rescission is only possible if the delay is 'qualified' (§ 376 and 326 (2) HGB[281]).

In Italy, according to Article 1455 of the Civil Code, the contract cannot be terminated where the non-performance is of little importance.[282]

In Denmark and Finland, non-performance must be 'substantial'.[283]

In France, the gravity of the non-performance is something that the judge must also consider when pronouncing termination of the contract.[284] According to some recent case law, the gravity of the breach can itself justify unilateral termination of the contract, although the author of the termination bears the risk.[285]

Only the Netherlands does not recognise the concept of fundamental non-performance.[286] In principle, every non-performance justifies the termination of the contract on

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regards to the provision for damages in § 282: it must be that '*the maintenance of the contract became impossible* (unzumutbar) *for the creditor; this impossible character being appreciated in concreto according to the interests of both parties and the facts of the case*'.)

277 *Principles of European Contract Law, Part I and II, op.cit.* p. 367.

278 *Principles of European Contract Law, Part I and II, op.cit.* p. 367.

279 *'Dans l'hypothèse où le débiteur n'a pas exécuté la prestation prévue dans le contrat, le créancier ne peut pas résilier le contrat, si la violation de l'obligation est insignifiante. On peut remarquer que le législateur allemand a renoncé, malgré les propositions faites à ce sujet, de suivre le système de la Convention de Vienne selon lequel la résolution du contrat est seulement possible si la violation de l'obligation du vendeur a été 'essentielle' au sens de l'article 25 […] En droit allemand, chaque violation significative de l'obligation suffit.'*, F. RANIERI *'La nouvelle partie générale du droit des obligations'*, La réforme du droit allemand des obligations (Colloque du 31 mai 2002 et nouveaux aspects), dir. C. WITZ and F. RANIERI, Soc. Législ. Comp. 2004, p. 33. – *Adde* M. PÉDAMON, *op.cit.* note 197.

280 *Principles of European Contract Law, Part I and II, op.cit.* p. 367.

281 *Ibid.*

282 *Ibid.*

283 See § 21, 28, 42 and 43 of the Danish law on sale. See also, § 25, 39, 54 and 55 of the Finish law on sale. See, *Principles of European Contract Law, Part I and II, op.cit.* p. 367.

284 See Cass. civ. 14 April 1891, *Grands arrêts de la jurisprudence civile, op.cit.* n° 176. – D. P. 1891, 1, 329, note PLANIOL.

285 Cass. civ. 1er, 20 February 2001: Bull. civ. I, n° 40: *'la gravité du comportement d'une partie à un contrat peut justifier que l'autre partie y mette fin de manière unilatérale, à ses risques et périls'*.

286 See D. BUSCH, E.H. HONDIUS and *alii op.cit.* p. 330 onwards.

the basis of Article 6:265 BW.[287] Nonetheless, by virtue of this provision, a relatively unimportant non-performance will not justify termination. For example, where there is only a minimal delay in performance, the creditor cannot terminate the contract, or else he can only terminate a part of the contract if the non-performance justifies a partial termination. The Hoge Raad has not followed the suggestions of authors according to whom termination would only be justified if the creditor had no other less severe remedy at his disposal, or if the non-performance was fundamental.[288]

B. International law and Acquis communautaire

18. Within the **Vienna Convention**, the principle favouring the maintenance of the contract can only be found in provisions concerning difficulties in performance as the Convention does not deal with either the validity or the interpretation of the contract of sale.

As in other systems, the Convention limits the operation of what it terms avoidance of the contract to situations where there has been '*a fundamental breach of contract*'.[289] We can add to this the fact that the benefit of the purchaser's termination resulting from Article 49 must be reconciled with the seller's right to correct the non-conforming performance provided for in Article 48.[290]

19. In **Community law**, the principle favouring the maintenance of the contract is illustrated by the notion of '*effet utile*' (effectiveness), used as a method of interpretation by the ECJ with the aim of allowing Community law to '*deploy the entirety of its effects*'.[291]

In particular, the principle favouring the maintenance of the contract can be found more directly within Council Directive 93/13/EEC of 5 April 1993 *on unfair terms in consumer contracts*.[292] '*If [the contract] is capable of continuing in existence without the unfair terms*'[293] then the sanction envisaged for these terms is not the invalidity of the contract

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287 '*1. Every failure of one party in the performance of one of his obligations gives the other party the right to set aside the contract in whole or in part, unless the failure, given its special nature of minor importance, does not justify the setting aside of the contract and the consequences following therefrom. 2. To the extent that performance is not permanently or temporarily impossible, the right to set the contract aside does not arise until the debtor is in default*' (trad. in D. BUSCH, E.H. HONDIUS and *alii op.cit.* p. 365).

288 D. BUSCH, E.H. HONDIUS and *alii op.cit.* p. 365 onwards.

289 See Article 49 for the fundamental breach of the seller; Article 64 for the fundamental breach of the purchaser; Articles 72 and 73 for anticipatory breaches.

290 The articulation of these two provisions is not however without diffculty.

291 '*… Déployer la plénitude de ses effets*', see '*effet utile*', in T. DEBARD, B. Le Baut-Ferrarèse & C. Nourissat, *Dictionnaire du droit de l'Union européenne*, Paris, Ellipses, 2002, especially p. 87.

292 Council Directive 93/13/EEC of 5 April 1993 *on unfair terms in consumer contracts*, OJ L 095 21/4/1993, p. 0029-0034.

293 Article 6 § 1 of the above Directive.

in its entirety. The terms will be regarded as struck out from the contract and the contract can then be performed.[294]

C. Codifications by legal scholars

1. Interpretation of the contract

20. Each of the studied projects provides a provision which privileges a useful interpretation of the contract.

Article 4.5 of the **UNIDROIT Principles** establishes such a rule. According to the text '*contract terms shall be interpreted so as to give effect to all the terms rather than to deprive some of them of effect*'.

The **Proposals for Reform of the Law of Obligations and the Law of Prescription** implicitly establish the principle favouring the maintenance of the contract in matters of interpretation in Article 1139-1: '*where a term of a contract may bear two meanings, it should be understood in the way which gives it some effect rather than in the way according to which it would produce no effect*'.[295]

Lastly, in a comparable way, the **European Code of Contract Preliminary Draft** posits a rule stating the preference for the effective interpretation of the contract. According to Article 40 (2): '*in case of doubt, the contract or the individual clauses shall be interpreted in the sense in which they can have some effect rather than in that in which they would have none*'.

2. Validity of the contract

21. In the same way as PECL, the **UNIDROIT Principles** recognise many applications of the principle favouring the maintenance of the contract. For example, the following situations can be found: the maintenance of the contract despite a mistake having been made[296] and the adaptation of the contract in situations of excessive benefit.[297] With

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294 For another example of the principle favouring the maintenance of the contract see Article 4 § 7 of Council Directive 90/314/EEC of 13 June 1990 *on package travel, package holidays and package tours*, OJ L 158 23/6/1990, p. 59-64.

295 J. CARTWRIGHT and S. WHITTAKER, *op.cit.*

296 Article 3:13, '*Loss of right to avoid*': '*(1) If a party is entitled to avoid the contract for mistake but the other party declares itself willing to perform or performs the contract as it was understood by the party entitled to avoidance, the contract is considered to have been concluded as the latter party understood it. The other party must make such a declaration or render such performance promptly after having been informed of the manner in which the party entitled to avoidance had understood the contract and before that party has reasonably acted in reliance on a notice of avoidance.*
(2) After such a declaration or performance the right to avoidance is lost and any earlier notice of avoidance is ineffective'.

297 Article 3:10 (2), and (3): '*(2) Upon the request of the party entitled to avoidance, a court may adapt the contract or term in order to make it accord with reasonable commercial standards of fair dealing.*
(3) A court may also adapt the contract or term upon the request of the party receiving notice of

regard to the extent of the sanction, here again partial invalidity will always be preferred whenever it is not unreasonable to maintain the contract in its entirety.[298] Confirmation (affirmation) is also envisaged by the project.[299]

The **European Code of Contract Preliminary Draft** adopts the possibility of partial invalidity by admitting the validity of the remainder of the contract *'provided this remaining part can exist independently and reasonably realise the purpose of the parties'*.[300] It also recognises alternatives to the invalidity of the contract. We find conversion by reduction: *'a void contract has the effect of a different and valid contract of which it has the requisites of substance and form whenever these enable the objective sought by the parties to be reasonably realized'*. The conversion is automatic, but the parties can expressly exclude it.[301] We also find the possibility of a regularisation of the contract. Article 143 § 2 deals with, in appearance, *'validation of void contract'*. However, in reality it is concerned with regularisation: § 2 *'Contracts void for reasons other than those indicated in the preceding paragraph can be validated. Validation is made by an act of the contracting parties who reproduce the void contract but remove the cause of its being void and undertake to make due restitution and to perform their respective obligations, as would have been the case if the contract had been valid ab*

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avoidance, provided that that party informs the other party of its request promptly after receiving such notice and before the other party has reasonably acted in reliance on it. The provisions of Article 3.13(2) apply accordingly'.

298 Article 3:16, *'Partial avoidance'*: *'Where a ground of avoidance affects only individual terms of the contract, the effect of avoidance is limited to those terms unless, having regard to the circumstances, it is unreasonable to uphold the remaining contract'*.

299 Article 3:12, *'Confirmation'*: *'If the party entitled to avoid the contract expressly or impliedly confirms the contract after the period of time for giving notice of avoidance has begun to run, avoidance of the contract is excluded'*.

300 Article 144, § 1: *'Except as provided in Art 143 para 1, if an individual clause or a part of a contract is void, the remainder of the contract remains valid, provided this remaining part can exist independently and reasonably realise the purpose of the parties'*.

301 See Article 145, *'Conversion of void contract'*: *'Without prejudice to the provisions of Art 40 para 2 and Art 143 para 1, a void contract has the effect of a different and valid contract of which it has the requisites of substance and form whenever these enable the objective sought by the parties to be reasonably realized.*

2. The rule in the preceding paragraph applies also to individual clauses of a contract.

3. Conversion cannot take place if the contract or the circumstances reveal a different intention of the parties.

4. For there to be conversion it is sufficient that the conditions for this are present; but the party who intends to avail himself of the situation must send to the other party a notification, giving all necessary information, before the expiry of three years from the making of the contract. To this notification the provisions of Art 21 and Art 36 para 2 shall apply. Before the time limit matures, the first party can also apply for a judicial ruling on the subject, but no action can be brought before six (three) months have elapsed, calculated from receipt of the declaration, in order to enable the parties to settle the matter out of court. The right to apply to the court for the urgent reliefs contained in Art 172 is unaffected.

5. The rules in this article apply also to an avoided contract. For an ineffective contract reference is to be made to the provisions of Art 153 para 5.'

initio. To this act the provisions of Art 36 para 2 shall apply'. The provision applies, for example, where a formality is required under threat of invalidity. Lastly, the possibility of validation (affirmation) of a void contract is also recognised.[302]

The **Proposals for Reform of the Law of Obligations and the Law of Prescription** prefer partial nullity when the clause that has been marred with nullity has not "*formed a decisive element of the parties 'undertaking, or of one of them*'".[303] With regards to alternatives to nullity, this project recognizes regularisation[304] of the contract as well as its affirmation.[305]

3. Performance of the contract

22. As previously, the rules adopted by PECL resemble those of the **UNIDROIT Principles**. However, the approaches adopted by the other projects move further away from this.

Within the **UNIDROIT Principles**, the principle favouring the maintenance of the contract can be found in the rules which envisage substitution when the fixed price is unreasonable[306] or when the chosen mode of fixing the price is defective.[307]

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302 See Article 149 § 2: '*A voidable contract can be validated, and thus remain in operation in all its effects, if the entitled contracting party or his legal representative either declares, while respecting the provision of Art 36 para 2, his intention not to proceed with avoidance or performs the contract voluntarily himself. Validation requires that the contracting party, or his legal representative if he is incapable, is able to conclude a valid contract and is fully aware of the reason for the contract being voidable.*'

303 Article 1130-2, para 1: '*Where the ground of nullity affects only one term of the contract, it does not give rise to nullity of the whole juridical act unless this term formed a decisive element of the parties' undertaking, or of one of them*', J. CARTWRIGHT and S. WHITTAKER, *op.cit.*

304 Article 1133: '*When the law so authorises, regularisation restores its full effect to a juridical act by the removal of the defect which affects it, or by the completion of any formality required*'.

305 See Article 1129-4: '*An act of affirmation or ratification of an obligation for which the law allows an action for nullity is valid only where it identifies the substance of the obligation, the ground of action for nullity, and the intention to rectify the defect on which the action is based.*
In the absence of an act of affirmation or ratification, it is sufficient that the obligation is performed voluntarily after the time when the obligation when the obligation may be validly affirmed or ratified. Affirmation, ratification or voluntary performance in the forms and at the time fixed by legislation imply waiver of the grounds of claim and defences that a person might otherwise raise to the juridical act, without, however, prejudice to the rights of third parties.
If a number of persons have the right to the action for nullity, waiver by one does not bar the action of the others'.

306 Article 5.1.7. (2): '*Where the price is to be determined by one party and that determination is manifestly unreasonable, a reasonable price shall be substituted notwithstanding any contract term to the contrary*'.

307 Article 5.1.7. (3) and (4): '*Where the price is to be fixed by a third person, and that person cannot or will not do so, the price shall be a reasonable price.*
(4) Where the price is to be fixed by reference to factors which do not exist or have ceased to exist or to be accessible, the nearest equivalent factor shall be treated as a substitute'.

With regard to the termination of the contract for non-performance, the UNIDROIT Principles only allows termination where the non-performance is fundamental.[308]

In the **European Code of Contract Preliminary Draft**, only some occasional applications of the principle favouring the maintenance of the contract can be cited. Thus, for example, the failure of the parties to determine the place of performance is mitigated by the rules of Article 82.[309] This failure cannot therefore be a cause of the calling into question of the contract or of its non-performance.

With regard to the termination of the contract, it is only allowed in cases of '*substantial*'[310] non-performance.

In the **Proposals for Reform of the Law of Obligations and the Law of Prescription**, the principle favouring the maintenance of the contract is in retreat with regards to the termination of the contract. Indeed, this is not expressly confined to situations of fundamental non-performance. Article 1158 offers the creditor of the non or imperfectly-performed obligation the choice between enforced performance, termination, or the award of damages. The project recognises non-judicial termination but subordinates it to non-performance on the part of the debtor after a reasonable delay following service of a notice to perform by the creditor. Although the domain of termination therefore seems wide open, a slight tempering of this results from Article 1158-1. This article states that '*the debtor may contest the creditor's decision before the court by claiming that any failure to perform which is alleged against him does not justify termination of the contract*'.[311] From this we can deduce that termination should not be a disproportionate measure in comparison with the gravity of the non-performance.

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308 Article 7.3.1. '*Right to terminate the contract*', especially (1): '*A party may terminate the contract where the failure of the other party to perform an obligation under the contract amounts to a fundamental non-performance*'.

309 Article 82 '*Place of performance*': '*1. Contractual obligations shall be performed at the place expressed or implied in the contract or, failing such provision, at the place which is in accordance with usage and the circumstances given the nature of the performance required. If the place at which the performance is to be carried out is not specified in the contract and cannot be inferred from these criteria, the following rules apply.*

2. The obligation to deliver a certain and specified thing shall be performed at the place where the thing was situated when the obligation arose. If the obligation concerns goods produced by the debtor, they shall be delivered at the business premises of the debtor at the time the obligation matures.

3. The obligation having as its subject matter a sum of money shall be performed, at the debtor's risk, at the residence of the creditor or, if he is the owner of a business, at his business premises at the time the obligation matures. If the residence or business premises are different from those which the creditor had when the obligation arose, and if this makes performance more burdensome, the debtor by informing the creditor in advance has the right to make payment at his own residence.

4. In all other cases the obligation shall be performed at the residence of the debtor at the time the obligation matures.'

310 Article 114 '*Right to dissolve the contract*', especially (1): '*Substantial non-performance as understood in Art 107 gives the creditor the right to dissolve the contract by serving notice on the debtor to perform within a reasonable time, which shall be not less than fifteen days, and notifying him that, if this time expires without performance, the contract shall be considered to be dissolved ipso iure.*'

311 J. CARTWRIGHT and S. WHITTAKER, *op.cit.*

23. Lastly, we can note that, whatever the treatment of unforeseeable change of circumstances,[312] each of the projects adopts the approach whereby before any termination of the contract, or for those who recognise it, any judicial modification, the parties are bound to renegotiate the contract.[313] This measure gives the parties a chance to 'save' the contract.

IV. Proposed text

Article 0-204: Principle favouring the maintenance of the contract

When a contract is subject to interpretation, or when its validity or performance is threatened, the effectiveness of the contract should be preferred if its destruction would harm the legitimate interests of one of the parties.

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312 On this point, see *supra* under Article 0-201.

313 Article 6.2.3. UNIDROIT Principles; Articles 97 and 157 of the European Code of Contract Preliminary Draft; Article 1135-2 and 3 of the Proposals for Reform of the Law of Obligations and the Law of Prescription.

Chapter 3:
Contractual Fairness

Article 0-301: General duty of good faith and fair dealing

I. General presentation of the principle

1. A chapter which has contractual fairness as its subject should, as a matter of logic, open with a guiding principle that states the very principle of fairness itself, and especially its obligatory character. It is therefore important that the first article of this chapter has as its subject the duty of good faith and fair dealing.[1] It will be necessary to clarify the scope of the duty of good faith and fair dealing, in two respects.

First, we must clarify the scope of the duty of good faith. It is a question here of determining at which stages of the contractual process the parties are required to comply with the duty of good faith and fair dealing. However, the duty of good faith and fair dealing necessarily appears as a generally applicable duty, in the sense that parties are subject to it from the start of negotiations of the contract through to the performance of the contract, or even beyond. Indeed, if the contract is later invalidated, the parties must also provide proof that they acted in good faith during the process of invalidation as well as during the determination of the consequences (restitution, damages etc). Therefore, the parties must prove their good faith until the extinction of the effects of the contract.

Secondly, we must establish the force of the duty of good faith on the parties. Here it is the imperative character of the duty of good faith and fair dealing that it is important to state. After all, a general duty of good faith and fair dealing would be entirely ineffective if the parties were allowed to derogate from the principle, or even just to limit it.

II. Application of the principle in PECL

2. The principle of good faith and fair dealing is already the subject of an autonomous article in PECL. Indeed, in the first chapter, dedicated to '*General Provisions*', and more specifically section II concerning '*General Obligations*', Article 1:201 deals with good faith. According to this article:

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1 In so far as it is a question here of dealing with 'good contractual conduct', that is to say making good faith and fair dealing a behavioural norm, the terms good faith (bonne foi), fair dealing and fairness (loyauté) should be seen as synonymous. In any case, it can be shown, from a study of comparative law, that the distinctions sometimes proposed between good faith and fairness are more dogmatic than practical: see in this respect the study of the term 'good faith' (bonne foi) by the terminology group – the group suggests that the only distinction which is useful in practice is that which distinguishes good faith as a behavioural norm and good faith as a basis for the protection of a mistaken belief.

'(1) *Each party must act in accordance with good faith and fair dealing.*
(2) The parties may not exclude or limit this duty'.

The current position of this article dedicated to good faith underlines its importance since the principle of good faith and fair dealing appears as a general obligation. However, in so far as the Guiding Principles of European Contract Law are concerned, the principle of good faith and fair dealing must be seen as one of the central pillars of these principles.[2] Consequently, there is reason to move the current Article 1:201 and make it the first article of the chapter dedicated to contractual fairness. Although paragraph 2 is satisfactory, in that it states the imperative character of the obligation,[3] paragraph 1 should be rewritten to reflect the scope of the principle of good faith and fair dealing more clearly.[4]

3. In addition to the general principle of good faith and fair dealing, PECL contain many applications of the principle which confirm that it applies throughout the contractual process.

First, it must be emphasised that freedom of contract is understood only within the confines of the principles of good faith and fair dealing. Indeed, Article 1:102 paragraph 1 states that '*parties are free to enter into a contract and to determine its contents, subject to the requirements of good faith and fair dealing, and the mandatory rules established by these Principles*'. To this we can add the concept of reasonableness, found frequently throughout PECL, which is defined by reference to '*what persons acting in good faith and in the same situation as the parties would consider to be reasonable*'.[5]

4. Good faith and fair dealing also presides over contractual negotiations. Thus, according to Article 2:301 (2) '*a party who has negotiated or broken off negotiations contrary to good faith and fair dealing is liable for the losses caused to the other party*'. In addition, according to Article 2:301 (3), that fact that a party starts or pursues the negotiations with '*no real intention of reaching an agreement with the other party*' is contrary to the requirements of good faith and fair dealing.

Even after the contract is entered into, the obligation to negotiate in good faith continues to apply should the contract have to be renegotiated. Thus, according to

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2 **Acquis Group**: For some members of the group, the change in status to that of a fundamental principle is likely to create considerable uncertainties in repsect of the principle of good faith and fair dealing. Although many rules and principles, which we will identify, follow on from the principle of good faith, fair dealing and 'what a reasonable man might expect', the question of whether this obligation should be elevated into a fundamental principle or not remains hotly contested. For the moment no general principle of good faith and fair dealing has been elaborated.

3 *Compare* Article 8:109 PECL which allows the parties to exclude or limit remedies for non-performance, unless it would be contrary to good faith and fair dealing to do so. The commentary indicates that it is not contractually possible to get rid of this limit (*Principles of European Contract Law, Part I and II, op.cit.* p. 388) which confirms the imperative character of the duty of good faith.

4 See in this respect the general presentation *supra*.

5 Article 1:302.

Article 6:111 (3) final paragraph, the court '*may award damages for the loss suffered through a party refusing to negotiate or breaking off negotiations contrary to good faith and fair dealing*'. Good faith and fair dealing governs the way in which the renegotiation will be conducted and also the very fact that such renegotiation must commence within a reasonable time-frame.[6]

Many articles of PECL show that good faith and fair dealing at the precontractual stage impose other obligations on the parties, and this is particularly the case where one of the parties is in a dominant position in comparison to the other party.

First, Article 2:104 creates a reinforced obligation to inform on the part of the party who has stipulated certain clauses of the contract. Paragraph 1 states that '*contract terms which have not been individually negotiated may be invoked against a party who did not know of them only if the party invoking them took reasonable steps to bring them to the other party's attention before or when the contract was concluded*'. Paragraph 2 then usefully details, as an example, a situation in which the above requirement is not satisfied: thus '*terms are not brought appropriately to a party's attention by a mere reference to them in a contract document, even if that party signs the document*'. From this we can see that it really is a reinforced obligation to inform which is placed on the party who invokes the non-negotiated clauses.

Secondly, it is forbidden to take an excessive benefit from the contract when the other party is in a situation of weakness. Thus, according to Article 4:109, a contract can be avoided or adapted by the judge when, at the moment of entering into the contract, one of the parties '*was dependent on or had a relationship of trust with the other party, was in economic distress or had urgent needs, was improvident, ignorant, inexperienced or lacking in bargaining skill*',[7] while at the same time the other party '*knew or ought to have known of this and, given the circumstances and purpose of the contract, took advantage of the first party's situation in a way which was grossly unfair or took an excessive benefit*'.[8]

We can also note that the sanction for the bad faith of the party who is in an advantageous contractual position also results from the prohibition of unfair terms. Article 4:110 deals with '*unfair terms which have not been individually negotiated*'. It is especially concerned with terms that are contrary to the requirements of good faith and fair dealing. The first paragraph states that '*a party may avoid a term which has not been individually negotiated if, contrary to the requirements of good faith and fair dealing, it causes a significant imbalance in the parties' rights and obligations arising under the contract to the detriment of that party, taking into account the nature of the performance to be rendered under the contract, all the other terms of the contract and the circumstances at the time the contract was concluded*'.

5. In addition to contractual negotiations, good faith and fair dealing can be found at every stage of the life of the contract.

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6 *Principles of European Contract Law, Part I and II, op.cit.* p. 326.

7 Article 4:109 (1) (a).

8 Article 4:109 (1) (b).

When entering into the contract, the prohibition on fraud[9] and threats[10] can be analysed as manifestations of good faith.

Good faith and fair dealing also influence the obligatory content of the contract. Indeed, according to Article 6:102 (c): *'in addition to the express terms, a contract may contain implied terms which stem from […] (c) good faith and fair dealing'*.

Good faith can also be found at the stage of performance. It gives the debtor the right to cure a non-conforming performance before the deadline for performance has passed.[11] It also prevents enforced performance in kind if such performance would involve unreasonable efforts and expense for the debtor.[12]

Lastly, good faith and fair dealing remain present even when the contract has exhausted its effects (normally because it has been invalidated). In this way, someone who knew of the reason for the invalidity is not able to demand restitution[13] or the payment of damages.[14]

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9 Article 4:107, *'Fraud'*: *'(1) A party may avoid a contract when it has been led to conclude it by the other party's fraudulent representation, whether by words or conduct, or fraudulent non-disclosure of any information which in accordance with good faith and fair dealing it should have disclosed.*
(2) A party's representation or non-disclosure is fraudulent if it was intended to deceive.
(3) In determining whether good faith and fair dealing required that a party disclose particular information, regard should be had to all the circumstances, including:
(a) whether the party had special expertise;
(b) the cost to it of acquiring the relevant information;
(c) whether the other party could reasonably acquire the information for itself; and
(d) the apparent importance of the information to the other party.'

10 Article 4:108, *'Threats'*: *'A party may avoid a contract when it has been led to conclude it by the other party's imminent and serious threat of an act:*
(a) which is wrongful in itself, or
(b) which it is wrongful to use as a means to obtain the conclusion of the contract,
unless in the circumstances the first party had a reasonable alternative.'

11 Article 8:104, *'Cure by Non-Performing Party'*: *'A party whose tender of performance is not accepted by the other party because it does not conform to the contract may make a new and conforming tender where the time for performance has not yet arrived or the delay would not be such as to constitute a fundamental non-performance'*.

12 Article 9:102, especially (2) (b): *'(2) Specific performance cannot, however, be obtained where: (b) performance would cause the obligor unreasonable effort or expense'*.

13 Article 15:104, especially (3): *'(3) An award of restitution may be refused to a party who knew or ought to have known of the reason for the ineffectiveness'*.

14 Article 15:105, especially (3): *'(3) An award of damages may be refused where the first party knew or ought to have known of the reason for the ineffectiveness'*.

III. Applications of the principle in comparative law

A. National laws

6. The principle of good faith and fair dealing is recognised in all the countries of the European Union as determining of good contractual conduct.[15] However, the scope and the force of the principle of good faith and fair dealing do vary according to the different systems. While German and Swiss law recognise good faith as a fundamental principle, the common law does not recognise that it has any general applicability. In between these two extremes, the laws of other legal systems within the European Union all accord the principle of good faith and fair dealing an important role and recognise its imperative character.[16]

In Germany, the principle of good faith and fair dealing revolutionised the law of contract to the extent that it constitutes a characteristic feature of the law of the country. Germany is the country in which the principle of good faith and fair dealing has effected the most important breakthrough.[17] § 242 BGB states that *'an obligor has a duty to perform according to the requirements of good faith, taking customary practice into consideration'*. Literally, this requires the party to perform in good faith: the provision *'requires him to show proof of fairness (Treu) in the performance of his obligation, to respect the legitimate reliance that he has engendered* (Glauben), *[…] to take into account the legitimate interests of the other party'*.[18] Nonetheless, it is universally admitted that § 242 *'is also addressed to the creditor who must in return assert his right taking into account the legitimate interests of the debtor'*.[19] In addition, § 242 BGB has been extended beyond a simple principle of performance in good faith, and has become a general principle of good faith in German law. It has *"acquired a far more considerable scope. It has been established as a 'general clause' and as a superior principle of legal ethics. In this way, it aims to insure the respect of justice and equity not only within the sphere of obligations but also throughout legal life […], everywhere that legal*

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15 Principles of European Contract Law, Part I and II, *op.cit.* p. 116.

16 See in this respect, Principles of European Contract Law, Part I and II, *op.cit.* p. 117.

17 *Principles of European Contract Law, Part I and II, op.cit.*, p. 116. – *Compare* for example, Austrian law: the principle of good faith and fair dealing is an ethical rule that is recognised as generally applicable (see OGH 29 April 1965, SZ 38/72) which is derived from the Imperial declaration in the introduction of the general Civil Code of 1st June 1811, which recognises as the basis of civil law (see OGH 7 October 1974, SZ 47/104) the 'general principles of justice', expressly mentioned by the Code as including 'good faith', see § 863 and 914 ABGB. From this it clearly results that the performance of contractual obligations is subject to good faith (…). However, the requirement of good faith does not receive as extensive an interpretation as § 242 BGB in German law, see in this respect, *Principles of European Contract Law, Part I and II, op.cit.* p. 117-118.

18 '*… Lui impose de faire preuve de loyauté* (Treue) *dans l'exécution de son obligation, de respecter la confiance légitime* (Glauben) *qui a été placée en lui, […] de tenir compte des intérêts légitimes du créancier*', M. PÉDAMON, *op.cit.* n° 167.

19 '*… S'adresse aussi au créancier qui doit en retour faire valoir sa créance en portant attention aux intérêts légitimes du débiteur*', M. PÉDAMON, *ibid.*

relations between people are established".[20] In fact, the principle of good faith and fair dealing, of which interpretation[21] and performance in good faith are only illustrations, has become a central pillar of German law. As a result this principle also applies to the precontractual period. Following from the theory of *culpa in contrahendo* developed in Germany by R. von Ihering in 1861,[22] the principle of good faith at a precontractual stage was established by the BGB before being refined and enriched by case law and legal scholarship in the 20th century. The statute modernising the law of obligations of 26 November 2001 codified this Praetorian institution in the new § 311 II BGB.[23] From then on, *'business connections (geschäftliche Kontakte)'* were included amongst the legal sources of obligations; *'the simple fact of starting negotiations or even making preparations in view of entering into a contract creates, between those who participate in them, a specific legal link (rechtliche Sonderverbindung) from which derives precise duties, the breach of which leads to liability in respect of the party who was at fault'*.[24] It is recognised that the precontractual relationship generates an obligation of fairness *(Redlichkeitspflicht)*.[25]

Lastly, although in German law there is no rule which states that it is impossible to limit the duty of good faith, it is hard to see how the obligations arising from the principle of good faith and fair dealing, established as a general principle of law and as a principle of legal ethics, could be set aside by the agreement of the parties. The rule is mandatory.[26]

Swiss law, in the same way as German law, recognises a general principle of good faith and fair dealing.[27] Thus, Article 2 of the Swiss Civil Code states that *'1. Every person is*

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20 *'… Acquis une portée beaucoup plus considérable. Il a été érigé en 'clause générale 'et en principe supérieur d'éthique juridique. A ce titre, il vise à assurer le respect de la justice et de l'équité non seulement dans le domaine des obligations mais aussi dans toute la vie juridique […], partout où s'établissent des rapports de droit entre les personnes'*, M. PÉDAMON, *ibid.*

21 See § 157, *supra* under Article 0-204.

22 In his article 'Culpa in contrahendo *oder Schadensersatz bei nichtigen oder nicht zur Perfektion gelangten Verträgen*'.

23 *'An obligation with duties under section 241 (2) also comes into existence by*
1. the commencement of contract negotiations
2. the initiation of a contract where one party, with regard to a potential contractual relationship, gives the other party the possibility of affecting his rights, legal interests and other interests, or entrusts these to him, or
3. similar business contacts'.

24 *'Le seul fait d'entamer une négociation ou même d'engager des préparatifs en vue de la conclusion d'un contrat crée entre ceux qui y participent un lien juridique particulier (rechtliche Sonderverbindung) d'où dérivent des devoirs précis dont la violation fautive fait peser une responsabilité sur celui des intéressés qui s'en rend coupable'*, M. PÉDAMON, *op.cit.* n° 10.

25 M. PÉDAMON, *op.cit.* n° 44 and 45.

26 *Principles of European Contract Law, Part I and II, op.cit.* p. 119.

27 See in particular G. BROGGINI, *'L'abus de droit et le principe de la bonne foi, Aspects historiques et comparatifs'*, *Abus de droit et bonne foi*: ed. P. WIDMER and B. COTTIER, èditions universitaires Fribourg Suisse, 1994, Coll. Enseignements du 3e cycle de droit 1992, Universités de Berne, Fribourg, Genève, Lausanne et Neufchãtel, p. 3-21; P. ENGEL *'La portée de la clause générale de la bonne foi (art. 2 CC) dans la jurisprudence et par rapport à sa concrétisation dans certains domaines spécifiques (LCD, bail, contrat de travail)'*, *ibid.* p. 125-137; C. CHAPUIS, *'Les règles de la bonne foi*

bound to exercise his rights and fulfil his obligations according to the principles of good faith'.[28] The rule laid down by this article has become a general principle of law.[29] '*The whole of contract law follows the principle of good faith and fair dealing, stated in Article 2 I CCS […]. Establishing fairness in transactions, this principle plays an essential role in the interpretation and completion of contracts*'.[30] At a precontractual stage, it is noticeable that precontractual liability[31] for *culpa in contrahendo* has been exported. In the absence of a written provision to this effect, the case law and legal scholarship have been responsible for establishing this approach. It is therefore recognised that '*as soon as they enter into negotiations, the parties are required to behave in accordance with the rules of good faith and fair dealing. Each party must do everything that they have the right to expect from a fair partner and avoid, as far as possible, anything that might cause harm to the other*'.[32] The duty of good faith and fair dealing therefore has many diverse applications. For example, '*a party may not, by adopting an attitude contrary to their true intentions, engender in the other party the illusory hope that a matter will be concluded and therefore lead them to spend money in this respect (or on the contrary to abstain from making other provisions). He who enters into negotiations with the aim, even if it is only a potential aim, of breaking them off must compensate the other party for any harm caused*'.[33] It is even considered that in some situations there is a duty to break negotiations. As soon as one of the parties realises that the negotiations are bound to fail, they should bring an end to them.[34] In addition, an obligation to inform exists during the precontractual period, which covers any relevant circumstances which might influence the decision of one of the parties to enter into the contract, or to enter into it in certain terms.[35] The scope of the obligation to inform is determined by the position of the parties

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entre contrat et délit', *Pacte, convention, contrat*: Essays in honour of Professeur Bruno Schmidlin, Helbing and Lichtenhahn, Bãle and Francfort-sur-le-Main, 1998, Coll. genevoise, p. 227-248.

28 S. WYLER, B. WYLER *op.cit.*, '*I. Chacun est tenu d'exercer ses droits et d'exécuter ses obligations selon les règles de la bonne foi*'. Paragraph 2 states for its part that '*II. L'abus manifeste d'un droit n'est pas protégé par la loi*' (The law does not sanction the evident abuse of a person's rights).

29 P. ENGEL, *Traité … op.cit.* p. 179.

30 '*L'ensemble du droit des contrats obéit au principe de la bonne foi, énoncé à l'article 2 I CCS […]. Consacrant la loyauté en affaires, ce principe joue un rôle essentiel dans l'interprétation et le complètement du contrat*', P. TERCIER, *op.cit.* n° 409 onwards. – The author adds that '*the good faith of Article 2 CCS (Treu und Glaube) should be distinguished from the 'good faith' of Article 3 CCS (guter Glaube), which is the absence of knowledge of legal irregularity*'.

31 Contractual liability according to the Federal Tribunal.

32 '*Dès qu'elles entrent en pourparlers, les parties sont tenues de se comporter conformément aux règles de la bonne foi. Chacune doit faire tout ce que l'on est en droit d'attendre d'un partenaire loyal et éviter dans la mesure du possible tout ce qui pourrait causer un préjudice à l'autre*', see P. GAUCH, W.R. SCHLUEP and P. TERCIER, *op.cit.* t.1 n° 678 onwards.

33 '*Une partie ne peut pas, par une attitude contraire à ses véritables intentions, éveiller chez l'autre l'espoir illusoire qu'une affaire sera conclue et l'amener ainsi à faire des dépenses dans cette vue (ou au contraire à s'abstenir de prendre d'autres dispositions). Celui qui engage de la sorte des pourparlers dans le dessein, même éventuel, de les rompre doit réparation pour le préjudice causé à son partenaire*', ATF 77/1951 II p. 135, 137-138 cited by P. ENGEL, *Traité …, op.cit.* p. 189.

34 See in this respect, P. ENGEL, *ibid.*

35 See P. GAUCH, W.R. SCHLUEP and P. TERCIER, *op.cit.*, t. 1 n° 682 onwards. – P. ENGEL, *Traité …, op.cit.* p. 187 onwards.

and the balance of their relationship. *'The duty to inform will be less extensive if the two parties are on an equal technical footing, and are practising the same profession and the same speciality. The duty to inform will be [more extensive] if one of the parties is equipped with knowledge or experience which plays a role in the decision to be taken'*.[36]

Although there is no express provision which forbids the undermining of the principle of good faith and fair dealing, as in German law, it is hard to see how the principle of good faith and fair dealing could be set aside by the agreement of the parties.[37]

7. In contrast to the legal systems mentioned above, English and Irish law do not recognise the existence of a general duty of good faith and fair dealing.[38] There are no generally applicable provisions of statute or case law relating to good faith and fair dealing in these countries, only cases dealing with specific applications of the principle of good faith.

In this way, the *common law* and the case law do not recognise a general duty of good faith in the entering into of contracts.[39] In particular, the case of Walford v Miles (1992), a decision of the House of Lords, denies the existence of a precontractual duty of good faith. According to the most senior English judges, the existence of such a principle would call into question the necessary opposition between the interests of the parties at the negotiating stage. Nonetheless, the refusal of a general principle of good faith and fair dealing is sometimes limited in scope. In this way, the re-surfacing of contract law theory in English law has led to the emergence of what is called *'a duty to negotiate with care'*,[40] which involves taking into consideration the interests of the other negotiating party. The English approach therefore relies on specific mechanisms to censor violations of the duty of good faith at a precontractual stage.[41] In addition, there are some contracts which require a reinforced duty of good faith at the stage of formation because of the particularity of their subject, (these are contracts *uberrimae fidei*, or contracts of *utmost good faith*). These contracts include, in particular, contracts of insurance, contracts transferring shares in a company, contracts for the sale of land, as well as some family arrangements dealing with inheritance. In these contracts it is recognised that the breach of a

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36 *'Le devoir d'information sera moins large si les partenaires sont sur un pied d'égalité technique, exercent la même profession, pratiquent la même spécialité. Le devoir d'information sera [plus large] si l'une des parties est dotée de connaissances ou d'expériences qui jouent un rôle dans la décision à prendre'*, P. ENGEL, *Traité …*, *op.cit.* p. 187.

37 *Compare* P. ENGEL *Traité … op.cit.* p. 109: the principle of objective good faith of Article 2 CCS *'evades the autonomy of the will, more exactly, it prevails over it'*.

38 *Compare* American law where the principle of good faith and fair dealing is firmly anchored in substantive law, whether it is a question of provisions generally applicable to contractual matters or provisions which apply only to the regulation of trade (see *Uniform Commercial Code* [U.C.C], or more significantly the *Second Restatement of Contracts* [1981], which provides that *'every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement'*).

39 On the absence, as such, of 'precontractual good faith' in English law, see H. BEALE, A. HARTKAMP, H. KÖTZ, D. TALLON, *op.cit.* p. 238.

40 See H. COLLINS, *op.cit.* p. 178 s.

41 The different bases are diverse: *'misrepresentation'*, *'undue influence'*, *'collateral contracts'* *'equitable estoppel'*, *'implied terms'* …

reinforced obligation to act in good faith allows the party who suffers the consequences to demand the avoidance of the contract, without however being able to obtain damages.

In respect of the contractual period, English law remains opposed to the establishment of a general principle of good faith and fair dealing, thought to be a problem for legal certainty.[42] Here again though, this does not mean that the requirements of good faith and fair dealing are not recognised in English law. In many situations, the same results imposing good faith are reached as elsewhere thanks to specific rules.[43] For example, the courts have sometimes refused to consider the contract terminated for non-performance when the true intention of the dissatisfied party was to rid himself of a bad deal.[44] We can also note a more general evolution in English law, based on the idea of '*fairness*'. This concept is comprised of three ideas: '*unjustifiable domination, the equivalence of the exchange and the need to ensure co-operation*[45]'. In addition, the concept of good faith has itself entered English law via the influence of Community law and the transpositions rendered necessary by it.[46]

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42 For an exhaustive analysis of the reasons why English law refuses to establish a general obligation of good faith and fair dealing in the performance of contractual obligations see in particular S.A. SMITH, *Atiyah's Introduction to the Law of Contract*, Clarendon Law Series, Oxford University Press, 6th edition, 2005, pp. 164 to166.

43 We can cite the following devices as examples: '*consideration*', '*incorporation of terms*',' *undue influence and unconscionability*', '*interpretation and implied terms*', '*mistake and misrepresentation*', '*duress and undue influence*', '*waiver and estoppel*', '*fiduciary obligations*', '*unjust enrichment and restitution*': See H. COLLINS, *op.cit.*, 270 onwards.

44 See in particular, Hoening v. Isaacs (1952) – Honk Kong Fair Shipping Co Ltd v. Kawasaki Kisen Kaisha Ltd (1962); cited by *Principles of European Contract Law, Part I and II, op.cit.* p. 117.

45 H. COLLINS, The Law of Contract, Fourth edition, LexisNexis, 2003, p. 28-29.
Adde the evolution tending towards the protection of the weak party to the contract, and from this, the emergence of some control over the bad faith of the stronger party. English law has indeed progressively moved away from an undifferentiated application of the principles of contract law, which envisaged simply the control of various elements essential to the regularity of the procedure of formation of the contract (procedural fairness), towards a consideration of the positions of the parties (weak or strong, professional or consumer, informed or layman). Legal scholars do not hesitate to talk about distributive justice and substantive fairness. See in this sense, C. ELLIOTT and F. QUINN, *Contract Law, Case Navigator, 6th edition, Pearson Longman/Lexis Nexis 2007, p. 4: '(…) Over the last century, the law has to some extent moved away from simple procedural fairness, and an element of what is called substantive fairness, or distributive justice has developed. Substantive fairness aims to redress the balance of power between unequal parties, giving protection to the weaker (…)'*.

46 See also the Regulations adopted with the aim of transposing the European Directives which expressly reproduce the notion of good faith: see the Commercial Agents Regulations 1993, regulation 4: *'a principal, in dealing with his agent is obliged to act dutifully and in good faith'*. Regulation 5 provides that the parties cannot derogate from the duty of good faith.
In the same sense, The Unfair Terms in Consumer Contracts Regulations 1999, transposing Directive 93/13, defines an unfair terms in Article 5: '*(1) A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes*

8. The laws of the other countries of the European Union are somewhere in between the two extremes. Without good faith being an influence on the whole of the law as in Germany and Switzerland, it is nevertheless a principle which in general governs the whole of the contractual process. Good faith and fair dealing are, depending on the legal system, the subjects of one general provision, of several scattered provisions, or else they result from the work of the case law as a result of the inadequacies of the legal texts.

In Dutch law, the principle of good faith and fair dealing can be found in Article 6:2 BW.[47] '*1. A creditor and debtor must, as between themselves, act in accordance with the requirements of reasonableness and equity. 2. A rule binding upon them by virtue of law, usage or a juridical act does not apply to the extent that, in the given circumstances, this would be unacceptable according to criteria of reasonableness and equity*'. From a terminological point of view, the provision refers to reasonableness and equity rather than good faith in order to avoid any confusion with the concept of subjective good faith. This is because the above provision is concerned with objective good faith, based on the duty on the parties to observe the standards of reasonableness and fair dealing. In this sense, the terms good faith, fair dealing, reasonableness and equity can be seen as synonymous.[48] In certain respects, the BW goes further than German law: in exceptional circumstances, Articles 6:2 and 6:248 (2) give the court the power to replace the effects of the contract or a legislative text by a provision that it sees as fairer and more equitable.[49] Following Article 6:2 BW, good faith and fair dealing governs not only the law of contract but also the law of obligations. In addition, Article 6:248, in conjunction with Article 6:216 BW, extends the effect of the principle of good faith and fair dealing to all patrimonial multilateral juridical acts. As in the majority of European legal systems, good faith and fair dealing is considered to be a general clause, i.e. a norm the content of which cannot be abstractly established but which depends on the circumstances of the case and should be established *in concreto*. The generally employed method for establishing the content is the following: after grouping the situations in which the rule of good faith is invoked, legal scholarship has revealed that the case law uses the principle for three functions: interpretation, completing the contract[50] and its limitation.[51] Lastly, the imperative character of the principle of good faith and fair dealing is recognised even in the absence of an express rule in this sense.[52]

In many other legal systems, the principle of good faith and fair dealing is the subject of scattered legal provisions. This is the case in Spanish law[53] and Greek law.[54] It is the

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a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.'

47 Translation by D. BUSCH, E.H. HONDIUS et alii, *op.cit.* p. 48.

48 D. BUSCH, E.H. HONDIUS et alii, *op.cit.* p. 49; A.S. HARTKAMP *op.cit.* p. 138.

49 See in this sense, *Principles of European Contract Law, Part I and II, op.cit.* p. 118.

50 See Article 6:248 BW cited *supra* in the commentary on Article 0-201.

51 D. BUSCH, E.H. HONDIUS et alii, *op.cit.* p. 49 onwards.

52 D. BUSCH, E.H. HONDIUS et alii, *op.cit.* p. 51.

53 Article 7 Civil Code: '*the parties must exercise their rights in good faith*'. – Article 1258: '*the contracting parties are bound, not only by that which is expressly agreed, but also by that which is required by good faith, custom and the law*'. – Adde Article 57 Commercial Code: '*the parties to a commercial contract must perform it in accordance with the requirements of good faith and fair dealing*'.

54 Articles 200, 281 and 288 of the Civil Code.

same in Italian law. The requirement of good faith and fair dealing at a precontractual stage is provided for in Article 1137 of the Italian Civil Code. Non-compliance with the duty of good faith is therefore a source of delictual responsibility based on the unlawful character of the conduct of the person who has not acted in good faith.[55] Article 1375 of the Italian Civil Code requires performance in good faith, and Article 1366 poses the principles of an interpretation in good faith. Although the general applicability of the duty of good faith and fair dealing comes from these diverse rules, it is nevertheless reinforced by the provisions of Article 1175 of the Italian Civil Code. According to this provision, the two parties should conduct themselves in an honest fashion.[56] This article is generally applicable as it is included within the preliminary provisions of the section of the Civil Code on obligations in general.[57]

Lastly, in some of the legal systems studied it is the case law that has contributed to establishing the principle of good faith as generally applicable because the legal provisions concerning good faith and fair dealing are so few and far between.[58] This is the case in French law. Within the Civil Code, apart from the prohibition on fraud in Article 1116 of the Civil Code and the reference, in Article 1135,[59] to equity in respect of implied obligations, the only article which expressly deals with a duty of good faith is Article 1134. Paragraph 3 states that agreements '*must be performed in good faith*'. For a long time this provision was simply regarded as an aid to the interpretation of the contract. Today it is recognised as being responsible for unprecedented expansion. It has allowed legal scholarship and case law to impose on parties a duty to conduct oneself in good faith. This can be understood not only as conduct respecting the letter of the contract, but also as positive conduct which places numerous duties on the parties[60] such as that of fairness,[61] cooperation or collaboration.[62] In a general sense, these duties

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55 M.-C. DIENER, *op.cit.* § 3.6.3.

56 Article 1175: '*Il debitore e il creditore devono comportarsi secondo le regole della correttezza*' (The debtor and the creditor must behave following the rules of honesty.). '*Correttezza*' indicates the honesty that should preside over business relationships.

57 *Compare* Portuguese law where the principle of good faith and fair dealing is expressed in specific provisions, such as Article 227 on *culpa in contrahendo*, Article 239 concerning gaps in the contract, Article 334 concerning the abuse of law and Article 437 which deals with change of circumstances, and also in general terms in Article 762 (2) Civil Code. See on this point, *Principles of European Contract Law, Part I and II, op.cit.* p. 118.

58 *Compare* the legal systems in which the recognition of good faith and fair dealing results only from the work of case law: see *Principles of European Contract Law, Part I and II, op.cit.* p. 116-117: Denmark, Sweden and Norway: the principle of good faith is recognised by the courts and by legal scholarship; Scotland: the House of Lords has recently recognised (Smith v. Bank of Scotland (1997) S.L.T. 1061) that an inherent principle of good faith also exists in Scottish law, although it is difficult to find a clear and comprehensive expression of it in modern law.

59 '*Agreements are binding not only as to what is therein expressed, but also as to all the consequences which equity, usage or statute give to the obligation according to its nature*'.

60 See note D. MAZEAUD, *Loyauté, solidarité, fraternité: la nouvelle devise contractuelle?*, Mélanges F. Terré, Dalloz-PUF, éditions juris-classeur, 1999, p. 603 onwards. – C. *JAMIN, Plaidoyer pour le solidarisme contractuel; Mélanges Ghestin, LGDJ 2001, p. 441.*

61 For example, the case law refuses to allow a termination clause to apply if the person invoking it behaved unfairly: Cass. civ. 1ère, 31 January 1995: D. 1995, somm. 230, obs. D. MAZEAUD;

combine to require honest conduct and behaviour,[63] not only from the debtor, but also from the creditor, both in the performance of the contract and at other levels. In this way the case law has imposed a duty of good faith and fair dealing at the pre-contractual stage. Although the principle remains that of freedom to break negotiations, it is nonetheless recognised that the negotiations should be conducted in a fair way.[64] Many duties result from this, such as the obligation to fairly inform the negotiating partner.[65] In the same way, allowing the other party to run up large costs with a view to a future contract and then harshly breaking off negotiation without reason is not allowed.[66] The case law also clearly recognises that the party who has encouraged the creation of expectations on the part of the other party and then destroyed them is liable.[67] In addition to behaviour motivated by bad faith or an intention to harm, conduct that results from culpable carelessness is also sanctioned.[68]

In a more general way, the case law bases itself on objective facts, linked to the content of the contract, in order to determine the scope of the duty of good faith and fair dealing. It is in this way, for example, that the existence and the content of the duty of collaboration, are determined by the subject of the contract entered into.[69] The case law also ensures compliance with the requirements of good faith and fair dealing by basing itself on general principles which tend to prohibit all bad faith in contractual relations, such as abuse of law[70] or fraud. The principle of good faith and fair dealing is

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Defrénois 1995, p. 749, obs. P. DELEBECQUE. – 16 February 1999: Bull. civ. I n° 52. – On the duty of fairness, see more generally, Y. PICOD, *Le devoir de loyauté dans l'exécution du contrat*: thèse LGDJ, Paris, 1989.

62 For example, good faith and fair dealing prevents a party to the contract from profiting from the mistake made by the other party in omitting to charge for the essential services of the contract: see Cass. civ. 1ère, 23 January 1996: Bull. civ. I n° 36.

63 *Compare* R. DEMOGUE, *Traité des obligations en général*: tome VI, Rousseau, Paris, 1931, n° 3 onwards. This author, often considered as being at the origin of the renewal of the interpretation of Article 1134 para 3 of the Civil Code, was one of the first to consider that this article imposed an obligation on the parties to conduct themselves in conformity '*with the rules that imply fair and honest conduct*'.

64 Cass. com. 7 April 1998, D. 1999, p. 514, n. P. CHAUVEL.

65 Cass. civ. 1ère, 6 January 1998, Bull. civ. I n° 7; Defrénois 1998, article 36815, n° 70, obs. D. MAZEAUD: liability of the party who knowingly allows negotiations to continue thereby generating costs for the other party to the contract.

66 Cass. com. 20 March 1972, Bull. civ. I n° 93; JCP 1973 II 17543, n. J. SCHMIDT.

67 Cass. com., 11 July 2000, Cont. Conc. Cons., 2000, n° 174.

68 Cass. com., 22 February 1994, Bull. civ. IV, n° 79.

69 See *infra* under Article 0-304.

70 See in particular P. STOFFEL-MUNCK, *L'abus dans le contrat. Essai d'une théorie*: thèse LGDJ 2000. – The case law sometimes links the sanctioning of abuse of law to Article 1134 para 3. For the prohibition on abuse in the unilateral termination of contracts for an indefinite period, see for example Cass. Civ. 1ère, 5 February 1985, Bull. civ. I, n° 54, p. 52; RTDC 1986, 105, obs. J. MESTRE. – Cass. com., 8 April 1986, Bull. civ. IV, n° 58. – Cass. com., 20 January 1998, Bull. civ. IV, n° 40; D., 1998, 413, note. CH. JAMIN; 1999, som. 114, obs. D. MAZEAUD.

not however without limit. Two recent cases are proof of this. In the first,[71] the Cour de cassation attributed a strictly enshrined domain to Article 1134 paragraph 3 of the Civil Code in deciding that the obligation of good faith required the existence of contractual ties.[72] In the second, the Cour de cassation held that, although Article 1134 paragraph 3 allows the judge to sanction the unfair use of a contractual prerogative, it *'does not allow him to undermine the very substance of the rights and obligation legitimately agreed between the parties'*[73] thereby applying Article 1134 paragraph 1 of the Civil Code.[74]

9. It is notable that, at a precontractual stage, different national laws impose a reinforced duty of good faith on a party where that party is in a much stronger position that the other, echoing similar treatment in PECL. We find duties to inform about the clauses of the contract, a prohibition on taking an excessive benefit from the contract, and lastly the sanctioning of unfair terms.

Many different mechanisms aim to ensure that information is given about the clauses stipulated by the party in the stronger position. These mechanisms apply, depending on the case, whatever the position of the parties or else only in respect of contracts entered into between professionals and consumers.

It is generally recognised that the party in the stronger position should draw the attention of the other party to the non-negotiated terms. For example, in Italian law, Article 1341 of the Civil Code, concerning non-negotiated contracts, provides in paragraph 2 that some terms (for example limitation clauses, clauses limiting freedom of contract in respect of third parties, and clauses limiting which exceptions are opposable …) can only be inserted by a party who has already established the content of the contract if they are specially approved in writing by the other party. The same rule applies, by reference to Article 1342, to standard from contracts.

In addition, the majority of national laws specially regulate standard terms inserted into a contract so that they cannot harm the party who did not stipulate them.

In German law, by virtue of § 307 I BGB, *'provisions in standard business terms are ineffective if, contrary to the requirement of good faith, they unreasonably disadvantage the other party to the contract with the user. An unreasonable disadvantage may also arise from the provision not being clear and comprehensible'*. This article *'rests on the principle of good faith and fair dealing, it is a direct continuation of the case law and former legislation based on § 242 BGB'*.[75] It is notable that German law does not differentiate according to the position of the party. § 307 applies to all contracts which contain standard terms.[76]

In Dutch law, by virtue of Article 6:233 (b) BW, a general condition of contract can be declared invalid if its author has not offered the other party reasonable opportunity to

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71 Cass. civ.3ème, 14 September 2005: Bull. civ. III n° 166; D. 2006. 761, note D. MAZEAUD; JCP 2005 II 10173, note LOISEAU.

72 And this was not the case in a case of failure of the condition precedent found in the contract.

73 '*… L'autorise pas à porter atteinte à la substance même des droits et obligations légalement convenus entre les parties*', Cass. com. 10 juillet 2007: pourvoi n° 06-14768; D. 2007, act. jur. 1955.

74 Which states that '*agreements lawfully entered into take the place of the law for those who have made them*'.

75 *'Repose sur le principe de la bonne foi, il se situe dans le prolongement direct de la jurisprudence et de la législation antérieures qui se fondaient sur le § 242 BGB'*, M. PÉDAMON, *op.cit.* p. 236-237.

76 M. PÉDAMON, *op.cit.* n° 114.

gain awareness of the standard terms. Article 6:234 BW enumerates the way in which this reasonable opportunity can be offered. These provisions protect consumers and small businesses.[77]

In French law, standard terms only bind the parties if, on the one hand the contract contains a reference clause which refers to these conditions and considers them accepted, and on the other hand the accepting party has had chance to properly consult them.[78] In addition, a clause which appears in the standard terms but which was only brought to the attention of the other party after entering into the contract does not bind or have any other effect on them.[79] The simple attachment of the standard terms does not suffice to render them invocable against the contracting party if their existence has not been brought to the attention of that party by the other party to the contract.[80]

In Italian law, a provision of the Civil Code, Article 1341 paragraph 1, expressly provides that standard terms inserted by one party will only bind the other party if, at the moment of entering into the contract, he had, or could reasonably have had, knowledge of that clause.

Lastly, in English law, if a party has signed a contractual document, all the terms contained in that document and to which it refers are treated as part of the contract.[81] However, if the term does not figure in a signed document it does not form part of the contract unless the other party to the contract has been reasonably informed of it at the moment of entering into the contract or before,[82] or it has been incorporated into the contract by a past practice[83] or a regular commercial practice.[84]

Within the different national laws, we can find two applications of the prohibition on a party profiting from their superior position in order to take an excessive benefit from the contract. On the one hand, the taking of an excessive profit is in itself sanctioned. On the other hand, unfair terms are prohibited.

First, the approaches adopted by the different national legal systems in respect of the sanction for excessive benefit are varied. Some systems sanction such benefit specifically while others base the sanction on more general devices.

In Italian law, judicial rescission of the contract is possible when a party has contracted on unjust terms because they were in a state of necessity.[85] No economic threshold is provided and the unjust character of the terms of the contract is appreciated objectively.[86] Rescission for substantive inequality of bargain is also possible if the eco-

77 See *Principles of European Contract Law, Part I and II, op.cit.* p. 151.

78 Cass. civ. 1ère, 20 January 1993, Cont. Conc. Consom. April 1993, n° 77. – 17 November 1998, Cont. Conc. Consom. 1998, n° 18, obs. L. LEVENEUR; Defrénois 1999, p. 367, obs. P. DELEBECQUE.

79 Cass. com. 28 April 1998: RJDA 1998, n° 938; RTD civ. 1999, p. 81, obs. J. MESTRE.

80 Cass. com. 10 February 1959, Bull. civ. III, n° 70. – Civ. 1ère, 4 July 1967, Bull. civ. I n° 248.

81 See *L'Estrange v. F. Graucob Ltd* (1934) 2 *K.B.* 394, *C. A.*

82 See *Parker v. South Eastern Railway Co* (1877) 2 *CPD* 416.

83 See *Hollier v. Rambler Motors AMC Ltd* (1972) 2 *Q. B.* 71, *C. A.*

84 See *British Crane Hire Corp. Ltd v. Ipswich Plant Hire Ltd* (1975) *Q. B.* 303 *C. A.*

85 Article 1447 of the Civil Code.

86 M.-C. DIENER, *op.cit.* § 15.2.1.

nomic imbalance results from the advantage taken by one of the parties of the state of need of the other. In this case, Article 1448 of the Italian Civil Code requires an economic imbalance greater than half of the value of the goods or services.

In Dutch law, the sanction of the taking of an excessive benefit comes under the remit of abuse of circumstance provided for in Article 3:44 (4) BW.[87] Abuse of circumstance is constituted by: the existence of specific circumstances, a causal link between them and the entering into of the contract, and the fact that the party, who knew of the victim's critical position, nonetheless entered into the contract although they should have abstained in view of the manifest disadvantage which would result for the victim.[88]

In Swiss law, the sanction of the taking of an excessive benefit operates via the sanction of grossly unbalanced contracts on the basis of Article 21 I CO. Inequality of bargain (lésion), in the sense of this article, requires the reunion of an objective element (the obvious disproportion) and a subjective element (the decision was determined by the exploitation of the difficulty, the carelessness or the inexperience of the victim).[89]

In German law, although no rule specifically sanctions the excessive profit taken from the other party's vulnerable position, this situation comes within the sphere of application of § 138 II BGB (legal transaction contrary to public policy). This provision '*treats as invalid any extortionary act by which a person exploiting the state of necessity, the weakness or the inexperience of another is promised or granted disproportionate patrimonial advantages either to himself or to a third party*'.[90]

In French law, the basis of the sanction of an excessive benefit taken from the exploitation of the contracting party's weakness is subject to debate. In the absence of any specific provision, part of the legal scholarship suggests that it should be seen as a specific instance of duress, namely as an example of economic duress. The idea is not to sanction the party who contracts with the party suffering a state of necessity, but to sanction the party who profits from this situation in order to take an excessive benefit.[91] The case law has recognised that '*economic constraint is closer to duress than to* lésion'[92]. *In this way, a contract of employment that was very disadvantageous for the employee could be invalidated, it*

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87 '*A person who knows or should know that another is being induced to execute a juridical act as a result of special circumstances – such as state of necessity, dependency, wantonness, abnormal mental condition or inexperience – and who promotes the creation of that juridical act, although what he knows or ought to know should prevent him therefore, commits an abuse of circumstances*' (translation D. BUSCH, E.H. HONDIUS et *alii op.cit.* p. 212).

88 D. BUSCH, E.H. HONDIUS et *alii*, *op.cit.* p. 212.

89 See P. ENGEL, *Traité …*, *op.cit.* p. 298 onwards.

90 '*… Frappe de nullité tout acte lésionnaire (Wucher) par lequel une personne exploitant l'état de nécessité, la légèreté ou l'inexpérience d'autrui se fait promettre ou accorder soit à elle-même soit à un tiers des avantages patrimoniaux en disproportion flagrante avec sa propre prestation*', M. PÉDAMON, *op.cit.* n° 24. – Compare § 315 I BGB by virtue of which '*where performance is to be specified by one of the parties to the contract, then in case of doubt it is to be assumed that the specification is to be made at the reasonably exercised discretion of the party making it*'.

91 See J. FLOUR, J.-L. AUBERT and E. SAVAUX, *op.cit.* n° 224. – J. GHESTIN, *op.cit.* n° 586.

92 '*La contrainte économique se rattache à la violence et non à la lésion*', *Cass. civ. 1ère*, 30 May 2000, Bull. civ. 2000, I, n° 169; RTD civ. 2000, p. 827, obs. J. MESTRE and B. FAGES; *ibid.*, p. 863, obs. P.-Y. GAUTIER; D. 2000, p. 879, note J.-P. CHAZAL; Defrénois 2000, art. 37237, p. 1124, note D. MAZEAUD.

having been entered into when the employee was in a situation of necessity resulting from the illness of their child and a pressing need for money[93]*. However, the case law requires that there is an abuse of the economic dependence of the contracting party. Thus, it has held that 'consent is vitiated by duress only when a situation of economic dependence is abused in order to profit from the dependent party's fear of some evil directly threatening their legitimate interests'.*[94]

In English law, reference is made to two distinct doctrines, each of which requires the exploitation of a particularly vulnerable party. First, the doctrine of undue influence applies when one party exerts, or is in the position to exert, considerable authority over the other party. Recourse is available if it is proved, either that the party has exerted this authority over the other to the extent that the other party's independence of spirit is suppressed, or the parties are in a relationship of trust and confidence. In both of these cases, if the weaker party enters into a manifestly disadvantageous contract with the stronger party then a presumption arises that undue influence has been exerted.[95] Secondly, according to the doctrine of unconscionability, if a party deliberately takes advantage of the poverty and ignorance of the other party to buy goods from him at a price which is much lower than their real value, the contract can be invalidated.[96] This doctrine is old and infrequently used.[97]

The prohibition on taking an excessive benefit by profiting from a position of strength is also effected by the censoring of unfair terms. Here the different national laws have been modified under the influence of Directive 93/13/EEC *on unfair terms in consumer contracts*. Article 3.1 of this directive makes acting contrary to good faith one of the elements which allows a clause to be classified as unfair. Since transposition of the directive,[98] some legal systems have reproduced this criterion as part of the definition of unfairness. This is the case in German law[99] and also in Italian law.[100] It is the same in English law in respect of contracts entered into with consumers within the *Unfair terms in consumer contracts regulations 1999*.[101] The idea according to which a special duty of good

93 Cass. soc., 5 July 1965: Bull. civ. 1965, IV, n° 545.

94 *'Seule l'exploitation abusive d'une situation de dépendance économique, faite pour tirer profit de la crainte d'un mal menaçant directement les intérêts légitimes de la personne, peut vicier de violence son consentement'*, *Cass. civ. 1ère*, 3 April 2002, Bull. civ. 2002, I, n° 108; RTD civ. 2002, p. 502, obs. J. MESTRE and B. FAGES; JCP 2002, I, 184, note G. VIRASSAMY; D. 2002, p. 2844, obs. D. MAZEAUD; *ibid.*, p. 1860, note J.-P. GRIDEL and note J.-P. CHAZAL; Contrats, conc. consom. 2002, comm. 121, note L. LEVENEUR; Defrénois 2002, art. 37607, p. 1246, note E. SAVAUX.

95 *Principles of European Contract Law, Part I and II, op.cit.*p. 264.

96 See *Fry v. Lane* (1884): 40 *Ch.D.* 312.

97 *Principles of European Contract Law, Part I and II, op.cit.* p. 264.

98 For an overview of the transposition of the directive in the different Member States see the *Commission Report on the application of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts*. COM (2000) 248 final.

99 § 305 to 310 BGB. See in particular § 307.

100 Article 1469 bis of the Civil Code.

101 Even if its sphere of application seems to be wider and concerns many aspects of the professional/consumer relationship, this legislation has as its principal subject the prevention and sanction of unfair terms. On the scope and content of the *Unfair Contract Terms Act 1977*, see H. BEALE, A. HARTKAMP, H. KÖTZ, D. TALLON, *op.cit.* p. 515 to 519.

faith and fairness is imposed on the 'strong' party when one of the parties is not able, because of their position, their situation or their competences, to negotiate the contract or its terms, is reproduced within Regulation 5: *'a contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer'*. It is also stated that the unfair character of the contract or contract term may be appreciated not only by reference to the very letter of the contract (or the very letter of other contracts to which the principal contract refers) but in function of the nature of the goods or services concerned, as well as all the circumstances which surrounded the conclusion of the contract.[102] The clarification of the standard of good faith, which the provision refers to, has been the subject of a House of Lords decision. In the case of Director General of Fair Trading v. First National Bank (2001), the House of Lords had the opportunity to state that good faith, far from being an artificial or purely technical notion, should be appreciated by reference to good standards of business morality and commercial practice (fair and open dealing).[103]

Following transposition of the above directive, other legal systems have distanced themselves from the criterion of good faith and only use the criterion of significant imbalance to characterise unfairness. Thus, in French law, Article L 132-1 of the Consumer Code states that *'clauses which aim to create or result in the creation, to the detriment of the non-professional or the consumer, of a significant imbalance between the rights and obligations of the parties to the contract, are unfair'*.

B. International law and Acquis communautaire

10. The scope awarded to the duty of good faith in the **Vienna Convention** is somewhat ambiguous. Indeed, Article 7 (1) states that *'in the interpretation of this Convention, regard is to be had […] to the need to promote […] the observance of good faith in international trade'*. In spite of the letter of the provision, it is not certain that the Convention makes good faith and fair dealing a simple directive of interpretation. Indeed, this provision seems to be the result of a compromise during the negotiation of the terms of the Convention, between the representatives of the *civil law* countries (in favour of establishing a duty of good faith) and the representatives of *common law* countries (forcibly opposed to such an approach).[104] In particular England and Wales were opposed to any establishment of the

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102 See *Unfair terms in consumer contracts regulations 1999*, reg. 6: '(…) *the unfairness of a contractual term shall be assessed, taking into account the nature of the goods and services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all the circumstances attending the conclusion of the contract and to the other terms of the contract or another contract on which it is dependent* (…)'.

103 On the requirements of fair and open dealing, see in particular H. TREITEL, *op.cit.* pp. 112 to 114.

104 See the United Nations Conference on contracts for the international sale of goods, Vienna, 10 March – 11 April 1980, United Nations Official Documents, p. 79 and p. 272; see also G. EORSI, *'Problems of Unifying Law on the Formation of Contracts for the International Sale of Goods'*, Am. J. Int. Law, 1979, vol. 27, p. 311 onwards, especially, p. 313.

duty of good faith in the guise of a general principle.[105] The provision is therefore interpreted in a diverse manner, with some going so far as to deny any establishment of a duty of good faith within the Convention. However, this analysis hardly seems tenable in view of the numerous Convention articles which simply follow through the consequences of the principle of good faith and fair dealing. Thus, at a pre-contractual stage, although the Convention poses the principles of free revocation of the offer before it is accepted, this is different *'if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer'*.[106] More generally we can cite Article 29.2 according to which *'a contract in writing which contains a provision requiring any modification or termination by agreement to be in writing may not be otherwise modified or terminated by agreement. However, a party may be precluded by his conduct from asserting such a provision to the extent that the other party has relied on that conduct'*. We can also consider Article 35.3: *'The seller is not liable under subparagraphs (a) to (d) of the preceding paragraph for any lack of conformity of the goods if at the time of the conclusion of the contract the buyer knew or could not have been unaware of such lack of conformity'*.[107] Article 77, concerning the obligation to mitigate loss, can also be seen as an application of a general principle of good faith and fair dealing between the parties: *'a party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach. If he fails to take such measures, the party in breach may claim a reduction in the damages in the amount by which the loss should have been mitigated'*. Finally, Article 80 of the Convention states that *'a party may not rely on a failure of the other party to perform, to the extent that such failure was caused by the first party's act or omission'*.

In view of these different provisions, there is as a result no doubt that the duty of good faith and fair dealing permeates the contractual process of sale within the Convention, and that this is the case whatever the scope attributed to the ambiguous Article 7 (1).

11. It has already been noted that the principle of contractual fairness is frequently found in **Community law**.[108] Nevertheless, the recognition of a genuine duty of good faith and fair dealing is uncertain. As the recent Green Paper *on the review of the Consumer Acquis*[109] showed, for the moment the Community provisions which apply to the consumer in contractual affairs *'do[es] not include a general duty to deal fairly or to act in good faith'*.[110] However, the European Commission proposes to introduce such a general principle into contract law: *'(…) a general provision could be built round the phrase "good faith and fair dealing". This includes the idea that they show due regard to the interests of the other party, considering the specific situation of certain consumers. (…) The main advantage of an overarching general clause for consumer contracts (…) would be the creation of a tool which*

105 See in this respect, P. LALIVE, *'Sur la bonne foi dans l'exécution des contrats d'état'*, in Mélanges offerts à Raymond Vander Elst, éd. Némésis, 1981, p. 434.

106 Article 16.2 (b).

107 *Compare* Article 40: *'The seller is not entitled to rely on the provisions of articles 38 and 39 if the lack of conformity relates to facts of which he knew or could not have been unaware and which he did not disclose to the buyer'*.

108 See *supra* Article 0-201.

109 Green Paper *on the review of the Consumer Acquis* 15 March 2007, OJ 2007/C61/01.

110 Point 4.3 (Annex I) of the above Green Paper.

would provide guidance for the interpretation of more specific provisions and would allow the courts to fill gaps in the legislation by developing complementary rights and obligations'.[111]

There are already occasional applications of the duty of good faith and fair dealing, either at the margins of the domain of contract *stricto sensu*, or else applying in a narrower way within the contractual domain. This first example can be illustrated by the wide expression '*professional diligence*',[112] used in the Directive on '*unfair business-to-consumer commercial practices in the internal market*' and defined as a '*standard of special skill and care which a trader may reasonably be expected to exercise towards consumers, commensurate with honest market practice and/or the general principle of good faith in the trader's field of activity*'.[113] The second example can be found at a precontractual stage with the reinforced protection that is given to the weaker party to the contract, and the reinforced requirement to inform. Thus for example, Directive 2002/65/EC *concerning the distance marketing of consumer financial services*[114] establishes in Article 3, dedicated to '*information to the consumer prior to the conclusion of the distance contract*',[115] that the consumer should be informed of the supplier. The second paragraph of this article very precisely details the manner in which precontractual information should be given to the future contracting party: '*in a clear and comprehensible manner (…) with due regard, in particular, to the principles of good faith in commercial transactions*'.[116] In addition, we also see the sanction of unfair terms by Directive 93/13/EEC 5 April 1993[117] in Community law. When the requirement of good faith is not met,[118] in so far as the term of the contract has not been individually negotiated and '*it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer*'[119] then the clause in question is '*regarded as unfair*'.[120]

Some provisions also reflect the impossibility for the parties to limit or derogate from the duty of good faith and fair dealing. This takes the form of a total prohibition on clauses excluding the operation of mandatory norms which would have the above effect. This is the case for example in Directive 94/47/EC *on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on*

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111 Point 4.3 (Annex I) ('*The concepts of good faith and fair dealing in the consumer acquis*'), in the Green Paper *on the review of the Consumer Acquis*.

112 Article 2 (h) of Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market, OJ L 149, 11/06/2005 p. 22-39.

113 *Ibid*.

114 Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC OJ L 271, 9/10/2002, p. 16-24.

115 The title of Article 3 of the above Directive.

116 Article 3 § 2 of the above mentioned Directive.

117 Council Directive 93/13/EEC 5 April 1993 on unfair terms in consumer contracts, OJ L 095 21/04/1993, p. 29-34.

118 Article 3 § 1 of the above Directive.

119 *Ibid*.

120 *Ibid*.

a timeshare basis,[121] which requires Member States, by way of the transposition into national law of the above texts, to make provision *'in their legislation to ensure that any clause whereby a purchaser renounces the enjoyment of rights under this Directive or whereby a vendor is freed from the responsibilities arising from this Directive shall not be binding on the purchaser, under conditions laid down by national law'*.[122]

C. Codifications by legal scholars

12. Whilst there is a provision to be found in the **UNIDROIT Principles**, as in PECL, which poses a mandatory general duty of good faith and fair dealing, the other projects have chosen to proceed by way of establishing particular applications of the duty at the different stages of the contractual process.

Thus, the **UNIDROIT Principles** establish good faith as generally applicable in Article 1.7 *'(1) Each party must act in accordance with good faith and fair dealing in international trade. (2) The parties may not exclude or limit this duty*'. The consequences of this principle are then applied at the precontractual stage. In this way, Article 2.1.15 states in paragraph 2 that *'(…) a party who negotiates or breaks off negotiations in bad faith is liable for the losses caused to the other party*'. Paragraph 3 clarifies, *'it is bad faith, in particular, for a party to enter into or continue negotiations when intending not to reach an agreement with the other party*'.

In the **Proposals for Reform of the Law of Obligations and the Law of Prescription**, in respect of the negotiation stage of the contract, it is stated that *'parties are free to begin, continue and break off negotiations, but these must satisfy the requirements of good faith*'.[123] In addition, *'a break-down in negotiations can give rise to liability only if it is attributable to the bad faith or fault of one of the parties*'[124] which *a contrario* leads to the establishment of a requirement of good faith at a precontractual stage. In addition, the project provides for a precontractual obligation to inform in Article 1110 which states in its first paragraph that *'if one of the parties knows or ought to have known information which he knows is of decisive importance for the other, he has an obligation to inform him of it*'.[125] Nevertheless, this obligation exists *'only in favour of a person who was not in a position to inform himself, or who could legitimately have relied on the other contracting party, by reason (in particular) of the nature of the contract or the relative position of the parties*'.[126] When it comes to formation of the contract, the prohibitions on fraud and duress as factors vitiating consent are also an expression of the requirement of good faith.[127] Finally, in respect of performance of the contract, it is provided that contracts *'must be performed in good faith*'.[128]

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121 Directive 94/47/EC of the European Parliament and the Council of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis, OJ L 280 29/10/1994, p. 83-87.

122 Article 8 of the above Directive.

123 Article 1104 para 1, J. CARTWRIGHT and S. WHITTAKER, *op.cit*.

124 Article 1104 para 2, *ibid*.

125 *Ibid*.

126 Article 1110 para 2, *ibid*.

127 Article 1111 onwards.

128 Article 1134 para 3, *ibid*.

The duty of good faith and fair dealing is present in the **European Code of Contract Preliminary Draft** without having been established as a general principle. Thus, Article 32 (1) in the section '*Implied terms*' states that '*in addition to the express terms the contract includes terms which (b) stem from the obligation of good faith*'. Moreover, at a precontractual stage, this duty is broken down into various aspects and comprises an obligation of good faith,[129] an obligation to inform[130] and an obligation of confidentiality.[131] In addition, Article 6.3 states that '*if in the course of negotiations the parties have already given consideration to the essentials of the contract the conclusion of which is predictable, either party who breaks off negotiations without justifiable grounds, having created reasonable confidence in the other that the contract will be concluded, is acting contrary to good faith*'. In respect of the formation of the contract, Article 1 states in its second paragraph that a contract may result from an agreement implied '*from conduct when in conformity with (…) good faith*'. In respect of performance of the contract, a duty of good faith and fair dealing is confirmed.[132] Article 44 for its part states that '*the effects of a contract derive not only from the agreement made between the parties but also from (…) good faith and equity*'. Good faith has also been called on in the case of refusal of performance made before the time due as such a refusal is only possible if it is not contrary to good faith.[133]

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129 Article 6, especially § 1: '*1. Each of the parties is free to undertake negotiations with a view to concluding a contract without being held in any way responsible if the contract is not drawn up, unless his conduct is contrary to good faith*'.

130 Article 7 '*Obligation to inform*': '*1. During negotiations each party who knows or should know any circumstance of fact or law which would help the other party assess the validity of the contract and the benefit of concluding it is under a duty to inform the other.*

2. In the event of information being withheld or being falsely or partially given, if the contract has not been concluded or is void, the party who has acted contrary to good faith is responsible to the other party in the measure stated in Art 6 para 4. If the contract has been concluded, the party in bad faith must return such sum or pay such compensation to the other party as the court shall determine on equitable grounds, but without prejudice to the other party's right to avoid the contract on the ground of mistake.'

131 Article 8 '*Obligation of confidentiality*': '*1. The parties have the obligation to treat with circumspection any confidential information obtained during negotiations.*

2. Whichever party does not comply with this obligation shall compensate the other for any resulting loss, and if he has also drawn undue benefit from the confidential information he must recompense the other party to the extent of his own enrichment.'

132 Article 75 § 1: '*Each of the parties is bound to perform exactly and completely all the obligations laid on him by the contract, without request from the entitled party being necessary. In rendering due performance the debtor must conform to what has been agreed by the parties, to good faith and to the diligence required in the particular case, on the basis of the agreement, the circumstances and current practice*'.

133 Article 109 § 1: '*1. Without prejudice to the provisions of Art 101 the creditor has the right to refuse performance offered or made before the time due, or in greater quantity than that due, provided his refusal is not contrary to good faith as understood in the preceding article to the extent that the article is applicable*'.

13. In addition it is notable that the different projects, with the exception of the **Proposals for Reform of the Law of Obligations and the Law of Prescription**, infer a reinforced obligation to inform about general conditions of the contract from the duty of good faith and fair dealing.

The **UNIDROIT Principles** designate these general conditions as 'standard-terms'.[134] Article 2.1.20 states, in its first paragraph, that *'no term contained in standard terms which is of such a character that the other party could not reasonably have expected it, is effective unless it has been expressly accepted by that party'*.[135]

The **European Code of Contract Preliminary Draft** holds that the *'standard conditions of contract drawn up by one of the parties in order to regulate a multiplicity of specific contractual relations in a uniform manner are effective as against the other party if he has knowledge of the conditions or should have knowledge of them by using ordinary diligence (…)'*.[136] Article 30 paragraph 4 provides in addition that some of these clauses should be expressly approved in writing.[137]

14. Lastly, the different projects all sanction the party who profits from their stronger position to take an excessive benefit from the contract or in order to stipulate unfair terms.

Firstly, in respect of the sanction for excessive benefit, Article 3.10 of the **UNIDROIT Principles** states that *'(1) A party may avoid the contract or an individual term of it if, at the time of the conclusion of the contract, the contract or term unjustifiably gave the other party an excessive advantage. Regard is to be had, among other factors, to (a) the fact that the other party has taken unfair advantage of the first party's dependence, economic distress or urgent needs, or of its improvidence, ignorance, inexperience or lack of bargaining skill (…)'*.

The **Proposals for Reform of the Law of Obligations and the Law of Prescription** establish the concept of economic duress *(violence economique)* as the basis for the sanction of excessive benefit. Thus Article 1114-3 states that *'there is also duress where one party contracts under the influence of a state of necessity or dependence, if the other party exploits this situation of weakness by obtaining from the contract a manifestly excessive advantage'*.[138] The second paragraph of the provision details that *'a situation of weakness is assessed by reference to all the circumstances, taking particular account of the vulnerability of the party who submits, the pre-existing relationship between the parties, and their economic inequality'*.[139]

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134 Article 2.1.9: *'Contracting under standard terms': '(1) Where one party or both parties use standard terms in concluding a contract, the general rules on formation apply, subject to Articles 2.1.20-2.1.22'. (2) Standard terms are provisions which are prepared in advance for general and repeated use by one party and which are actually used without negotiation with the other party'*.

135 Paragraph 2 states that *'in determining whether a term is of such a character regard shall be had to its content, language and presentation'*.

136 Article 33.

137 Article 30, para 4: *'In the standard conditions of contract provided for in Art 33, those terms are ineffective, unless specifically approved in writing, which create, in favour of the party who has prepared them, limitations of liability or rights of withdrawing from the contract or of suspending its performance, or which impose on the other party forfeitures, limitations on the right to raise defences, restrictions on contractual freedom in relations with third parties or on the extension or the implied renewal of the contract, arbitration clauses or derogations from the competence of the courts'*.

The **European Code of Contract Preliminary Draft** also sanctions the taking of an excessive benefit. Article 30 § 3 states thus that *'as provided for in Art 156, any contract may be rescinded where one of the parties, by abusing the other's situation of danger, need, incapacity to understand or to form an intention, inexperience, or economic or moral subjection, has induced that other party to promise or provide to him or a third party a performance or other pecuniary benefits clearly disproportionate to the performance he has provided or promised in exchange'*.

Second, all the projects, with the exception of the UNIDROIT Principles, sanction the use of unfair terms.

In the **Proposals for Reform of the Law of Obligations and the Law of Prescription**, Article 1122-2 states that *'(…) a contract term which creates a significant imbalance in the contract to the detriment of one of the parties may be revised or struck out at the request of that party, in situations where the law protects him by means of a particular provision – notably because he is a consumer, or where the clause has not been negotiated'*.[140]

In the **European Code of Contract Preliminary Draft**, Article 30 § 5 states that *'in contracts drawn up between a professional and a consumer, apart from Community rules, those terms are ineffective which have not been individually negotiated if they create a significant imbalance, to the detriment of the consumer, between the rights and the obligations arising under the contract, even if the professional is in good faith'*.

IV. Proposed text

Article 0-301: General duty of good faith and fair dealing
Each party is bound to act in conformity with the requirements of good faith and fair dealing, from the negotiation of the contract until all of its provisions have been given effect.
The parties may neither exclude this duty, nor limit it.

Article 0-302: Performance in good faith

I. General presentation of the principle

1. After the statement of a general duty of good faith and fair dealing in Article 0-301, it appears necessary to clarify the scope of this duty in respect of performance of the contract. Naturally, it is also important to state the principle of performance in good faith itself. Such a principle appears in the majority of the sources studied.[141] But, due as always to a concern over the accessibility and intelligibility of the proposed guiding principle,[142] it would appear opportune to specify clearly what exactly performance in good faith

138 J. CARTWRIGHT and S. WHITTAKER, *op.cit.*

139 *Ibid.*

140 *Ibid.*

141 See *infra* II and III.

142 See *supra*: general introduction.

requires, rather than to limit the discussion to a statement of the one principle alone. The point of these clarifications is to clearly indicate to the parties what constitutes good contractual conduct.[143] Three points can be distinguished.

Performance in good faith supposes firstly that the parties invoke the contractual terms and exercise their contractual rights in good faith. In order to do this, they should only avail themselves of these rights and these terms in accordance with the aim that justified their original stipulation. Thus, a party may only invoke a term of the contract if it corresponds with his statements, or with the nature and content of the contract. This means that a party cannot take advantage of a term on the sole pretext that it figures in the body of the contract if the operation of that term would be inconsistent with the economy of the contract or with the conduct of the party who invokes it.

Good faith in respect of performance of the contract necessarily places on the parties a duty to abstain. So as to respect the binding force of contract, the parties are in fact bound to do nothing that would compromise the proper performance of the contract. If this were not the case, the binding force of contract would be deprived of all effectiveness. The parties must not therefore diminish the utility of the contract for the other party or undermine the rights that the contract gives the other party.

In addition to this duty to abstain, an obligation of positive conduct can be placed on the party who, without having hindered performance of the contract, has nonetheless, by his conduct, lessened the point of the contract for the other party. In this case, if the other party so desires, the party whose conduct has caused the loss of utility must not refuse to renegotiate the content of the contract.

II. Application of the principle in PECL

2. Although good faith in the performance of the contract does not feature in an individual provision of PECL, it does nonetheless follow clearly from the general obligation posed by Article 1.201. We will recall[144] that the first paragraph of this article states that '*each party must act in accordance with good faith and fair dealing*'. Placed within the chapter dedicated to general provisions and presented as a general obligation, there is no doubt that the duty of good faith and fair dealing applies throughout the contractual process, and therefore at the time of performance. In addition there are several illustrations of the principle throughout the text. Thus, the duty of good faith prevents a creditor from being able to force the debtor to perform in kind if such performance '*would cause the obligor unreasonable effort or expense*'.[145] Good faith also requires that a party accepts early performance if this does not unreasonably affect his interests,[146] in particular when the party suffers no inconvenience as a result of the early performance.[147] Lastly, good faith and fair dealing requires that termination of the contract should only be possible where there is '*fundamental*'[148] non-performance and not where there is a lesser non-performance.[149]

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143 **Acquis Group**: no provision has been proposed on this topic.

144 See *supra* under Article 0-301.

145 Article 9:102 (2) (b) PECL.

146 Article 7:103 (1) PECL: '*A party may decline a tender of performance made before it is due except where acceptance of the tender would not unreasonably prejudice its interests*'.

147 *Principles of European Contract Law, Part I and II, op.cit.* p. 335.

3. PECL also impose a duty of good faith and fair dealing in the implementation of the terms of the contract and the exercise of the rights arising from the contract. Thus, according to Article 8:109, '*remedies for non-performance may be excluded or restricted unless it would be contrary to good faith and fair dealing to invoke the exclusion or restriction*'. The commentary specifies that this is in particular a question of setting aside the terms which, at their most extreme, '*would allow a debtor to undertake to perform and at the same time exclude all sanction for failure to perform*':[150] in this case, they constitute an incitement not to perform.[151]

4. PECL also recognise a specific illustration of the duty to abstain incumbent on the parties, which requires that they do nothing which could compromise the proper performance of the contract. The application in question is prohibition on interfering with the operation of a condition posed in Article 16:102. This provision provides that a condition is, according to the situation, regarded as accomplished or failed, if the debtor has prevented its fulfilment or provoked the realisation of it '*contrary to duties of good faith and fair dealing or co-operation*'.

III. Applications of the principle in comparative law

A. National laws

5. In respect of the treatment of the duty of good faith at the level of performance by different national laws, we find the approaches already mentioned under the study of the general duty of good faith and fair dealing.[152] It is interesting to note that even those legal systems that rarely contain references to good faith and fair dealing all contain a provision dedicated to performance in good faith. It is also normally around the provision on performance in good faith that the different legal systems have developed a more extensive duty of good faith and fair dealing.

This is indeed the case in French law where Article 1134 paragraph 3 of the Civil Code states that agreements '*must be performed in good faith*'. This is also the same in German law[153] and in Swiss law,[154] in which good faith has today become a fundamental principle.[155]

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148 Article 9:301 (1) PECL: '*A party may terminate the contract if the other party's non-performance is fundamental*'.

149 *Adde supra* the developments described under Article 0-204: Principle favouring the maintenance of the contract.

150 *Principles of European Contract Law, Part I and II, op.cit.* p. 385.

151 *Ibid.*

152 See *supra* under Article 0-301.

153 § 242 BGB: '*An obligor has a duty to perform according to the requirements of good faith, taking customary practice into consideration*'.

154 Article 2 CCS: '*I. Every person is bound to exercise his rights and fulfil his obligations according to the principles of good faith*', S. WYLER and B. WYLER, *op.cit.*

155 See *supra* under Article 0-301.

Italian law, which recognises many provisions dedicated to good faith and fair dealing, establishes the principle of performance in good faith in Article 1375 of the Civil Code. We can add two other important articles: Article 1175 of the Civil Code which states that the parties must conduct themselves according to the rules of fairness, and Article 1176 of the Civil Code which states that, in the performance of his obligation, the party must show proof of reasonable diligence.

The approach that Dutch law takes is similar to that currently adopted by PECL where good faith is the subject of a very general provision and therefore necessarily includes the performance stage of the contract. Thus, Article 6:2 paragraph 1 BW states that '*1. A creditor and debtor must, as between themselves, act in accordance with the requirements of reasonableness and equity*'.[156] It is the same in Spanish law where Article 7 of the Civil Code is also very general and states that '*rights must be exercised in accordance with the requirements of good faith*'.

In contrast to the above national laws, English law has not expressly recognised good faith in the performance of the contract at either a statutory or judicial level.[157] English law does not allow the concept of good faith to disturb the law which results from the contract, freely determined by the parties. Once again though, we can nonetheless observe that, by operation of specific rules, certain acts contrary to good faith are sanctioned. The most direct sanction of a party's conduct contrary to good faith at the stage of performance would appear to be the judicial doctrine of *estoppel*.[158]

6. The above study shows that where the obligation to perform the contract in good faith is a legal requirement, national laws are content to merely pose the principle without giving any concrete guidance to the parties. However, the case law plays an important role in each of these legal systems in that it elaborates the different applications of the obligation to perform the contract in good faith.

7. First, many of the legal systems studied hold that the terms of the contract and any rights arising from it cannot be invoked in a manner that is inconsistent with the objective that justified their stipulation. Even English law, which does not contain a general obligation to perform in good faith, recognises numerous situations where the courts interpret the contract in such a way as to prevent one party from taking advantage of a term in circumstances in which it was probably not the parties' intention that it apply.[159]

It is notable, firstly, that the right to terminate or provoke the termination of the contract cannot be exercised in bad faith, in particular by invoking a minor breach of the contract.[160] Even English law refuses termination to the party who intends to take ad-

156 Translation by D. BUSCH, E.H. HONDIUS et alii, *op.cit.* p. 48.

157 *Compare* American law: whether dealing with provisions generally applicable to contractual affairs, or provisions limited to the regulation of commercial exchanges, the principle of good faith is firmly anchored in substantive law (see *Uniform Commercial Code* [U.C.C], or more significantly the *Second Restatement of Contracts* [1981] which provides that '*every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement*').

158 See *infra* under Article 0-304.

159 See *Principles of European Contract Law, Part I and II, op.cit.* p. 117-118.

160 See *supra* under Article 0-204.

vantage of a minor breach in the sole aim of escaping the contract.[161] Where the termination of the contract is provided for by a term of the contract, the term can only be invoked or taken advantage of in accordance with the requirements of good faith. In fact, it is only when the other party to the contract has specifically allowed the term in question to be included in the contract that its beneficiary can invoke it in a different aim to that which justified its inclusion in the contract.[162] Thus, in French law, a consistent line of cases prevents the creditor from taking advantage of a termination clause in bad faith.[163] It is however necessary to qualify the abuse of the creditor in termination.[164] This is the case where the creditor invokes a fault of the debtor's which has caused him no harm, which is minor, and which he has otherwise tolerated.[165] This is also the case where the creditor intends to take advantage of a termination clause although he has already issued summons to perform, provided for in the clause, during the absence of the debtor.[166] In the same way, only the beneficiary of a clause requiring consent can take advantage of the clause contrary to the aim which justified its inclusion. Thus, in a contract which was concluded *intuitu personae*, the Cour de cassation decided that the refusal of consent or approval should have been justified by imperatives related to the safeguarding of the legitimate commercial interests of its beneficiary.[167]

Other terms cannot be invoked contrary to good faith. To return to the previously cited provision of PECL concerning the exclusion or limitation of remedies for non-performance,[168] limitation clauses may only be invoked in good faith. Thus, in French law, such clauses cannot be invoked, even though their validity is not in question, if the party trying to take advantage of the clause has committed a gross or deliberate or dishonest fault *(faute lourde ou faute dolosive)*.[169] In such a case, it would in fact be

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161 See Hoenig v. Isaacs (1952); Honk Kong Fair Shipping Co Ltd v. Kawasaki Kisen Kaisha Ltd (1962).

162 See G. WICKER, *Force obligatoire et contenu du contrat*, cited above, n° 34.

163 Cass. civ. 1ère, 31 January 1995: Bull. civ. I n° 57; D. 1995, p. 389, note. C. JAMIN.

164 Cass. com., 14 January 1997: D. aff. 1997, p. 274; Defrénois 1997, p. 745, obs. D. MAZEAUD; RTD civ. 1997, p. 427, note J. MESTRE.

165 Cass. com., 31 March 1978, Bull. civ. 1978, IV, n° 102.

166 Cass. civ. 3ème, 16 October 1973: Bull. civ. 1973, III, n° 529. – 29 June and 15 December 1976: RTD civ. 1977, p. 340, obs. G. Cornu. – Compare Cass. civ. 3ème, 25 January 1983: Bull. civ. 1983, III, n° 21; RTD civ. 1985, p. 163, obs. J. MESTRE.

167 Cass. com., 2 July 2002: D. 2003, p. 93, note. D. MAZEAUD; JCP 2003, II, 10023, note. D. MAINGUY. – *Compare* the approaches adopted for *intuitu societatis* clauses, that is to say clauses which attribute the power to destroy the contract to a party who contracts with a company. This applies in situations where there is a non-agreed modification to the management or the composition of share capital of the contracting company. The case law provides that these clauses can only be legitimately invoked if the envisaged modification gives rise to a risk of non-performance of the contract or a risk of the takeover of the company by a competitor: Cass. com., 14 January 1997: RTD civ. 1997, p. 427, obs. J. MESTRE; RJ com. 1998, p. 178, note G. WICKER. The approach thus applies the consequences of the reason why the clauses were inserted into the contract. – See G. WICKER, cited above, n° 34, p. 93.

168 Article 8.109 PECL.

169 Consistent line of case law: for example, Cass. com. 15 June 1959: Bull. civ. III, n° 265; D. 1960, p. 97, note R. RODIÈRE.

contrary to the requirements of good faith to allow the author of the fault to benefit from a limitation of his own liability. The same solution is adopted by the law in Spain,[170] Italy[171] and Germany,[172] and by the case law in the Netherlands.[173] In English law, this approach is not as clearly followed, but a clause limiting liability can nonetheless be set aside as '*unreasonable*',[174] that is to say as having been invoked in circumstances that did not correspond with what the parties had anticipated.[175]

We can also add that terms which directly contradict the purpose of the contract may not be validly invoked. This is the case where a limitation clause would deprive an essential obligation of the contract of its effect. Thus, in French law, the Cour de cassation[176] decided that a limitation clause, which had been inserted in a contract of transport fixing the indemnity payable in the case of delay as the price of the transport, should be regarded as removed from the contract, on the basis that the Chronopost company, '*a specialist undertaking which guaranteed the reliability and speed of its service and promised to deliver the Banchereau packages by a certain time, failed to honour this essential obligation, and therefore the clause limiting Chronopost's liability must be treated as struck out as being in conflict with the engagement it undertook*'.

8. Another illustration of the duty to perform the contract in good faith can be found in the duty to abstain that certain legal systems place on the parties in the name of good contractual conduct. Therefore, the parties are bound to do nothing that would compromise the proper performance of the contract. For example, one such obligation takes the form of a guarantee, owed by the vendor to the purchaser after the transfer of property, against compromise of the purchaser's rights by the vendor's personal action.[177] In the same way, another such obligation requires that the parties do nothing to compromise the proper performance of the contract by contracting with a third party. This is the situation of fraud on the rights of creditors.[178] Thus, a party may not enter into a contract that would result in his insolvency[179] or which would make his goods harder to

170 Articles 1102, 1256 and 1476 of the Civil Code.

171 Article 1229 of the Civil Code.

172 § 276 (2) BGB.

173 See Hoge Raad, 31 December 1993: NJ, 1995, 389; 5 September 1997: RvdW 1997. 161.

174 See in this respect *Principles of European Contract Law, Part I and II, op.cit.* p. 388.

175 See G. TREITEL, *op.cit.* p. 201 to 222.

176 Cass. com., 22 October 1996, affaire Chronopost: Bull. civ. 1996, IV, n° 261; GAJC, *op.cit.* n° 156; JCP 1997, I, 4002, n° 1, obs. M. FABRE-MAGNAN; Cont., conc. consom. 1997, n° 24, note. L. LEVENEUR; D. 1997, jurispr. p. 121, note A. SÉRIAUX and somm. p. 175, obs. PH. DELEBECQUE; Defrénois 1997, p. 333, obs. D. MAZEAUD; JCP G 1997, II, 22881, note D. COHEN; JCP 1997, I, 4025, n° 17; Gaz. Pal. 1997, 2, p. 519, note R. MARTIN. – See in the same sense, Cass. com., 17 July 2001: JCP 2002, II, 148, n° 117, obs. G. LOISEAU. – See also, Cass. com. 5 June 2007: JCP 2007, II, 10145, note D. HOUTCIEFF.

177 See in this respect G. WICKER, article cited above, n° 22.

178 For the different applications of the *action paulienne* in the national legal systems, see *supra*. under Article 0-203.

seize[180] as, in doing this, he would compromise the proper performance of his obligation to the other party.[181]

We find another illustration of the duty to abstain in the obligations imposed on the parties when the undertaking is subject to a condition. It is judged to be contrary to good faith to interfere in the operation of the condition. This is the case in German law where § 162 BGB[182] sanctions the party who, by his act, prevents or brings about contrary to good faith, the satisfaction of the condition. French law[183] and Spanish law[184] also sanction any interference by the parties in the operation of the condition precedent.[185] In Italian law, according to Article 1359 of the Civil Code, the condition is deemed to be fulfilled when its failure is due to a cause attributable to the party who had an interest contrary to its satisfaction. For the condition to be deemed fulfilled, the party at the origin of the failure must have acted fraudulently, dishonestly or must have been at fault.[186] However, Italian law goes further in that it imposes a wider obligation on the parties to act in good faith before the satisfaction of the condition. Thus, Article 1358 of the Civil Code, concerning the conduct of the parties *pendente conditione*, imposes on

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179 Cass. Req., 3 December 1923: S. 1923, I, 352; D. H. 1923. 6. – civ. 1ère, 27 June 1972: Bull. civ. I n° 163. – 31 May 1978: Bull. civ. I n° 209. – 6 January 1987: Bull. civ. I n° 1; RTD civ 1988, p. 137 obs. J. MESTRE. – com., 14 November 2000: Bull. civ. IV n° 1173; JCP G 2001, IV, 1049; D. 2000, p. 441, obs. See AVÉNA-ROBADET; Defrénois 2001. 240, obs. R. LIBCHABER.

180 See for example in French law: the replacement of goods which would be easily seizeable with goods that would be easy to hide (the agreed sale of real goods at a nonprejudicial price), Cass. civ. 1ère, 21 November 1967: Bull. civ. I n° 336; D. 1968, p. 317, note. LAMBERT-FAIVRE. – 18 February 1971: Bull. civ. I n° 56; D. 1972, p. 53, note. E. AGOSTINI; RTD civ. 1971, p. 841, obs. Y. LOUSSOUARN. – com., 1 March 1994: Bull. civ. IV n° 81; Defrénois 1994, p. 1118 note. D. MAZEAUD; D. 1994 somm. p. 215, obs. E. FORTIS. – 9 January 2001: RJDA 2001, n° 635. For the replacement of goods easily seizeable with goods that are harder to liquidate (the contribution of goods to a company): Cass. com. 19 April 1972: Bull. civ. IV n° 112. – civ. 1ère, 27 February 1973: Bull. civ. I n° 70. – 21 July 1987, Bull. civ. I n° 231; JCP 1987 IV p. 347; RTD civ. 1988, p. 136, obs. J. MESTRE. – com. 20 December 2000: Bull. civ. III n° 200; JCP 2001 IV 1326; Bull. Joly 2001, p. 305, note. H. LE NABASQUE.

181 See Laura SAUTONIE LAGUIONIE, *La fraude paulienne*, thesis cited above, especially n° 130 onwards.

182 BGB § 162: '*Prevention of or bringing about the satisfaction of the condition*
(1) If the satisfaction of a condition is prevented in bad faith by the party to whose disadvantage it would be, the condition is deemed to have been satisfied.
(2) If the satisfaction of a condition is brought about in bad faith by the party to whose advantage it would be, the condition is deemed not to have been satisfied'.

183 Article 1178 of the Civil Code: '*A condition is deemed fulfilled where it is the debtor, bound under that condition, who has prevented it from being fulfilled*'.

184 See Article 1119 of the Civil Code.

185 In French law the case law extends this legal device to situations where the debtor brings about the satisfaction of a condition of termination (Cass. civ. 3ème, 28 May 1970, motifs, Bull. civ. III n° 364), and to those situations where it is the creditor who interferes in the operation of the condition (Cass. civ. 3ème 23 June 2004, Bull. civ. III n° 132, D. 2005, p. 1532, n. H. KENFACK). – See F. TERRÉ, P. SIMLER and Y. LEQUETTE, *op.cit.* n° 1227.

186 Cass. 13 April 1985, n° 2464, NGCC 1985 I 610, note BELFIORE.

each party the obligation to conduct oneself in good faith in order that the rights of the other party remain intact.[187] This rule is applied by analogy to standard supply contracts.[188]

In English law, the basis of the obligation on the parties not to interfere in the operation of the condition is found in *implied terms*. Whether the obligation is express or implied, the parties cannot deliberately prevent the fulfilment of the condition. If the party in whose power the fulfilment of the condition lies does not do everything possible to satisfy the condition they may be ordered to pay damages, subject to the party proving that any efforts that he could have made would not have led to the fulfilment of the condition.[189] Where the condition fails, a distinction should be made between two types of obligation: the principal obligation of the parties (such as to sell or buy) and the subsidiary obligation (to not withdraw, to not cause the condition to fail or to do everything possible to fulfil the condition). Two approaches are therefore envisaged. The first consists in deeming the condition fulfilled to the detriment of the party who has not conducted themselves with necessary diligence or who caused the condition to fail (non-performance of the subsidiary obligation). This approach has not received the approval of legal scholarship which considers it to be excessively severe. In fact, the fulfilment of the condition was not, by definition, certain. The second approach consists in ordering the party to pay damages for breach of the subsidiary obligation, in consideration of the chance of the fulfilment of the condition.[190]

We can add that the duty to abstain, which weighs on the parties in the name of good faith in performance of the contract, also supposes that they do not diminish the utility of the contract for the other party to the contract. It is in this way that an employee or a director can be bound by a non-compete clause in a contract.[191]

9. Lastly, French case law provides an interesting illustration of the duty of good faith in respect of performance of the contract, in that it places on obligation to renegotiate on the parties. This applies where a contracting party, by his action, removes all or part of the utility of the contract for the other party, in particular because of the adaptation of his professional activity to the economic context. In two cases,[192] the Cour de cassation,

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187 *Compare* in French law the fact that acts accomplished *pendente conditione* are not opposable if they are incompatible with the satisfaction of the condition.

188 M.-C. DIENER, *op.cit.* § 5.21.3.

189 G.H. TREITEL, *op cit.* p. 61.

190 *Ibid.*

191 See in this respect G. WICKER, article cited above, n° 22.

192 Cass. com., 3 November 1992: arrêt 'Huard', JCP 1992, II, 22164, note. G. VIRASSAMY; RTD civ. 1993, p. 124, obs. J. MESTRE. In this case, following the removal of restrictions on the selling price of petrol which allowed him to lower his prices considerably, a supplier started to sell fuel, via his agents, to the final consumer at a lower price than the price he sold the fuel to his distributors for, which had been previously fixed by contracts entered into before the removal of restrictions on price.

Cass. com., 24 November 1998: Defrénois 1999, p. 371, obs. D. MAZEAUD; RTD civ. 1999, p. 98, obs. J. MESTRE: in this case, a commercial agent found himself in difficulties as he could not sell at competitive prices in comparison with those products sold in parallel by central sales who provided the products directly to his principals. The decision was rendered in reliance on

rather than sanctioning the change of circumstances attributable to the party, required the latter to renegotiate the content of the contract. It is interesting, from an economic point of view, to generalise such an approach:[193] in effect it allows the party who suffers the change of circumstances to retain their partner whilst at the same time remedying the loss of profitability of the contract.

B. International law and Acquis communautaire

10. In the **Vienna Convention**, the question of whether there is a duty of good faith in the performance of the contract depends more widely on the scope that is given to Article 7 of the Convention.[194] However, in any event the Convention recognises illustrations of good faith in the performance of the contract. For example, Article 77, concerning the obligation to mitigate damage, states that '*a party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach. If he fails to take such measures, the party in breach may claim a reduction in the damages in the amount by which the loss should have been mitigated*'. In addition, Article 80 of the Convention which states that '*a party may not rely on a failure of the other party to perform, to the extent that such failure was caused by the first party's act or omission*'.

11. Although it has been seen that the establishment of a general duty of good faith remains uncertain in **Community Law**, the ECJ has not hesitated to recognise a duty of performance in good faith based on the general principle of international law. Thus, in the case of *Hauptzollamt Mainz*[195] 1982 the ECJ stated that '*according to the general rules of international law there must be a bona fide performance of every agreement*'.[196]

C. Codifications by legal scholars

12. In respect of the statement of the principle of performance in good faith itself, each of the projects studied adopts a different approach.

The **UNIDROIT Principles** adopt, in the same way as PECL, an article that states a general duty of good faith and fair dealing,[197] on which is based the duty of good faith in respect of performance of the contract.

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the old Article 4 of the law of 25 June 1991, which has become Article L 134-4 of the Commercial Code. This subjects the relationship between the commercial agent and his principal to a duty of fairness, and holds that '*principals shall make sure that the commercial agents are able to perform their mandate*' (paragraph 3).

193 *Compare* G. WICKER, article cited above, n° 37.

194 See *supra* under Article 0-301.

195 CJCE, 26 October 1982, *Hauptzollamt Mainz v. C.A. Kupferberg & Cie KG a.A*, Aff. 104/81, *Rec.* 1982 p. 03641.

196 Point 18 of the above case.

197 See Article 1.7 *(Good faith and fair dealing)*: '*(1) Each party must act in accordance with good faith and fair dealing in international trade. (2) The parties may not exclude or limit this duty*'.

The **Proposals for Reform of the Law of Obligations and the Law of Prescription** identically reproduce the current provision of the Civil Code, holding simply that contracts *'must be performed in good faith'*.[198]

The **European Code of Contra**ct Preliminary Draft contains for its part a very complete provision. Thus, Article 75 § 1 states that: *'each of the parties is bound to perform exactly and completely all the obligations laid on him by the contract, without request from the entitled party being necessary. In rendering due performance the debtor must conform to what has been agreed by the parties, to good faith and to the diligence required in the particular case, on the basis of the agreement, the circumstances and current practice'*. The criteria laid down by this article are sufficiently wide to enable the obligation of performance in good faith to have a very wide reach. We can also add that this project recognises, like PECL, a provision on early performance. Such performance can only be refused if it is not contrary to good faith.[199]

13. The **UNIDROIT Principles** deal with the question of good faith in the operation of contractual terms under exemption clauses. Thus, Article 7.1.6 states that *'a clause which limits or excludes one party's liability for non-performance or which permits one party to render performance substantially different from what the other party reasonably expected may not be invoked if it would be grossly unfair to do so, having regard to the purpose of the contract'*.

The **Proposals for Reform of the Law of Obligations and the Law of Prescription** adopt, for their part, the case law's approach. Thus, according to Article 1382-2 paragraph 1, *'a party to a contract cannot exclude or limit the reparation for harm caused to his co-contractor by his deliberate, dishonest or gross fault or by failure to perform one of his essential obligations'*.[200] In addition, within the generally applicable provisions, Article 1125 paragraph 2 states that *'any term of the contract that is incompatible with the real character of its cause is struck out'*.[201]

14. The requirement that parties do not interefere in the operation of a condition (itself a specific application of the obligation on the parties not to compromise the performance of the contract) can be found in two of the three projects.

In the **Proposals for Reform of the Law of Obligations and the Law of Prescription**, according to Article 1176, *'the parties have an obligation of loyalty with regard to the satisfaction of the condition'*.[202] According to Article 1177, the condition is deemed to have been satisfied or deemed to have failed if its obstruction or satisfaction was caused by the party who had an interest in bringing that about.[203]

The **European Code of Contract Preliminary Draft** contains a general provision which imposes a duty of good faith on the parties *pendente conditione* and clearly places a duty to abstain on the part of the parties. It is expressly mentioned in Article 51 that each

198 Article 1134 para 3, J. CARTWRIGHT and S. WHITTAKER, *op.cit.*

199 Article 109 (1).

200 J. CARTWRIGHT and S. WHITTAKER, *op.cit.*

201 *Ibid.*

202 *Ibid.*

203 Article 1777: *'The condition is deemed to have been satisfied if the party who is interested in its failure has obstructed its satisfaction. It is deemed to have failed if its satisfaction has been caused by the party who had an interest in this occurring'*.

party *'is required to act according to good faith in order to safeguard the interests of the other party'*. In addition, Article 52, in paragraph 2, states that *'a condition is considered fulfilled or not fulfilled when the interested contracting party prevents or brings about, respectively, its fulfilment'*.

IV. Proposed text

Article 0-302: Performance in good faith

Every contract must be performed in good faith.

The parties may avail themselves of the contractual rights and terms only in accordance with the objective that justified their inclusion in the contract.

Each party is required not to do anything that prevents the performance of the contract or that infringes the rights that the other party acquires from the contract.

Where one of the parties, without compromising the performance of the contract, has acted in such a way as to reduce the benefit that the other party could legitimately expect from the contract, the party is required, at the request of the other party, to renegotiate the contents of the contract.

Article 0-303: Duty to cooperate

I. General presentation of the principle

1. Article 0-302 defines what is meant by performance of the contract in good faith. In effect it states what, at the very least, is expected from the parties when they perform contractual obligations. We can note that the duty of good faith also places an obligation to abstain on the parties: an obligation not to invoke contract terms contrary to the objective that justified their inclusion in the contract, and an obligation to not compromise the proper performance of the contract. Only the isolated situation where a change in circumstances is attributable to one of the parties can lead to the imposition of a positive duty on that party to renegotiate the contract and not simply a duty to abstain. Despite its rich content, it appears that this provision does not fully allow all the consequences of good faith in the performance of the contract to be applied. Indeed, good faith and fair dealing goes further than a simple absence of bad faith. If it consisted in this alone, then it would only justify the duties on the parties to abstain. Yet good faith can also be understood as a dynamic concept which places a requirement of positive conduct on the parties when it appears to be necessary in order that the contract can be fully effective. Good faith is no longer the opposite of bad faith but a positive, autonomous concept, generally understood to be the basis of a duty of cooperation between the parties.[204]

Even if we stick to a simple statement of the duty to cooperate between the parties,[205] it can however be noted that the scope of such a duty depends on the nature or the

[204] The concept of cooperation appeared in the different sources studied. See *infra*.

[205] **Acquis Group**: no provision on this point.

subject of the contract. The obligations arising from the duty to cooperate vary according to whether the nature and subject of the contract require more or less collaboration between the parties. For example, the nature of the contract of mandate or the employment contract is such that they require a large amount of cooperation between the parties, without mentioning the contract constituting a company the validity of which requires the *affectio societatis* of members. The subject of the contract can also lead to collaboration sometimes being required, for example where the service being provided is very technical as in contracts for the provision of information technology services. It is different where the interests of the parties to the contract are more opposed or even antagonistic, for example a contract of sale. But even in this case, the opposing interests of the parties do not mean that a minimum level of collaboration should not be expected from the parties. It would appear obviously contrary to good faith not to inform the other party of events which could compromise the proper performance of the contract and which the party had personal knowledge of.

II. Application of the principle in PECL

2. Amongst the general obligations laid down in the first chapter of PECL, and following from the duty of good faith, can be found the duty to cooperate. Article 1:202 states thus that '*each party owes to the other a duty to co-operate in order to give full effect to the contract*'. The chosen formulation of the principle is interesting in that it clearly shows the function of the duty to cooperate: to assure the full effect of the contract. It is this that explains the fact that the parties are not simply bound to abstain from harming the contract but that they must adopt a positive conduct. Following the treatment adopted for the general principle of good faith,[206] it seems that the statement of the principle of cooperation is better placed in the Guiding Principles than within the different provisions of Chapter One of PECL. It is suggested, in addition to an elaboration of the content of Article 1:202, that it be placed within the Guiding Principles.

The commentary clarifies the scope of this article. The duty to cooperate '*includes a duty to allow the other party to perform its obligations and thereby earn the fruits of performance stipulated in the contract*'.[207] The commentary also indicates that cooperation requires that a '*a party has to inform the other party if the other party in performing the contract may not know that there is a risk of harm to persons or property*'.[208] We find a specific application of the duty in Article 8:108 (3) according to which a party should notify the other party of the existence of any impediment and the consequences of this on his ability to perform.[209] The commentary indicates clearly that this rule follows from the duty of good faith. It allows the party who receives notice to take precautions in order to limit the inconveniences of non-performance and also to exercise the right to terminate.[210]

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206 See *supra* under Article 0-301.

207 *Principles of European Contract Law, Part I and II, op.cit.* p. 119.

208 *Ibid.* p. 120.

209 Article 8:108 (3): '*The non-performing party must ensure that notice of the impediment and of its effect on its ability to perform is received by the other party within a reasonable time after the non-performing party knew or ought to have known of these circumstances. The other party is entitled to damages for any loss resulting from the non-receipt of such notice*'.

III. Applications of the principle in comparative law

A. National laws

3. In the majority of national laws, a duty of cooperation has been inferred from the provisions which establish a general duty of good faith.

In German law, the duty of cooperation results from the general applicability given to the § 242 BGB principle of performance in good faith. It follows, for example, that if the permission of a third party or a public authority is required, the parties should work together to obtain it.[211] In addition, the German law on the modernisation of the law of obligations introduced § 241 paragraph 1 into the BGB which states that *'an obligation may also, depending on its contents, oblige each party to take account of the rights, legal interests and other interests of the other party'*.

In Dutch law, according to legal scholarship and case law, the duty to cooperate is a result of the completive function of the principle of good faith and fair dealing found in Articles 6:2 and 6:248 BW.[212] The duty to cooperate can be expressly agreed by the parties or it can be inferred from the nature of the obligation. It is therefore a true obligation incumbent on the parties, and its violation constitutes a breach *stricto sensu*.

In Italian law, Article 1175 of the Civil Code, which requires the parties to prove fairness in their contractual relations, forms the basis for the duty to cooperate. In Spanish law, legal scholarship describes how the parties should cooperate in the proper performance of the contract.[213]

French law recognises numerous illustrations of the duty to cooperate, which has for a long time been recognised as a principle by a section of the legal scholarship.[214] The scope of the duty of cooperation varies according to the nature and object of the contract.[215] For example, in respect of the subject of the contract, it might be the technicality of the service which is taken into account: thus when considering the provision of IT systems the seller should help the purchaser to specify his needs, and will often prolong his obligation to advise by providing assistance in training the purchaser's staff.[216] The

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210 *Principles of European Contract Law, Part I and II, op.cit.* p. 383.

211 *Principles of European Contract Law, Part I and II, op.cit.*, p. 121.

212 D. BUSCH, E.H. HONDIUS et *alii*' *op.cit.* p. 50, 52 onwards.

213 See *Principles of European Contract Law, Part I and II, op.cit.* p. 121 and the references cited there.

214 See especially R. DEMOGUE, who suggested a cooperation between the parties where it was considered that the contracts formed a sort of microcosme *'where each party must work with a common purpose'* (*'où chacun doit travailler dans un but commun'*): See *Traité des obligations en général, t. IV, 1931, n° 3.* – See also, J. MESTRE, *D'une exigence de bonne foi à un esprit de collaboration: RTD civ. 1986, p. 101.* – Y. PICOD, *L'obligation de coopération dans l'exécution du contrat: JCP G 1988, I, 3318.* – D. MAZEAUD, *Loyauté, solidarité, fraternité: la nouvelle devise contractuelle?*, Mélanges F. TERRÉ, Dalloz-PUF, éditions juris-classeur, 1999, p. 603 onwards.

215 See in this respect, F. TERRÉ, P. SIMLER and Y. LEQUETTE, *op.cit.* n° 441. – *Adde* G. WICKER, *Force obligatoire et contenu du contrat*, article cited above, n° 24, which shows that the duty to cooperate can only be required from the parties *'when a collaboration, either material or intellectual, turns out to be necessary having regard to the nature or the subject of the contract'*.

216 See in this repect, Y. PICOD, juris-classeur civil, V° *Article 1134-1135*, n° 46.

nature of distribution contracts also requires a close collaboration between the parties as their interests are closely overlapping. Consequently, if the supplier changes the balance of the contract such that the distributor is no longer able to compete, the supplier is not performing the contract in good faith.[217] The duty of cooperation therefore applies not only to the debtor, but also to the creditor.[218] Sometimes the case law gives a wider scope to the duty of cooperation, without however assimilating it to a duty to work together (mutual aid).[219] Case law has also decided that the party who is bound to perform the contract in good faith should check that the creditor has invoiced him correctly for the services provided, and if he has not done so then he should alert him to the mistake.[220]

Lastly, in English law, in the absence of a general duty of good faith and fair dealing, the duty to cooperate is only occasionally placed on the parties. Nonetheless, it is interesting to note that this duty is considered as implicit when such a duty is necessary to give the contract its economic efficiency.[221] From this we can deduce that the nature and the objective of the contract will determine the recognition of an implied duty to cooperate.

4. Some legal systems consider that the duty of cooperation requires the party, who is aware of an event that might compromise the proper performance of the contract, to inform the other party of it.

This is the case in those systems that hold, in the same way as PECL, that the party from whom performance is due should notify the other party of the existence of an impediment to performance. Sometimes, as in Italy,[222] this is inferred from the duty of good faith although statute is silent.[223] Sometimes, it is a question of applying a more general obligation to inform the other party of the risks that might affect performance, as in Spain.[224] On the other hand, other legal systems refuse to recognise such an approach. Thus, the duty to notify the other party of a possible impediment no longer exists in Germany,[225] and is excluded in English law.[226]

In French law, legal scholarship recognised very early that each party had *'an obligation to inform the other party, during the contract, of any event that he would be interested to know about for performance of the contract'*.[227] This obligation to inform is sometimes

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217 Cass. com. 19 December 1989, Bull. civ. IV n° 327; RTD civ. 1990 p. 649, obs. J. MESTRE.

218 For example, the client must inform the dry cleaner of a previous attempt at stain removal (Cass. 1re civ., 11 May 1966: Bull. civ. 1966, I, n° 281). – Adde Y. PICOD, article cited above, n° 49 onwards and the examples cited there.

219 The case law has established that a supplier is not obliged to help his distributor find new markets: Cass. com., 6 May 2002, JCP 2002, II, 10146, note PH. STOFFEL-MUNCK; D. 2002, p. 2842, obs. D. MAZEAUD; RTD civ. 2002, 810, obs. J. MESTRE and B. FAGES.

220 Cass. civ. 1ère, 23 January 1996: Bull. civ. I n° 36; Defrénois 1996, p. 744, obs. P. DELEBECQUE; RTD civ. 1996, p. 900, obs. J. MESTRE; Contr. Conc. Consom. 1996, n° 76, obs. L. LEVENEUR.

221 See *Principles of European Contract Law, Part I and II, op.cit.* p. 121 citing the case of The Moorcock 1889.

222 See *Principles of European Contract Law, Part I and II, op.cit.* p. 384.

223 See however Article 1780 of the Italian Civil Code which, in respect of the deposit contract, imposes on the depository the duty to notify the other party of the loss of the goods in custody.

224 See Article 1559 of the Spanish Civil Code.

established by statute. Thus, in respect of insurance contracts, the requirement that the policy-holder keep the insurer informed of events that occur during performance of the contract, and in particular those that are in the nature of increasing the risk, is laid down by statute.[228] More generally, the case law imposes on the parties an obligation to inform the other party of any events that might affect the proper performance of the contract. It is therefore considered that a party should inform the other of the risk of an element of the contract disappearing, when this information would permit him to eliminate the risk.[229]

B. International law and Acquis communautaire

5. Although there is no article in the **Vienna Convention** that states, as such, the principle of cooperation between the parties in the performance of the contract, it does however recognise many illustrations of the principle. Thus, Article 79 (4) imposes an obligation on the party from whom performance is due to notify the other party of any impediment to performance within a reasonable time frame, under threat of damages.[230] In addition, we can note that the obligation to preserve the goods which is placed on the parties by Article 85 onwards also implements the minimum level of cooperation that can be expected from the parties.

6. In **Community law**, the duty to cooperate results from the duty of fairness which applies throughout the contractual process. It is a question of the parties showing a certain availability towards each other in order that, through positive actions if necessary, they can favour the proper performance of the contract. In this respect we can cite Directive 90/314/EEC *on package travel, package holidays and package tours*,[231] in which everything is done to ensure that the organisers of the package and their partners do everything possible to prevent the risk of the package holiday envisaged in the contract failing. Thus, '*in cases of complaint, the organizer and/or retailer or his local representative, if there is one, must make prompt efforts to find appropriate solutions*'.[232] In addition, '*the*

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225 OLG Hambourg, 13 May 1901, OLGE 3, n° 4, p. 8, cited by *Principles of European Contract Law, Part I and II, op.cit.* p. 384.

226 *Principles of European Contract Law, Part I and II, op.cit.* p. 384.

227 '*L'obligation d'avertir l'autre, en cours de contrat, des évènements qu'il a intérêt à connaître pour l'exécution du contrat*', R. DEMOGUE, *op.cit.* n° 29.

228 Article L 113-4 3° of the Insurance Code.

229 Cass. civ. 1ère, 27 June 1995: Bull. civ. I n° 281; RTD civ. 1996, p. 393, obs. J. MESTRE.

230 Article 79 (4): '*The party who fails to perform must give notice to the other party of the impediment and its effect on his ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, he is liable for damages resulting from such non-receipt*'.

231 Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours O J L 158, 23/06/1990 p. 59-64.

232 Article 6 of the above Directive.

organizer and/or retailer party to the contract shall be required to give prompt assistance to a consumer in difficulty (…)'.[233] The French version of this provision refers to the concept of '*diligence*',[234] which itself underlies the concept of fairness.

In counterpart, the consumer is also bound to cooperate, in particular by communicating as soon as possible '*any failure in the performance of a contract which he perceives on the spot (…) in writing or any other appropriate form at the earliest opportunity*'.[235] It is only in these conditions of reciprocal cooperation that the performance of the contract seems able to be successful. More often than not, it will be the defaulting party who will be required to do all that he can to inform the other party of a risk, of which he is aware, which could prevent the proper performance of the contract. Thus for example, '*where a supplier fails to perform his side of the contract on the grounds that the goods or services ordered are unavailable, the consumer must be informed of this situation (…)*'.[236] This is provided for in Directive 97/7/EC *on the protection of consumers in respect of distance contracts*.[237]

C. Codifications by legal scholars

7. Only the **UNIDROIT Principles** clearly state, in the same way as PECL, a duty of cooperation. Thus, according to Article 5.1.3, '*each party shall cooperate with the other party when such co-operation may reasonably be expected for the performance of that party's obligations*'. We can note that the UNIDROIT Principles are careful to limit the domain of this duty in that it only applies where '*such co-operation may reasonably be expected*'. The criterion of reasonabless does however lack clarification.

The silence of the other projects does not however mean that they reject the very principle of a duty of cooperation.

This is evident firstly in respect of the **European Code of Contract Preliminary Draft** where Article 75 § 1 is endowed with a very wide scope. We will recall that it states that '*each of the parties is bound to perform exactly and completely all the obligations laid on him by the contract, without request from the entitled party being necessary. In rendering due performance the debtor must conform to what has been agreed by the parties, to good faith and to the diligence required in the particular case, on the basis of the agreement, the circumstances and current practice*'. The reference to diligence in particular would appear able to justify requiring the parties to adopt positive conduct in order to facilitate the performance of the contract.

Second, in respect of the **Proposals for Reform of the Law of Obligations and the Law of Prescription**, the reproduction of the formula of the current Article 1134 paragraph 3 of the Civil Code[238] allows the foundation, as in substantive law, of a duty of cooperation.

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233 Article 5 para 2 of the above Directive.

234 Article 5 para 2 of the above Directive (French version): '*L'organisateur et/ou le détaillant partie au contrat sont tenus de faire diligence pour venir en aide au consommateur en difficulté*'.

235 Article 5 para 4 of the above Directive.

236 Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts OJ L 144' 04/06/1997 p. 19-20.

237 Above Directive.

238 Contracts '*must be performed in good faith*', J. CARTWRIGHT and S. WHITTAKER, *op.cit.*

8. The duty to inform the other party of events that may compromise the proper performance of the contract (a specific application of the duty to cooperate) is is only recognised by the **UNIDROIT Principles**. This project deals with the notification of the existence of an impediment to performance that the party from whom performance is due must give the other party. Thus, Article 7.1.7 (3) states that '*the party who fails to perform must give notice to the other party of the impediment and its effect on its ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, it is liable for damages resulting from such nonreceipt*'.

IV. Proposed text

Article 0-303: Duty to cooperate
The parties are bound to cooperate with each other when necessary for the performance of their contract.

Article 0-304: Duty of consistency

I. General presentation of the principle

1. The treatment of contractual fairness requires a supplementary article concerning the scope of good faith in the performance of the contract. Although the abstentions and requirements of positive conduct which are placed on the parties have for the most part already been identified, it remains necessary to impose an obligation on each of the parties to behave consistently. In this section, it is therefore necessary to consider the principle of consistency, which requires that a party does not act in contradiction with the behaviour that he had previously adopted. The principal application of this principle rests in the prohibition on contradicting oneself to the detriment of another. From the moment one of the parties has created a legitimate expectation in the other party that they have relied on, the first party cannot legitimately conduct himself in a contrary manner.

Even if we restrict ourselves, in terms of guiding principles, to the statement of the principle of consistency alone,[239] such a principle must nonetheless be understood as having a very rich content.

The above principle has a particular application that can be found in the majority of the sources studied.[240] This is the situation where a party who is responsible for the non-performance or inefficacy of the contract cannot take advantage of it in order to demand a sanction.

However, the principle of consistency has a wider scope than this, in two respects. First, when the parties are bound to fulfil certain prerequisite conditions before their right

239 **Acquis Group**: No provision on this subject.

240 See *infra* II and III.

becomes exercisable, the principle of consistency means that they cannot invoke this right if they have not satisfied the required conditions. This is a case of applying the consequences of the concept of *incombance*.[241] Secondly, when a party tolerates some of the failings of the other party to the contract, the principle of consistency dictates that the party cannot, following this, take advantage of the contractual sanctions which would have applied to the tolerated failings.

II. Application of the principle in PECL

2. Although there is no article in PECL that states, as such, the principle of consistency, or the prohibition on acting contrary to previous conduct to the detriment of another, the commentary clearly shows that it is one of the duties that results from the general duty of good faith posed by Article 1:201. It is thus held that a *'particular application of the principle of good faith and fair dealing is to prevent a party, on whose statement or conduct the other party has reasonably acted in reliance, from adopting an inconsistent position'*.[242] The commentary then details the specific rules contained in PECL which are simply applications of this principle.

This is notably the case in Article 2:202 (3) (c) which creates an exception to the principle of free revocability of an offer. Thus, *'a revocation of an offer is ineffective if (…) it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer'*. The commentary for this article makes clear that this is an approach based on the reliance and expectations of the offeree created by the offeror.[243]

The principle can also be found in Articles 2:105 (4)[244] and 2:106 (2)[245] according to which the statements or the behaviour of one of the parties can prevent that party from relying on a merger clause or a clause requiring modification by writing if the other party has reasonably relied on it.

This is also the same in Article 3:201 (3),[246] according to which, when the apparent authority of an agent follows from the statements or conduct of the principal, the principal is bound by the agent's acts.

In addition to the articles cited above in the commentary to Article 1:201, other articles within PECL also demonstrate the influence of the duty of consistency. Thus for example, in the case of non-performance, the duty of consistency implies that the party cannot attempt to take advantage of two incompatible remedies. The rule is contained within Article 8: 102: *'remedies which are not incompatible may be cumulated (…)'*. The

241 On this concept see *infra*.

242 *Principles of European Contract, Part I and II, op.cit.* p.114.

243 *Ibid.* p.165.

244 Article 2:105 (4), *'Merger clause'*: *'A party may by its statements or conduct be precluded from asserting a merger clause to the extent that the other party has reasonably relied on them'*.

245 Article 2:106 (2), *'Modification by writing'*: *'A party may by its statements or conduct be precluded from asserting such a clause to the extent that the other party has reasonably relied on them'*.

246 Article 3:201 (3), *'Express, implied or apparent authority'*: *'A person is to be treated as having granted authority to an apparent agent if the person's statements or conduct induce the third party reasonably and in good faith to believe that the apparent agent has been granted authority for the act performed by it'*.

commentary gives the example of a party who has terminated the contract: the party can no longer demand performance in kind. This is an application of the principle which states that '*when a party has made a declaration of intention which has caused the other party to act in reliance of the declaration the party making it will not be permitted to act inconsistently with it*'.[247]

3. The Principles also contain a number of diverse provisions that illustrate the prohibition on a party taking advantange of the inefficacy of a contract or its non-performance when the reason for the inefficacy or non-performance is attributable to that party. Thus, the party to whom the non-performance is attributable may not have resort to any of the remedies provided for in Chapter 9 (termination, damages etc). The rule is clearly stated by Article 8: 101 (3): '*a party may not resort to any of the remedies set out in Chapter 9 to the extent that its own act caused the other party's non-performance*'. The commentary indicates that this provision is an application of the principle of good faith and fair dealing and the duty of fairness.[248] The rule applies to all the remedies available to the creditor. The duty of consistency also prevents the creditor demanding reparation of the harm caused by non-performance of the contract if it was the creditor himself who contributed to the non-performance. The rule is stated in Article 9:504: '*the non-performing party is not liable for loss suffered by the aggrieved party to the extent that the aggrieved party contributed to the non-performance or its effects*'.

We can compare these approaches to the rule according to which the party who knew or ought to have known of the reason for the contract's ineffectiveness (for example an unlawful motive) can be refused restitution[249] or damages.[250] Even though this rule is more directly based on the adage according to which no one can profit from his own wrongdoing, this can also be assimilated to the principle of consistency. It is clear that the party who has knowingly entered into an unlawful contract may not thereafter, without contradicting himself, take advantage of the consequences of the invalidity of the contract.

4. In respect of the prohibition on relying on a right when the party concerned has not fulfilled the necessary requirements for its exercise, we can cite the situations where a party is deprived of their right when they have not acted within a reasonable time-frame. Thus, according to Article 9:303 (2), dealing with the termination of the contract, '*the aggrieved party loses its right to terminate the contract unless it gives notice within a reasonable time after it has or ought to have become aware of the non-performance*'. In the same way, according to Article 9:102 (3),[251] a party who has not acted in reasonable time is deprived of the right to demand performance in kind.

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247 *Principles of European Contract Law, Part I and II, op.cit.* p. 363.

248 *Ibid.* p. 360.

249 Article 15: 104 (3): '*An award of restitution may be refused to a party who knew or ought to have known of the reason for the ineffectiveness*'.

250 Article 15: 105 (3): '*An award of damages may be refused where the first party knew or ought to have known of the reason for the ineffectiveness*'.

251 '*The aggrieved party will lose the right to specific performance if it fails to seek it within a reasonable time after it has or ought to have become aware of the non-performance*'.

A comparison can be made with the non-performing party's obligation to mitigate their harm. PECL pose this rule in Article 9:505 (1) which states that '*the non-performing party is not liable for loss suffered by the aggrieved party to the extent that the aggrieved party could have reduced the loss by taking reasonable steps*'. If the aggrieved party does not take '*reasonable steps*', he is deprived of the right to demand damages as compensation for the loss which could have been avoided. The commentary shows that this situation covers two sets of circumstances: '*either … [when] the aggrieved party incurs unnecessary or unreasonable expenditure or … [when] it fails to take reasonable steps which would result in reduction of loss or in offsetting gains*'.[252]

5. Lastly, although there is no provision in PECL which prohibits a party who has tolerated a non-performance from demanding its sanction later on, a comparison can however be made with the situations where a right must be exercised '*in a reasonable time*' under penalty of forfeiture.[253] When the aggrieved party has not acted to demand the sanction of a non-performance of which he has knowledge within a reasonable time then this can be seen as tolerance on his part.

III. Applications of the principle in comparative law

A. National laws

6. The principle of prohibiting inconsistent conduct which harms another is widely recognised in two 'families' of national laws: the Anglo-Saxon legal systems and the legal systems influenced by German law. In the other national laws, in the absence of any recognition of a general principle, particular applications of the principle prohibiting contradictory conduct which harms another can nonetheless still be found.

7. In English law, the principle is known under the name of *estoppel*. This rule '*rests on the prohibition on benefiting from ones own contradictions*';[254] it is '*a blocking mechanism which works in a similar way to the* fin de non-recevoir' (a sort of lack of standing).[255] But, '*estoppel does not establish a general prohibition on contradicting oneself […] In addition a legitimate expectation must have been created in the other party and the re-establishment of the truth would lead to harm in respect of that party*'.[256] English law recognises many categories of estoppel.[257] Some find their origins in *common law*[258] and others in *equity*. Amongst the

252 *Principles of European Contract Law, Part I and II, op.cit.* p. 445.

253 See *supra*.

254 '*… Repose sur l'interdiction de profiter de ses propres contradictions*', B. FAUVARQUE-COSSON, '*L'estoppel du droit anglais*', in *L'interdiction de se contredire au détriment d'autrui*, Colloque 13 janv. 2000, dir. M. Behar-Touchais, Centre de droit des affaires et de gestion (CEDAG) de l'Université Paris V, Economica 2001, Coll. Etudes juridiques, p. 3.

255 '*… qui fonctionne à la manière d'une fin de non-recevoir*', *ibid.* p. 3.

256 '*L'estoppel ne consacre pas une interdiction générale de se contredire […]. Encore faut-il avoir créé, chez autrui, une attente légitime et que le rétablissement de la vérité porte préjudice à celui-ci*', *ibid.* p. 4.

257 For a study of *estoppel* in American and Australian law see, B. FAUVARQUE-COSSON, article cited above, p. 15 onwards.

latter, one of the more remarkable is without doubt *promissory estoppel*, the development of which is due to the case of *Central London Property Trust Ltd v. High Trees House Ltd.*[259] This *estoppel* has firstly *'served to render obligatory the promise not to act to obtain the full payment of a sum due when the creditor made it understood that he would be satisfied with the partial payment of the debt, without requiring a counterpart that would be constitutive of consideration'*.[260] Today it is a way of permitting the attenuation of the rigour of *consideration* (i.e. a counterparty), whether or not the parties are already linked by a previous contractual or pre-contractual relationship.[261] In respect of the sanction, given that equity *'justifies freedom of choice as to the amount and nature of the compensation'*,[262] the objective is not the performance in kind of the promise but the reparation of the harm suffered.[263]

8. In German law, the prohibiting of contradictory conduct which harms another is widely established.[264] The interpretors of the BGB have rediscovered the Roman exceptio doli generalis[265] in § 242, established as a barrier against the exercise of rights contrary to good faith.[266] The norm non concedit venire contra factum proprium sanctions the 'behaviour of the holder of the right which contradicts the previously

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258 We can cite *estoppel by convention*, which operates when two parties have assumed the existence of a set of facts and acted in reliance. One of the parties cannot call into question this common assumption when to do so would be inequitable for the other. See B. FAUVARQUE-COSSON, cited above, p. 8.

259 1947, K.B. 130.

260 *'… Servi à rendre obligatoire la promesse de ne pas agir en justice pour obtenir le paiement intégral de la somme due lorsque le créancier avait laissé entendre qu'il se contenterait du paiement partiel de la dette, et ce sans exiger de contrepartie constitutive d'une consideration'*, *ibid.* p. 9.

261 B. FAUVARQUE-COSSON, cited above, p. 8.

262 *'… Justifie la liberté de choix quant au montant et à la nature de la réparation'*, *ibid.* p. 10.

263 *Ibid.* p. 10.

264 On this matter see H. BOUCARD, *L'agréation de la livraison dans la vente, Essai de théorie générale*, Université de Poitiers, diff. Lgdj 2005, n° 487.

265 C. WITZ, *'Droit privé allemand t.1 Actes juridiques, droits subjectifs (BGB partie générale, loi sur les conditions générales d'affaires)'*, Litec 1992, n° 657; F. RANIERI, *'Bonne foi et exercice du droit dans la tradition du Civil Law'*: RIDC 1998/4, p. 1055-1092, p. 1069; *adde* B. JALUZOT, *'La bonne foi dans les contrats (Etude comparative de droit français, allemand et japonais)'*: Dalloz 2001, Nouvelle bibliothèque des thèses vol.5, n° 1476 onwards.

266 C. WITZ, *'Droit privé allemand t.1 Actes juridiques, droits subjectifs (BGB partie générale, loi sur les conditions générales d'affaires)' op.cit.* n° 660, 664; F. RANIERI *'Verwirkung et renonciation tacite. Quelques remarques de droit comparé'*, Mélanges en l'honneur de Daniel Bastian, t.1 Droit des sociétés, Litec 1974, p. 427-452, p. 452 n. 70, *'Bonne foi et exercice du droit dans la tradition du Civil Law'*, RIDC 1998/4, p. 1006 onwards, and *'Le principe de l'interdiction de se contredire au détriment d'autrui ou du venire contra factum proprium dans les droits allemand and followingisse and following diffusion en Europe'*, L'interdiction de se contredire au détriment d'autrui, Colloque 13 janv. 2000, dir. M. Behar-Touchais, Centre de droit des affaires et de gestion (CEDAG) de l'Université Paris V, Economica 2001, Coll. Etudes juridiques, p. 25 to 36, p. 25 onwards. – R. ZIMMERMAN, *The law of obligations, Roman Foundations of the Civilian Tradition Oxford University Press Inc.*, New York, 1996, p. 673 onwards.

adopted attitude on which his partner had relied'.[267] According to some authors, the principle does not suppose a renunciation (Verzicht) of the creditor.[268] The inconsistency of the creditor leads to his forfeiture (Verwickung):[269] it is necessary but it suffices that his attitude has 'given the other party the impression that he will no longer avail himself of' his rights,[270] and 'that one can not reasonably expect the obligated person to submit to their exercise',[271] in order that he is 'neutralised'.[272] Other authors adopt a more nuanced analysis: if we detach Verwickung from renunciation in order to attach it to abuse of law,[273] then the link with the tacit renunciation of the creditor is not entirely broken.[274]

In Swiss law, Article 2 CCS is inspired by the German 'model'.[275] Legal scholarship and case law have adopted the institution of Verwickung,[276] newly linked to abuse of law[277] – but without always removing it from the notion of tacit renunciation.[278]

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267 *'Comportement du titulaire du droit qui se met en contradiction avec l'attitude adoptée antérieurement et à laquelle son partenaire s'est fié'*, C. WITZ, ibid. n° 664.

268 Ibid n° 665.

269 Ibid. n° 666.

270 *'Donné l'impression à l'autre partie qu'il ne [se] servi[rait] plus [de ses droits]'*, ibid. n° 666. But *'the creditor should not suffer from the fact'* of his delay because the debtor *'must expect that he use his rights until the limitation period is over'*. Simple inaction on the part of the creditor is not sufficient' therefore *'to lead to forfeiture'* and n° 692: a *'creditor who benefits from a long limitation period asserts his claim a long time after the claim first arose. Such behaviour is not in itself at all abusive. It is not the same when the creditor acts in total contradiction with his former behaviour from which the debtor could reasonably have deduced that he had definitively abandoned his claim (venire contra factum proprium). The creditor therefore forfeits his right to an effective claim'*.

271 *'Que l'on ne puisse raisonnablement attendre de l'obligé qu'il se soumette à [leur] exercice'*, C. WITZ, ibid. n° 666; F. RANIERI, *'Verwirkung et renonciation tacite. Quelques remarques de droit comparé'*, cited above, p. 428.

272 C. WITZ, *ibid.* n° 109.

273 F. RANIERI, *'Verwirkung et renonciation tacite. Quelques remarques de droit comparé'*, cited above, p. 428; compare *'Bonne foi et exercice du droit dans la tradition du Civil Law'*, cited above, p. 1067, cf. ibid. p. 1071 onwards, mentioning the current discussions in legal scholarship over the pertinence of a recourse to abuse of law.

274 F. RANIERI, *'Verwirkung et renonciation tacite. Quelques remarques de droit comparé'*, cited above, p. 428 onwards; *'Bonne foi et exercice du droit dans la tradition du Civil Law'*, cited above, p. 1084, n. 98.

275 F. RANIERI, *'Bonne foi et exercice du droit dans la tradition du Civil Law'*, cited above, p. 1056, 1073, and *'Le principe de l'interdiction de se contredire au détriment d'autrui ou du venire contra factum proprium dans les droits allemand and followingisse and following diffusion en Europe'*, cited above, p. 32.

276 See F. RANIERI, *'Bonne foi et exercice du droit dans la tradition du Civil Law'*, cited above, p. 1073 onwards.

277 C. CHAPPUIS, *'L'abus de droit en droit suisse des affaires'*, L'abus de droit, comparaisons franco-suisses, Séminaire de Genève, mai 1998 [s. d.], Etudes réunies par P. ANCEL, G. AUBERT and C. CHAPPUIS, Publications de l'Université de Saint Etienne, Saint Etienne, 2001, p. 69-99.

278 F. RANIERI, *'Verwirkung et renonciation tacite. Quelques remarques de droit comparé'*, cited above, p. 432, n. 16.

In Dutch law, it has long been discussed whether the principle of good faith could lead to the extinction of a right. Under the reign of the old code, the *Hoge Raad* was always reluctant to recognise it. An exception was however recognised where a party lost *'his right because of his own conduct, incompatible with the exercise of the right in good faith (Rechtsverwerking, equivalent of the German Verwirkung)'*.[279] Today, the limitative function of the principle of good faith operates notably in respect of the inconsistent conduct of the party: *'venire contra factum proprium and Verwirkung'*.[280]

9. In other national laws, such as French law, the principle prohibiting contradictory conduct which harms another does not appear as such.[281] Nonetheless, we can observe numerous applications,[282] generally based on the duty of good faith and fair dealing.[283] Thus, the Cour de cassation has decided that *'by virtue of Article 1134 paragraph 3 of the Civil Code, no one may contradict themselves to the detriment of another, and therefore betray the legitimate expectation of the other party to the contract'*.[284] For example, a party to the contract may not, in pursuance of his interests, invoke and at the same time ignore the existence of one and the same contract, according to which he is requiring payment or performing his obligations.[285] More recently, an important case, decided by reference to Article 1134 paragraph 3 of the Civil Code, decided that *'in spite of the signature of a united account agreement, the bank, who, in treating the accounts in dispute as independent accounts, had adopted behaviour inconsistent with the implementation of the disputed agreement, of which it had claimed the benefit, had failed in its duties of good faith'*.[286] It is because of the incon-

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279 *'Son droit en raison de sa propre conduite, incompatible avec l'exercice de bonne foi de ce droit (Rechtsverwerking, equivalent of the German Verwirkung)'*, A.S. HARTKAMP, *op.cit.* p. 138.

280 D. BUSCH, E.H. HONDIUS et *alii*, *op.cit.* p. 50.

281 On the reasons for the reticence of French law in respect of establishing such a principle, see D. MAZEAUD, *La confiance légitime et l'estoppel*, RIDC 2006-2 p. 363, especially n° 2 and 3.

282 For a complete overview of these applications, see D. MAZEAUD, article cited above, n° 6.

283 Certain authors would like the prohibition on contradictory conduct which harms another to be detached from the basis of good faith as it is inconsistency (contradiction in conduct) which is sanctioned above all else. – See in this respect H. MUIR WATT, *'Pour l'accueil de l'estoppel en droit privé français'*, in Mélanges Y. LOUSSOUARN, Dalloz, 1994, p. 303. – D. HOUTCIEFF: *'Quelle sanction pour la contradiction?'*: Revue Lamy droit civil, July/August 2005, n° 18, p. 5. – *Adde* B. FAUVARQUE-COSSON, D. 2005, panorama p. 2843, about a case of the Commercial Chamber of the Cour de cassation, of 8 March 2005, which held that the detachment from the approach based on good faith allowed the adoption of an original sanction, borrowed from procedural law, namely *une fin de non-recevoir* (effectively the denial of locus standi), the approach therefore resembling English law.

284 *'En vertu de l'article 1134 alinéa 3 du Code civil, nul ne peut se contredire au détriment d'autrui, et tromper ainsi l'attente légitime de son cocontractant'*, Cass. com. 11 March 1997, Inédit, pourvoi n° 95-16.853, Lamy cass., cited by H. AUBRY, in *'L'apport du droit communautaire au droit français des contrats: la notion d'attente légitime'*, RIDC, 3-2005, pp. 627-651, especially note 46.

285 Cass. civ. 3ème, 13 April 1988, RTD civ. 1989, p. 743, obs. J. MESTRE: *'le sous traitant ne peut à la fois se prévaloir du contrat de sous-traitance pour obtenir le paiement de ses travaux et le rejeter pour échapper à ses obligations contractuelles'*.

286 *'En dépit de la signature d'une convention d'unité de compte, la banque, qui, en faisant fonctionner les comptes litigieux comme des comptes indépendants, avait adopté un comportement incompatible avec*

sistency of their behaviour that the bank can no longer invoke the benefit of a clause which they had previously disapplied in perfect knowledge of the cause. The case law has also applied the consequences of the principle of consistency in respect of distribution contracts. Although, in principle, the breaking off of these contracts is free, the case law sanctions the party who breaks off the contract having previously engendered in the other party a legitimate expectation of the stability of the contract.[287] Lastly, we also find the approach adopted by Article 8: 102 of PECL[288] in French case law. It has therefore been decided that that a party may not simultaneously or successively exercise two incompatible actions. For example, in the name of consistency, a party who is the victim of non-performance cannot at the same time terminate the contract and claim its total or partial performance on an additional basis.[289]

Some national legal systems recognise more varied applications of the principle of consistency.

10. It is often recognised that a party may not take advantage of a cause of inefficacy or a non-performance for which that party is responsible.[290] Thus Article 1227 paragraph 1 of the Italian Civil Code provides that if the act of the party contributed to the damage occurring, the reparation will be reduced according to the fault and its consequences. Similar approaches are to be found in Dutch law[291] and German law.[292] In French law, the act of the party seeking performance either totally or partially exonerates the party from whom performance is due according to its causal role. The act of the party to whom performance is due, whether they are at fault or not, totally exonerates the other party when it is the exclusive cause of the damage.[293] In the case of the common fault of both

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l'application de la convention litigieuse, dont elle a revendiqué ensuite le bénéfice, avait manqué à son obligation de bonne foi', Cass. com. 8 March 2005: D. 2005, panorama, 2843, obs. B. FAUVARQUE-COSSON; RDC 2005, 1015, obs. D. MAZEAUD; Rev. Lamy, Droit civil, July/August 2005, p. 5, note D. HOUTCIEFF; RTD civ. 2005, 391, obs. J. MESTRE et B. FAGES.

287 Example: when the contractor subordinates, explicitly or implicitely, the maintenance of the distributor is his distribution network to the realisation of important investments on his part, he is liable for unfair breach if he terminates the contract or does not renew it: see Cass. com. 5 April 1994: Contrats, conc., consomm., 1994, comm. n° 159, obs. L. LEVENEUR; D. 2005, somm. comm., 90, obs. D. MAZEAUD; RTD civ. 1994, 603, obs. J. MESTRE. – 20 January 1998: Contrats, conc., consomm., 1998, comm. n° 56, obs. L. LEVENEUR; D. 1998, 413, note CH. JAMIN; D. 1999, somm. comm., 114, obs. D. MAZEAUD; JCP 1999, II, obs. J.-P. CHAZAL; RTD civ. 1998, 675, obs. J. MESTRE. – 9 April 2002: RTD civ. 2002, 811, obs. J. MESTRE and B. FAGES.

288 See *supra*.

289 Cass. civ. 3ème, 7 June 1989, Defrénois 1990, 360, obs. J.-L. AUBERT; RTD civ. 1990, 100, obs. PH. RÉMY and 473, obs. J. MESTRE.

290 *Compare* English law where it is generally recognised that *contributory negligence* either will not be invocable as a defence to a contractual claim, or will prohibit any compensation by application of the principle that the damage was not caused by the non-performance. See in this sense, *Principles of European Contract Law, Part I and II, op.cit.* p. 447.

291 See the '*act of the creditor*' in Article 6: 101 BW. See D. BUSCH, E.H. HONDIUS et *alii*, *op.cit.* p. 327.

292 § 254 (1) BGB.

parties, there will only be partial exoneration if the act of the party to whom performance is due constitutes a sufficiently grave fault.[294] It is also notable that the Praetorian approaches[295] which prevent a party who has committed a gross fault from relying on a limitation clause, or which disapply such clauses in the case of failure to meet an essential obligation, are also applications of the principle according to which a party cannot rely on a non-performance for which he was responsible to the detriment of the other party.[296]

It is also notable that, in German law, § 323 VI of the BGB excludes termination when the party to whom performance is due can be seen to be responsible for the event which led to the non-performance.[297]

In addition, the rule, adopted by PECL, which allows the exclusion of any entitlement to damages or restitution on the part of the party who knew or should have known of the reason for the contract's inefficacy, can be found in different legal systems. In Spanish law, according to Article 1305 and 1306 of the Civil Code, restitution depends on whether the illegality constitutes a penal infraction and if the unlawful aim was attributable to the two parties or not. In French law, the adage *nemo auditur propriam suam turpitudinem allegans* operates in order to prevent the party who knew of the immoral motive, which led to the invalidity of the contract, from obtaining restitution. However, the case law is reluctant to invoke this maxim when the contract is simply unlawful and not immoral.[298] In the same way, this maxim is not invoked in matters of liability. Article 2035 of the Italian Civil Code also prohibits the party who entered into the contract with an immoral aim, shared between the parties, from getting back the money paid. In German law[299] the principle is that of restitution (§ 817 BGB). However, restitution is excluded where the party had real and effective knowledge of the contract's invalidity, which does not include the situation where the party only should have known of the

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293 Example: Cass. civ. 1ère, 6 October 1964: 2 cases, Bull. civ. I n° 423 and 424; D. 1965, p. 21, note P. ESMEIN.

294 Consistent line of case law since Cass. civ. 1ère, 31 January 1973: Bull. civ. I n° 41; D. 1973, p. 149, note SCHMELK; RTD civ. 1973, p. 576, obs. G. DURRY.

295 See *supra* under Article 0-303.

296 See in this respect, D. MAZEAUD, cited above, n° 16 onwards.

297 § 323 VI: *'Withdrawal is excluded if the obligee is solely or very predominantly responsible for the circumstance that would entitle him to withdraw from the contract or if the circumstance for which the obligor is not responsible occurs at a time when the obligee is in default of acceptance'*.

298 For the refusal to apply this maxim to unlawful and not immoral agreements, see Cass. civ. 30 July 1844: S. 1844, 1, 582. – req. 18 March 1895: DP 1895, 1, 346; S. 1896, 1, 11 concerning the restitution of price supplements, in particular the transfer of ministerial offices – Cass. civ. I 19 December 1960: Bull. civ. I n° 548, p. 447, for restitutions linked to a trading of favours – Com. 20 January 1987, note G. GOUBEAUX, for restitutions following the invalidation of an illegal company.

However, the case law is not completely homogenous as some cases have applied the adage to unlawful agreements (Cass. req. 15 February 1877: D. P. 1877, 1, 520. – civ. 1ère, 16 July 1959: Bull. civ. I° 358) while others have refused to apply it to immoral agreements (Cass. civ. 7 June 1945: D. 1946, p. 149 n. R. SAVATIER; JCP 1946 II 2955, n. J. HÉMARD; RTD civ. 1946, p. 30 n. H. and L. MAZEAUD).

299 *Principles of European Contract Law, Part III, op.cit.* p. 224.

reason for invalidity.[300] The exception, considered to be a rule of punitive character, does not operate if the party was unaware of the legal prohibition. Lastly, in English law, restitution is in principle excluded for the party who knew the cause of the contract's inefficacy.[301]

11. The application of the principle of consistency, which supposes that a party may not rely on a right if they have not fulfilled the necessary requirements for its invocability, can be found in the legal systems that recognise the concept of *incombance*.[302] This concept, developed by German, Swiss and Belgian legal scholarship,[303] can be defined as the '*duty the inobservation of which exposes its author not to a condemnation, but to the loss of the advantages attached to the fulfilment of the duty*'.[304] '*The idea with* incombance, *– at least in the contractual sphere –, is that the fulfilment of the duty incumbent on the party forms a preliminary element, a preliminary condition, to the ability, either of his own undertaking, or the other party's obligation, to be invoked or demanded*'.[305] In the name of consistency, it therefore appears that the party who was required to fulfil certain requirements in order to be able to take advantage of a right, will find themselves deprived of this right if they do not comply with these requirements.

Many illustrations of this principle can be found in French law even if the concept of *incombance* is not recognised as such. The principle is sometimes applied by statute. For example, Article L 313-22, paragraph 2 of the Monetary and Financial Code states that the professional creditor who does not give the guarantor the annual update of information, provided for in paragraph 1 of this provision, is deprived of the interests outstanding since the previous update. Case law also adopts various approaches which require the party seeking performance to fulfil certain requirements before his right can be invoked. Thus, in respect of clauses guaranteeing liabilities, where the guarantor's obligation is subordinated to the beneficiary's undertaking to inform the guarantor of any event which might determine the operation of the clause, it has been judged that this stipulation aimed '*not to define an obligation to do in the sense of Article 1142 of the Civil Code, which would result in damages in the case of non-performance, but rather a contractual* fin de non-recevoir *preventing the beneficiary from validly invoking his guarantee without firstly having fairly informed the guarantor of the reasons for it being invoked*'.[306] '*Thus, because he has not*

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300 § 817 § 2 2nd phrase BGB.

301 *Principles of European Contract Law, Part III, op.cit.* p. 225.

302 Since this is not recognised in English law there is no suitable translation or equivalent and so *incombance* shall be used hereafter.

303 See F. LUXEMBOURG, *La déchéance des droits, Contribution à l'étude des sanctions civiles*, thèse, Paris II, 2005, n° 68 onwards; S. LICARI, *Pour la reconnaissance de la notion d'incombance*, R.R.J. 2002-2, p. 703; X. LABBÉ, *L'incombance: un faux concept*, R.R.J. 2005-1, p. 183. – *Adde* H. BOUCARD, *L'agréation de la livraison dans la vente, Essai de théorie générale*, cited above.

304 '*… Devoir dont l'inobservation expose son auteur non à une condamnation, mais à la perte des avantages attachés à l'accomplissement du devoir*', G. CORNU, *Vocabulaire juridique*, PUF, See *incombance*.

305 '*L'idée en matière d'incombance, – au moins sur le terrain contractuel –, est que l'accomplissement du devoir qui pèse sur le débiteur constitue un élément préalable, une condition préalable, à l'exigibilité, soit de son propre engagement, soit de l'obligation de son cocontractant*', see G. WICKER, '*La légitimité de l'intérêt à agir*', Mélanges Y. SERRA, n° 29.

given the promised information, which in this case is characterised as prerequisite in nature, the beneficiary of the clause, who is by this failure to act deemed to be acting contrary to contractual fairness, is unable to require the performance of guarantor's obligation'.[307] In the same way, in respect of the transfer of shares requiring approval,[308] it has been decided that the transferor, who was responsible for notifying the transfer of shares in view of obtaining agreement, and who failed to comply with this formality, *'is not able to take advantage of the failure of the condition that he himself prevented the fulfilment of'*.[309] The law of sale also exhibits numerous applications of the principle.[310]

We can also note that the duty incumbent on the party to whom performance is due to minimise the harm suffered, which can be analysed as a form of *incombance*, can be found in several legal systems, as well as in PECL. The party is in effect denied the right to demand reparation for the harm that he could have limited. Thus, Article 1227 paragraph 2 of the Italian Civil Code excludes all reparation for the harm that the party could have avoided by showing proof of diligence. German law adopts an analogous situation for failure to moderate the damage.[311] In English law the principle results from *mitigation of damages*.[312] However, in French law the case law seems to be hostile to the recognition of a duty to minimise the harm suffered by the party seeking performance.[313]

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306 '*… Non à définir une obligation de faire au sens de l'article 1142 du Code civil, qui se résout en dommages et intérêts en cas d'inexécution, mais bien une fin de non-recevoir conventionnelle interdisant au bénéficiaire de faire valablement jouer sa garantie sans avoir préalablement et loyalement informé le garant des motifs de sa mise en œuvre*', Paris 17 May 2002, 3e ch. B, JCP E 2004. 29, n° 1, obs. J.-J. CAUSSAIN, FL. DEBOISSY and G. WICKER; see also: Paris 6 December 2002, 25e ch. A, JCP E 2003. 1203, n° 3, obs. J.-J. CAUSSAIN, FL. DEBOISSY and G. WICKER.

307 *'Ainsi, parce qu'il n'a pas délivré l'information promise, dont il est ici relevé le caractère de préalable, le bénéficiaire de la clause, qui a par là-même manqué à la loyauté contractuelle, est irrecevable à exiger du garant l'exécution de son obligation*', G. WICKER, article cited above, n° 31.

308 See G. WICKER, *ibid*, who holds that *incombance* applies to the operation of a mixed condition.

309 '*… Ne pouvait se prévaloir de la défaillance d'une condition dont il avait lui-même empêché l'accomplissement*', Cass. com. 27 March 1990, D. 1991. 503, note J. BONNARD.

310 See H. BOUCARD, *L'agréation de la livraison dans la vente, Essai de théorie générale*, thesis cited above, n° 492 onwards – *Adde infra* in respect of the Vienna Convention.

311 See § 254 II BGB, where '*the fault of the injured person is limited (…) to failing to avert or reduce the damage*'; Article 44 I CO, to which Article 99 III refers: '*the court may reduce the damages, or even decline to allocate them, when the facts which (the injured party) is responsible for have contributed to the creation of the damage, its increase, or they have aggravated the debtor's situation*'.

312 On which see M. ELLAND-GOLDSMITH 'La *"mitigation of damages"* en droit anglais', *L'obligation de minimiser les dommages en cas d'inexécution des contrats internationaux* Colloque Feduci, dir. B. HANOTIAU [s.l., s.d.] *RDAI* 1987/4 p. 347-358, and 'Note sur la *"mitigation of damages"* en droit américain', *ibid.* p. 359-361; H. MUIR WATT *'La modération des dommages en droit anglo-américain'*, *Faut-il moraliser le droit français de la réparation du dommage? (à propos des dommages et intérêts punitifs et de l'obligation de minimiser son propre dommage)*, cited above, p. 45-49.

313 See, about delictual liability: Cass. civ. 2ème, 19 June 2003, [2 esp.]: Bull. civ. 2003, II, 203; D. 2003, p. 2326, note CHAZAL; ibid. 2004, somm. p. 1346, obs. D. MAZEAUD; Dr. et patrimoine November 2003, p. 83, obs. CHABAS; Resp. civ. et assur. 2004, chron. 2, by AGARD; JCP G 2003, II, 10170, note CASTETS-RENARD; ibid. 2004, I, 101, n° 9, obs. G. VINEY; RTD civ. 2003, p. 716, obs. JOURDAIN; LPA 17 October 2003, n° 208, p. 16, note REIFEGERSTE;

12. Several illustrations of the final function of the principle of consistency, which consists of not being able to obtain contractual sanction in the name of non-performance where it had previously been tolerated, are also found. The commentary to Article 9: 303 (2),[314] concerning the forfeit of the right to terminate the contract on expiry of a reasonable time, indicates that the approach is recognised in many legal systems on the basis of legal provisions or in the name of a general duty of good faith. In French law, the case law holds that a party who has tolerated non-performance for several years may not, suddenly, validly claim the termination of the contract by operation of law.[315]

We can also note Article 6: 89 BW in Dutch law according to which *'a defect in performance can no longer by invoked by the party who has not promptly notified the other party of his protest in this respect after he has discovered, or should normally have discovered, the defect'*.[316]

B. International law and Acquis communautaire

13. The **Vienna Convention** recognises many applications of the principle of consistency.

Firstly, the right to terminate can be suspended, by virtue of the duty of consistency, as long as the attempts to perform continue. Thus, after the buyer has served notice to perform on the seller, he is forbidden from demanding termination during the time granted.[317] It is the same when, following the refusal of consent, the seller tries to correct delivery. Following Article 47 (2),[318] the buyer may not declare the contract terminated before the expiry of the time given to the seller unless the seller has declared that he will not perform the contract. Article 48 (2) envisages a similar solution when the seller

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ibid. LPA 31 December 2003, n° 261, p. 17, note DAGORNE-LABBE: where the Cour de cassation considered that *'the author of an accident is obliged to rectify all the harmful consequences; that the victim is not obliged to mitigate their loss in the interest of the party responsible'. The approach in the first case has been criticised by part of the legal scholarship. It consisted of an economic prejudice formed by the loss of business following the permanent partial incapacity of the operator. The victim could easily have avoided the loss of their business following the loss of clientele by hiring a third party to replace them.*

314 *Principles of European Contract Law, Part I and II, op.cit*. p. 414.

315 Cass. civ. 1ère, 8 April 1987, Defrénois, 1988, 375, obs. J.-L. AUBERT; JCP 1988, II, 21037, obs. Y. PICOD; RTD civ. 1988, 122, obs. J. MESTRE and 146, obs. PH. RÉMY. – Com. 7 December 1993: RTD civ. 1994, 856, obs. J. MESTRE. – Civ. 1ère, 16 February 1999: D. 2000, somm. comm., 360, obs. D. MAZEAUD.

316 *'Le défaut dans la prestation ne peut plus être invoqué par le créancier qui n'a pas promptement protesté à cet effet auprès du débiteur après qu'il a découvert ou aurait normalement dû découvrir le défaut'*; see also C.B.P. MAHE and E.H. HONDIUS *'Les sanctions de l'inexécution en droit néerlandais'*, *Les sanctions de l'inexécution des obligations contractuelles, ètudes de droit comparé*, dir. M. FONTAINE and G. VINEY, Bruylant/Lgdj, Bruxelles/Paris, 2001, Bibliothèque de la Faculté de droit de l'Université catholique de Louvain t.32, p. 837-870, n° 3: the rule follows from the fact that, *'independently of the action taken by the creditor, he should firstly guarantee that the debtor knows of the failure to perform'*.

317 See Cass. com., 3 December 1952, *Bull. civ*. III n° 376.

proposes to remedy a failure to deliver. If the seller *'requests the buyer to make known whether he will accept performance'* but the buyer *'does not comply with the request within a reasonable time'* the seller may proceed to remedy the failure within the time indicated as the absence of protest from the buyer indicates their permission. Therefore, the buyer may not, before the expiry of the time period, take advantage of a remedy that is incompatible with the regularisation of the contract.[319]

Second, the Vienna Convention does not recognise that a party who is responsible for non-performance can rely on that non-performance against the other party. Thus, according to Article 80, *'a party may not rely on a failure of the other party to perform, to the extent that such failure was caused by the first party's act or omission'*.

The Vienna Convention also adopts the concept of *incombance*. Thus, following Articles 38 (1) and 39 (1), the buyer, who *'must examine the goods, or cause them to be examined, within as short a period as is practicable in the circumstances'*, *'loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it'*. The buyer must carry out an inspection of the goods, then, if necessary, refuse to approve them. If he fails to do so then this will result in the loss of his rights, this is to say the release of the seller.[320] In the same way, the buyer may lose his right to avoid the contract if he does not act within a reasonable time.[321]

The Vienna Convention also adopts the duty to mitigate the damage suffered in Article 77: *'a party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach. If he fails to take such measures, the party in breach may claim a reduction in the damages in the amount by which the loss should have been mitigated'*.

Lastly, we find, as in PECL, the principle according to which the statements or the behaviour of one of the parties can prevent that party from relying on a clause requiring modification by writing if the other party has reasonably relied on it.[322] In the same way,

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318 Article 47 (2): *'Unless the buyer has received notice from the seller that he will not perform within the period so fixed, the buyer may not, during that period, resort to any remedy for breach of contract. However, the buyer is not deprived thereby of any right he may have to claim damages for delay in performance'*.

319 On this question as a whole, see H. BOUCARD, thesis cited above, n° 503.

320 See H. BOUCARD, thesis cited above, n° 153.

321 See Article 49 (2): *'the seller has delivered the goods, the buyer loses the right to declare the contract avoided unless he does so:*

a) in respect of late delivery, within a reasonable time after he has become aware that delivery has been made;

b) in respect of any breach other than late delivery, within a reasonable time:

i) after he knew or ought to have known of the breach;

ii) after the expiration of any additional period of time fixed by the buyer in accordance with paragraph (1) of article 47, or after the seller has declared that he will not perform his obligations within such an additional period; or

iii) *after the expiration of any additional period of time indicated by the seller in accordance with paragraph (2) of article 48, or after the buyer has declared that he will not accept performance'*.

322 See Article 29 (2).

we find the prohibition on invoking incompatible remedies. According to Article 46 (1): *'the buyer may require performance by the seller of his obligations unless the buyer has resorted to a remedy which is inconsistent with this requirement'*.

14. In **Community Law**, the concept of consistency finds its roots, as is often the case, in institutional law. The term is introduced, in a general sense, in the Treaty on the European Union in Article 1 § 3, as the Union's task is *'to organise, in a manner demonstrating consistency and solidarity, relations between the Member States and between their peoples'*,[323] and it contributes to the foundation of *'the objective and the supreme purpose of the European Union to which all the general principles of this Union are subordinated'*.[324] It should be looked at in conjunction with another concept of Community law, the general principle of legitimate reliance/expectations which has been established by the ECJ. This principle *'[corresponds] to an aspect of the principle of legal certainty [and] means that Community authority may not modify, without prior notification and precautions being taken, a provision if it has itself created (…) the legitimate reliance of economic operators …'*.[325] Within the framework of the duty of consistency, legitimate reliance is expressed through the legitimate expectations of the parties and implies that each party does what was envisaged in the contract.[326] The principal manifestation of the duty of consistency, namely that the parties may not act inconsistently with their previous undertakings, has been recognised by the Community judge as a defence in the case of *Dionysia Vlachaki*,[327] describing it as *'[a] related principle of legitimate reliance'*,[328] even if, *in fine*, they then rejected it.

C. Codifications by legal scholars

15. Amongst the different projects studied, it is undoubtedly the **UNIDROIT Principles** that recognise the most applications of the principle of consistency. The principle is posed by Article 1. 8, entitled *'Inconsistent Behaviour'* and which states *'a party cannot act inconsistently with an understanding it has caused the other party to have and upon which that other party reasonably has acted in reliance to its detriment'*. As in PECL, we find an exception to the free revocation of an offer where *'it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer'*.[329] In the same way,

323 Extracts of Article 1 § 3 TEU.

324 *'… L'objectif et la finalité suprême de l'Union européenne à laquelle sont subordonnés tous les principes généraux de cette Union (…)'*; see *'cohérence'*, *in* F. DE LA FUENTE (translation from the Spanish by J. DENIS), *Dictionnaire juridique de l'Union européenne*, Bruxelles, Bruylant, 1998, p. 103.

325 *'… [Correspond] à un aspect du principe de sécurité juridique [et] signifie que l'autorité communautaire ne peut modifier sans précautions une réglementation si elle a elle-même créée (…) la confiance légitime des opérateurs économiques …'*; see *'confiance légitime'*, *in* T. DEBARD, B. LE BAUT-FERRARÈSE and C. NOURISSAT, *Dictionnaire du droit de l'Union européenne*, Paris, Ellipses, 2002, especially p. 56.

326 The duty of consistency appears to correspond to a 'private' manifestation of legitimate reliance.

327 CFI, 8 March 2005, Dionysia Vlachaki, wife of Petros Eleftheriadis v. Commission of the European Communities, T-277/03, Rec. 2005 p. 00000.

328 *'Principe connexe de la confiance légitime'*, point 72 of the above case.

according to Article 2.1.18,[330] the statements and behaviour of one of the parties can prevent that party from taking advantage of a merger clause or a modification by writing clause. Article 7.1.5 deals with the prohibition on cumulating incompatible remedies. Thus, a party who grants additional time to perform may not take advantage of any other remedy (termination, damages etc).

The UNIDROIT Principles also prohibit the party who is responsible for the non-performance from relying on it. Thus, according to Article 7.1.2 *'a party may not rely on the non-performance of the other party to the extent that such non-performance was caused by the first party's act or omission (…)'*. In respect of harm only partially attributable to the party to whom performance is due, Article 7.4.7 states that *'where the harm is due in part to an act or omission of the aggrieved party or to another event as to which that party bears the risk, the amount of damages shall be reduced to the extent that these factors have contributed to the harm, having regard to the conduct of each of the parties'*. Lastly, the Principles adopt the duty incumbent on the aggrieved party to mitigate their harm. Thus, *'the non-performing party is not liable for harm suffered by the aggrieved party to the extent that the harm could have been reduced by the latter party's taking reasonable steps'*.[331]

We also find the principle whereby the right to terminate the contract is lost if the aggrieved party does not act within a reasonable time.[332] In the same way, the party loses his right to demand performance in kind if he does not require the performance of a non-pecuniary obligation within a reasonable time.[333]

16. Several applications of the principle of consistency are to be found in the **European Code of Contract Preliminary Draft**. As in PECL we find the rule concerning apparent authority.[334] It is the same in respect of the prohibition on cumulation of two incompatible remedies. Thus for example, according to Article 110, a creditor who grants additional time for performance can not take advantage of the remedies of enforced performance or termination of the contract. In matters of non-performance, according to Article 114 § 6, *'the creditor has no right to dissolve a contract if the non-performance turns solely on an act or omission attributable to him (…)'*. The same article states that *'neither has the creditor*

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329 Article 2.1.4.

330 *'A contract in writing which contains a clause requiring any modification or termination by agreement to be in a particular form may not be otherwise modified or terminated. However, a party may be precluded by its conduct from asserting such a clause to the extent that the other party has reasonably acted in reliance on that conduct'*.

331 Article 7.4.8 (1).

332 Article 7.3.2 (2): *'If performance has been offered late or otherwise does not conform to the contract the aggrieved party will lose its right to terminate the contract unless it gives notice to the other party within a reasonable time after it has or ought to have become aware of the offer or of the non-conforming performance'*.

333 Article 7.2.2 (e).

334 Article 61: *'If a person lacks authority to act in the name and on behalf of another, but this other party acts in such a way as to lead the third party contracting reasonably to believe that the apparent agent has been granted authority, the contract is concluded between the apparent principal and the third party'*.

this right if he has made the other party convinced that dissolution would not be sought, even in the case of substantial non-performance'. This project therefore establishes the rule according to which the creditor may not demand the sanction of a non-performance which has previously been tolerated.

17. Lastly, the **Proposals for Reform of the Law of Obligations and the Law of Prescription** is the project which recognises the fewest applications of the principle of consistency. This is no doubt explained by the fact that the substantive law, which applies the principle of consistency, is derived from case law which refers, if need be, to Article 1134 paragraph 3 of the Civil Code. Nevertheless, it is still possible to find provisions that apply the principle of consistency.

We find a provision that prohibits the revocation of an offer in contradiction with previous statements. Nonetheless, in contrast to other provisions, the wording chosen does not show the influence of the principle of consistency as clearly.[335] According to Article 1105-4, '*however, where an offer addressed to a particular person includes an undertaking to maintain it for a fixed period, neither its premature revocation nor the incapacity or death of the offeror can prevent the formation of the contract*'.[336]

It is also proposed to introduce the rule drawn from the proverb '*nemo auditur*' into the Civil Code and to extend its scope to all unlawful acts, and not to immoral ones alone.[337]

In respect of the prohibition on the creditor demanding reparation of damage for which he is responsible, there is reason to apply Article 1350, shared between both types of liability, which states that '*a victim cannot recover any reparation where he deliberately sought the harm*'.[338] Article 1351 further specifies that '*a partial defence to liability can only apply where the victim's fault contributed to the production of the harm*'.[339]

Lastly, the proposals establish the principle of a duty to mitigate damage. Thus, Article 1373, shared between both orders of liability, states that '*where the victim had the possibility of taking reliable, reasonable and proportionate measures to reduce the extent of his loss or to avoid its getting worse, the court shall take account of his failure to do so by reducing his compensation, except where the measures to be taken were of a kind to have compromised his physical integrity*'.[340]

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335 See however, D. MAZEAUD, *La confiance légitime et l'estoppel*, article cited above, n° 30, for whom the provision shows the penetration of the concept into the French legal order.

336 J. CARTWRIGHT and S. WHITTAKER, *op.cit*.

337 Article 1162-3: '*Restitution may be refused to a person who has knowingly violated public policy, public morality or more generally, any mandatory rule*', *ibid*.

338 *Ibid*.

339 The provision then states that '*in the case of personal injury, only a serious fault can lead to a partial defence*', *ibid*.

340 *Ibid*.

IV. Proposed text

Article 0-304: Duty of consistency

No party shall act inconsistently with any prior statements made by the party or behaviour on the part of the party, upon which the other party may legitimately have relied.

Text of the Guiding Principles of European Contract Law

Section I:
Freedom of contract

Article 0-101: Freedom of the parties to enter into a contract
Each party is free to contract and to choose the other party.
The parties are free to determine the content of the contract and the rules of form which apply to it.
Freedom of contract operates subject to compliance with mandatory rules.

Article 0-102: Respect for the freedom and rights of third parties
Each party can only contract for themselves, unless otherwise provided.
A contract can only produce an effect in as much as it does not result in an infringement of unlawful modification of third party rights.

Article 0-103: Freedom of the parties to modify or put an end to the contract
By their mutual agreement, the parties are free, at any moment, to terminate the contract or to modify it.
Unilateral termination is only effective in respect of contracts for an indefinite period.

Section II:
Contractual Certainty

Article 0-201: Principle of binding force
A contract which is lawfully concluded has binding force between the parties.
In addition to the performance of the contractual obligations, each party is bound to comply with the duties which can be implied from the principle of contractual fairness.
In the course of performance, the binding force of the contract can be called into question if an unforeseeable change of circumstances seriously compromises the usefulness of the contract for one of the parties.

Article 0-202: Right to performance
Each party can demand from the other party the performance of the other party's obligation as provided in the contract.

Article 0-203: Rights and duties of third parties
A contract creates a situation which third parties must respect and upon which they may rely without being able to require performance.

Article 0-204: Principle favouring the maintenance of the contract
When a contract is subject to interpretation, or when its validity or performance is threatened, the effectiveness of the contract should be preferred if its destruction would harm the legitimate interests of one of the parties.

Section III:
Contractual Fairness

Article 0-301: General duty of good faith and fair dealing
Each party is bound to act in conformity with the requirements of good faith and fair dealing, from the negotiation of the contract until all of its provisions have been given effect.
The parties may neither exclude this duty, nor limit it.

Article 0-302: Performance in good faith
Every contract must be performed in good faith.
The parties may avail themselves of the contractual rights and terms only in accordance with the objective that justified their inclusion in the contract.
Each party is required not to do anything that prevents the performance of the contract or that infringes the rights that the other party acquires from the contract.
Where one of the parties, without compromising the performance of the contract, has acted in such a way as to reduce the benefit that the other party could legitimately expect from the contract, the party is required, at the request of the other party, to renegotiate the contents of the contract.

Article 0-303: Duty to cooperate
The parties are bound to cooperate with each other when necessary for the performance of their contract.

Article 0-304: Duty of consistency
No party shall act inconsistently with any prior statements made by the party or behaviour on the part of the party, upon which the other party may legitimately have relied.

Part III
Revised Principles of European Contract Law

Chapter 2:
Formation

Section 1:
Pre-contractual Negotiations (addition)

Article 2:101: Duty to Negotiate in Good Faith and Fair Dealing (replacing article 2:301: Negotiations Contrary to Good Faith)

(1) Parties are free to initiate, continue and break off pre-contractual negotiations, provided they act in accordance with the requirements of good faith and fair dealing. The failure of pre-contractual negotiations can only give rise to liability if it is the consequence of a fault or actions contrary to good faith and fair dealing of either party.
(2) A party who enters into or pursues pre-contractual negotiations without the intention of concluding a contract, does not respect the requirement to negotiate in accordance with good faith and fair dealing.
(3) A party who breaks off pre-contractual negotiations for no legitimate reason, while the other party could legitimately believe that a contract would be concluded, acts contrary to the requirements of good faith and fair dealing.

Article 2:102: Duty of Information (addition)

(1) In principle, each of the parties to a contract must inform itself of the conditions of the conclusion of the contract.
(2) During pre-contractual negotiations, each of the parties is obliged to answer with loyalty any questions put to it, and to reveal any information that may influence the conclusion of the contract.
(3) A party which has a particular technical competence regarding the subject matter of the contract bears a more onerous duty of information as regards the other party.
(4) A party who fails to comply with its duty of information, as defined in the preceding paragraphs, or who supplies inaccurate information shall be held liable unless such party had legitimate reasons to believe such information was accurate.

Article 2:103: Duty of Confidentiality (restatement of article 2:302: Breach of Confidentiality)

If confidential information is given by one party in the course of negotiations, the other party is under a duty not to disclose that information or use it for its own purposes whether or not a contract is subsequently concluded. The remedy for breach of this duty may include compensation for losses suffered and restitution of the benefit received by the other party.

Section 2:
General Provisions

Article 2:201: Conditions for the Conclusion of a Contract (partial restatement of article 2:101)

(1) A contract is concluded if:
  (a) the parties have shown their intention to be legally bound,
  (b) and have reached an agreement on the fundamental elements of the contract.
(2) Subject to the exceptions provided by the present principles or by the law applicable to the contract, a contract need not be concluded or evidenced in writing nor is it subject to any formal requirements.
(3) The contract may then be evidenced by any means, including the use of witnesses.

Article 2:202: Intention (modification of article 2:102)

(1) A party must have shown its intention to be legally bound as regards the other contracting party, in order to be considered as legally bound by a contract,
(2) The intention of a party to be legally bound may be determined from its statements or conduct as reasonably understood by the other party.

Article 2:203: Agreement as to the Fundamental Elements of the Contract (replacing article 2:103: Sufficient Agreement)

(1) A contract is concluded when the parties have reached an agreement as to its fundamental elements. The parties have the right to designate as fundamental any element which, otherwise, would be considered as accessory.
(2) The fundamental elements of a contract are present when the purpose specially pursued by each of the parties is determined and can be achieved by the enforcement of the contract so envisaged, completed if necessary by the application of the present principles.
(3) In the case of lack of agreement between the parties on a point that is accessory or declared as such, the contract can be completed by application of the present principles and, if necessary, by application to the courts.

Article 2:204: Terms Not Individually Negotiated (restatement of article 2:104)

(1) Contract terms which have not been individually negotiated may be invoked against a party who did not know of them only if the party invoking them took reasonable steps to bring them to the other party's attention before or when the contract was concluded.
(2) Terms are not brought appropriately to a party's attention by a mere reference to them in a contract document, even if that party signs the document.

Article 2:205: Merger Clauses (partial rewording of article 2:105: Merger clause)

(1) The parties may insert a merger clause into the contract stating that any prior statements or undertakings which are not embodied in the writing do not form part of the contract.
(2) If the merger clause is not individually negotiated, it will only establish a presumption that the parties intended that their prior statements, undertakings or agreements were not to form part of the contract. This rule may not be excluded or restricted.

(3) A party may, by its statements or conduct, be precluded from asserting a merger clause to the extent that the other party has reasonably relied on them.
(4) The parties' prior statements may be used to interpret the contract. This rule may not be excluded or restricted except by an individually negotiated clause.

Article 2:206: Written Modification Only (restatement of article 2:106)

(1) A clause in a written contract requiring any modification or ending by agreement to be made in writing, establishes only a presumption that an agreement to modify or end the contract is not intended to be legally binding unless it is in writing.
(2) A party may by its statements or conduct be precluded from asserting such a clause to the extent that the other party has reasonably relied on them.

Article 2:207: Promises Binding without Acceptance (modification of article 2:107 Promises Binding without Acceptance)

A party may be legally bound in the absence of any acceptance by merely showing its intention to be bound. This promise is subject to the rules that govern contracts, as regards its validity and its effects, subject to any appropriate modifications.

Section 3: Offer and Acceptance

Article 2:301: General points (addition)

In principle, a contract is formed by the meeting of an offer and an acceptance.

Article 2:302: Offer (partial rewording of article 2: 201)

(1) A proposal will amount to an offer if,
  (a) it is intended to result in a contract if the other party accepts, and
  (b) it contains the elements which are fundamental to form a contract.
  (c) whether it is addressed to one or more specific persons or to the public at large.
(2) A proposal made by a professional supplier in a public advertisement or a catalogue, or by a display of good to supply goods or services at stated prices constitutes an offer. It is binding on the supplier until the stock of goods, or the capacity to supply the service, is exhausted.

Article 2:303: Revocation of an Offer (modification of article 2: 202)

(1) An offer may be freely revoked as long as it has not come to the attention of the offeree. If the offer has reached the offeree and contains no fixed time for its acceptance, it can be only be revoked after reasonable time.
(2) Revocation of an offer is ineffective:
  (a) if the offer indicates that it is irrevocable; or
  (b) the offer states a fixed time for its acceptance; or
  (c) if the revocation, occuring before a reasonable time has elapsed, negatively affects the legitimate expectation of the offeree who acted in reliance on the offer.
(3) The death or the incapacity of the offeror does not in itself result in the offer lapsing.
(4) An offer made to the public at large can be revoked in the same way as it was made.

Article 2:304: Extinction of the Offer
(modification of article 2:203: Rejection)

(1) An offer lapses at the expiration of the fixed time which was granted for its acceptance or, in the absence thereof, after reasonable time.
(2) An offer also lapses when its rejection reaches the offeror, whatever the time period given for acceptance.

Article 2:305: Acceptance
(partial restatement and modification of article 2:204)

(1) Any form of statement or conduct by the offeree is an acceptance if it indicates assent to the offer.
(2) Silence or inaction does not amount to acceptance, except in the case where:
  (a) the parties have provided by contract for it;
  (b) the legal provisions or usages applicable to the contract contain provisions to this effect;
  (c) the offer has been made in the sole interests of the offeree.

Article 2:306: Time of Conclusion of the Contract
(restatement of article 2:205)

(1) If an acceptance has been dispatched by the offeree, the contract is concluded when the acceptance reaches the offeror.
(2) In the case of acceptance by conduct, the contract is concluded when notice of the conduct reaches the offeror.
(3) If by virtue of the offer, of practices which the parties have established between themselves, or of a usage, the offeree may accept the offer by performing an act without notice to the offeror, the contract is concluded when the performance of the act begins.

Article 2:307: Time Limit for Acceptance
(restatement of article 2:206)

(1) In order to be effective, acceptance of an offer must reach the offeror within the time fixed by it.
(2) If no time has been fixed by the offeror, acceptance must reach it within a reasonable time.
(3) In the case of an acceptance by an act of performance under art. 2:306 (3), the performance must be commenced within the time for acceptance fixed by the offeror or, if no such time is fixed, within a reasonable time.

Article 2:308: Late Acceptance
(partial restatement and modification of article 2:207: Late Acceptance)

(1) A late acceptance is treated as new offer, the contents of which are identical to that of the initial offer, and which must be accepted without delay by the initial offeror.
(2) If the delay is not imputable to the offeree, the late acceptance of an offer is treated as new offer which is deemed to be accepted by the initial offeror, unless the initial offeror notifies the offeree of its refusal as soon as possible.

Article 2:309: Modified Acceptance
(partial restatement and modification of article 2:208: Modified Acceptance)

(1) A reply by the offeree which states or implies additional or different terms which would materially alter the terms of the offer, is a rejection and a new offer. This is the case in particular where the offeree modifies a fundamental element of the contract or seeks to impose a new duty or burden on the other contracting party.

(2) A reply which gives a definite assent to an offer operates as an acceptance even if it states or implies additional or different terms, provided these do not materially alter the terms of the offer. The additional or different terms are then incorporated into the contract. However the reply containing non-material additional or different terms, will nonetheless be treated as a rejection of the offer if:
   (a) the offer limits acceptance to the terms of the offer; or
   (b) the offeror objects to the non-material additional or different terms without delay; or
   (c) the offeree makes its acceptance conditional upon the offeror's assent to the non-material additional or different terms, and the assent does not reach the offeree within a reasonable time.

Article 2:310: A Professional's Written Confirmation
(restatement of article 2:210)

If professionals have concluded a contract but have not embodied it in a final document, and one, without delay, sends the other a written document which purports to be a confirmation of the contract but which contains additional or different terms, such terms will become part of the contract unless:

(a) the terms materially alter the terms of the contract, or

(b) the addressee objects to them without delay.

Article 2:311: Conflicting General Conditions
(formal rewording of article 2:209 Conflicting General Conditions)

(1) General conditions of a contract are terms which have been formulated in advance by one or other of the parties for an indefinite number of contracts of a certain nature, and which have not been individually negotiated between the parties.

(2) If the parties have reached agreement except that the offer and acceptance refer to conflicting general conditions of contract, a contract is nonetheless formed, unless a party:
   (a) has, beforehand, opposed the conclusion of a contract in such a case, expressly and not by way of general conditions;
   (b) without delay, informs the other party that it does not intend to be bound by the contract;

(3) The general conditions form part of the contract to the extent that they are common in substance.

Article 2:312: Contracts not Concluded by Offer and Acceptance
(restatement of article 2:211)

The rules in this section apply with appropriate adaptations even though the process of conclusion of a contract cannot be analysed using the concepts of offer and acceptance.

Chapter 3:
Authority of Agents

Section 1:
General Provisions

Article 3:101: Scope of the Chapter (modified)
(1) This chapter governs the authority of an agent or other intermediary to bind its principal in relation to a contract with a third party.
(2) This chapter does not govern an agent's authority bestowed by law or the authority of an agent appointed by a public or judicial authority.
(3) This chapter governs the relations between an agent or intermediary and its principal.

Article 3:102: Categories of Representation (restatement)
(1) Where an agent acts in the name of a principal, the rules on direct representation apply (Section 2). It is irrelevant whether the principal's identity is revealed at the time the agent acts or is to be revealed later.
(2) Where an intermediary acts on instructions and on behalf of, but not in the name of, a principal, or where the third party neither knows nor has reason to know that the intermediary acts as an agent, the rules on indirect representation apply. (Section 3)

Section 2:
Direct Representation

Article 3:201: Express, Implied and Apparent Authority (modified)
(1) The principal's grant of authority to an agent to act in its name may be express or may be implied from the circumstances.
(2) The agent has authority to perform all acts necessary in the circumstances to achieve the purposes for which the authority was granted, subject to any express or implied limitation of its authority.
(3) A person is to be treated as having granted authority to an apparent agent if the person's statements or conduct induce the third party to believe, reasonably and in good faith, that the apparent agent has been granted authority for the act performed by it.

Article 3:202: Agent acting in Exercise of its Authority (modified)
Where an agent is acting within its authority as defined by article 3.201, its acts bind the principal and the third party who knew or ought to have known of the status of the agent, directly to each other. The agent itself is not bound as regards the third party.

Article 3:203: Lack or Misuse of Authority (modified)

(1) Where a person acting as an agent acts without authority or outside the scope of its authority, its acts are not binding upon the principal and the third party.
(2) Failing ratification by the principal according to article 3:209, the agent is liable to pay the third party such damages as will place the third party in the same position as if the agent had acted with authority. This does not apply if the third party knew or could not have been unaware of the agent's lack of authority.

Article 3:204: Misappropriation of Authority (addition)

When an agent misappropriates the authority with which he was entrusted, the principal is not bound if the third party knew or should have known of this misappropriation. The misappropriation of authority constitutes a fault for which the agent may be liable.

Article 3:205: Unidentified Principal (renumbered)

If an agent enters into a contract in the name of a principal whose identity is to be revealed later, but fails to reveal that identity within a reasonable time after a request by the third party, the agent itself is bound by the contract.

Article 3:206: Conflict of Interest (modified)

(1) If a contract, concluded by an agent, involves the agent in a conflict of interest of which the third party knew or could not have been unaware, the principal may avoid the contract according to the provisions of articles 4:401 to 4:507.
(2) There is presumed to be a conflict of interest where:
  (a) the agent also acted as agent for the third party; or
  (b) the contract was with the agent itself in the agent's personal capacity.
(3) However, the principal may not avoid the contract:
  (a) if it had consented to, or could not have been unaware of, the agent so acting; or
  (b) if the agent had disclosed the conflict of interest to the principal and the principal did not object within a reasonable time.

The present rule applies, subject to any special provisions.

Article 3:207: Multiple Agents (addition)

(1) Where several agents have been given the same authority by a principal, each one can act separately unless otherwise agreed.
(2) Each of the agents can oppose the action of the other agents, before the formation of a contract with a third party, so as to render the third party "mala fides".

Article 3:208: Sub-Agency (modified)

In the absence of contrary provisions, an agent has implied authority to appoint a sub-agent to carry out tasks which are not of a personal character and which it is not reasonable to expect to carry out itself. The rules of this section apply to the sub-agency; acts of the sub-agent which are within its authority and the authority of the agent, bind the principal and the third party directly to each other.

Article 3:209: Ratification by the Principal (modified)

(1) Where a person acting as an agent, acts without authority or outside its authority, the principal may ratify the agent's acts.
(2) The ratification occurs either by the execution of the contract or by notification to the third party within a reasonable time.
(3) When a third party did not know and could not reasonably have known of the lack of authority of the agent at the time the act was carried out, it may, at any time before ratification, indicate to principal, by way of notification, its refusal to be bound by the ratification.
(4) Ratification has a retroactive effect, subject to the rights of any third party.

Article 3:210: Third Party's Right with Respect to Confirmation of Authority (modified)

Where a third party is in doubt about the existence or scope of an agent's authority, it may send a request for written confirmation to the principal or request ratification from it in accordance with the provisions of article 3:209. The principal must respond within the time period fixed by the third party or, if no period is specified, within a reasonable time. If the principal does not object to the confirmation or complies with the request for ratification without delay, the agent's act is treated as having been authorised.

Article 3:211: Extinction of Authority (modified)

(1) An agent's authority ends when:
  (a) the agent's authority has been brought to an end by the principal, the agent, or both; or
  (b) the acts for which the authority had been granted have been completed, or the time for which the authority had been granted has expired; or
  (c) the principal or the agent has died, become incapacitated or insolvent;
(2) However, for a reasonable time, the agent remains authorised to perform those acts which are necessary to protect the interests of the principal or its successors;
(3) The extinction of authority affects a third party only as from the time when the third party becomes aware of the extinction or ought to have become aware of it.

Article 3:212: Preservation of Principal's Prerogatives (addition)

Notwithstanding the authority entrusted to the agent, the principal retains the right to contract itself, although it may be necessary to indemnify the agent if it has been granted an exclusivity clause.

Section 3:
Indirect Representation

Article 3:301[(new)]: The Insolvency of an Agent or Non-performance of an Obligation Fundamental to the Principal

Subject to any specific provisions, if an agent becomes insolvent, or fails to perform an obligation that is fundamental to the principal, or if prior to the time for performance it is clear that there will be a failure to perform such obligation:

(a) on the principal's demand, made by way of notification to the agent, the agent must communicate the name and address of the third party to the principal; and
(b) the principal may exercise the rights acquired on the principal's behalf by the agent, against the third party, subject to any defences which the third party may invoke against the agent.
(c) the rights granted by the present article may be exercised only if the third party is given notice of the intention to exercise them. From the receipt of the notification, the third party is no longer entitled to perform into the hands of the agent.

Chapter 4
Invalidity of Contract

Section 1:
General Provisions

Article 4:101: Scope of Invalidity of Contract (modification of article 4: 101: Matters not Covered)

(1) This chapter deals with invalidity arising from:
  (a) mistake, fraud, threats or obviously excessive advantage, and;
  (b) violation of fundamental principles, mandatory rules and rights of the third parties.
(2) It does not deal with the consequences of the lack of capacity of the parties.
(3) It applies to contracts and, with the appropriate adaptations, to all juridical acts.

Article 4:102: Initial Impossibility (modification of article 4:102)

(1) A contract is not invalid merely because at the time it was concluded, performance of the obligation assumed was impossible, or because a party was not entitled to dispose of the assets to which the contract relates.
(2) (addition) The persistence of the impossibility at the date at which the obligation must be performed or, in absence of a fixed time period, after a reasonable time has elapsed, puts an end to the contract when, because of this impossibility, the purpose pursued by the parties cannot reasonably be attained.
(3) (addition) However, the persistency of the impossibility gives rise to the payment of damages for non-performance by the contracting party who has assumed the risk of impossibility or, given the circumstances, should have borne such risk.

Section 2:
Invalidity caused by Vitiated Consent

Article 4:201: Invalidity of a Vitiated Contract (partial addition)

(1) (addition) A contract is invalid when the consent of a party has been vitiated.
(2) (article 4:116, partially rewritten) If a ground for avoidance affects only particular terms of a contract, the effect of avoidance is limited to those terms unless,
  (a) the parties agree to render the whole contract invalid;
  (b) or, when such terms are determining regarding the consent of the parties or when the invalidity of such terms would prevent the parties from attaining, by reasonable means, the intended purpose. The party who invokes the determining nature of a term must prove it unless the term relates to a fundamental element of the contract.

Article 4:202: Mistake (rewording and modification of article 4:103: Fundamental Mistake as to Facts or Law)

(1) A mistake of fact or law existing when the contract was concluded may be invoked by a party only if:
  (a) the other party caused the mistake,
  (b) the other party knew or ought to have known of the mistake and it was contrary to the principles of good faith and fair dealing to leave the mistaken party in error; or
  (c) the other party made the same mistake.
(2) However a party may not invoke the mistake if:
  (a) its own mistake was inexcusable in the circumstances, or
  (b) the risk of the mistake was assumed, or should have been borne by such party, having regard to the circumstances and the position of the parties,
  (c) or that, subject to the requirements of good faith and fair dealing, the mistake only affects the value of the property.
(3) A party may only avoid a contract on the basis of mistake if the other party knew or ought to have known that the mistaken party, if it had known the truth, would not have contracted or only done so under fundamentally different conditions.
(4) When the mistake does not concern a fundamental element of the contract, the mistaken party must prove that the other party knew or ought to have known of the mistake in question.

Article 4:203: Inaccuracy in Communication (restatement of article 4:104)

An inaccuracy in the expression or transmission of a statement is to be treated as the mistake of the person who made or sent the statement and article 4:201 applies.

Article 4:204: Adaptation of Contract (modification of article 4:105)

(1) When a party indicates that it is willing to perform, or actually does perform the contract as it was understood by the mistaken party, the contract is to be treated as if it had been concluded as that party understood it.
(2) The other party must indicate its willingness to perform, or render such performance, within a reasonable time, and in any event before the mistaken party gives notice of avoidance and acts, consequently, in such a way that it no longer has any interest in the contract.

(3) Where both parties have made the same mistake, the court may, at the request of either party, bring the contract into accordance with what might reasonably have been agreed had the mistake not occurred, provided that the contract is still of benefit to each of the parties.

Article 4:205: Fraud (modification of article 4:107)

(1) A party may avoid a contract when it has been led to conclude it by the other party's fraudulent representation, or deliberate non-disclosure of any information which, in accordance with the principle of good faith and fair dealing, it should have disclosed.
(2) A mistake induced by fraud is always excusable.

Article 4:206: Threats (modification of article 4:108)

(1) A party may avoid a contract when it has been led to conclude it by fear due to the other party's imminent and serious threat of injury to itself or its relatives or threat of damage to its assets or is relatives' assets.
(2) The threat may be an act which is wrongful in itself or which it is wrongful to use as a means to obtain the conclusion of the contract.

Article 4:207: Obviously Excessive Advantage (rewording and modification of article 4:109: Excessive Benefit or Unfair Advantage)

(1) The avoidance or revision of a contract can be sought by the party suffering from an excessive contractual imbalance arising out of an abusive exploitation of a situation of dependency or weakness.
(2) Upon the request of the party entitled to avoidance, a court may adapt the contract in order to bring it into accordance with what might have been agreed had the requirements of good faith and fair dealing been followed.
(3) A court may also adapt the contract upon the request of a party receiving notice of avoidance for obviously excessive advantage, provided that this party informs the party who gave notice promptly after receiving it and before that party has acted in reliance on it so that it no longer has any interest in the contract.

Article 4:208: Unfair Terms (modification of Article 4:110: Unfair Terms not Individually Negotiated)

(1) A term which creates an excessive contractual imbalance may be avoided or its revision may be sought at the request of the contracting party to whose detriment it operates when:
  (a) the party was in a situation of dependency or weakness
  (b) or if the law specially protects the contracting party, in particular, due to its status as a consumer.
(2) This article does not apply to:
  (a) a term which defines the main subject matter of a contract, provided the term is in plain and intelligible language; or to
  (b) the adequacy in value of one party's obligations compared to the value of the obligations of the other party.

Article 4:209: Third Persons (rewording of article 4:111)

(1) Where a third person for whose acts a party is responsible, or who with a party's assent is involved in the making of a contract:

(a) causes a mistake by giving information, or knows of or ought to have known of a mistake,
(c) commits fraud, makes a threat, or takes unfair advantage from a contract,

remedies under this chapter will be available under the same conditions as if the behaviour or knowledge had been that of the party itself.

(2) Where another person commits fraud, makes a threat, or takes unfair advantage from the contract, remedies under this chapter will be available if the party knew or ought to have known of the relevant facts, or at the time of avoidance the party has not acted in reliance on the contract.

Section 3: Invalidity for Illegality

§ 1 Violation of Fundamental Principles

Article 4:301: Scope of Illegality (modification of article 15:101: Contracts Contrary to Fundamental Principles)

Where the conclusion or performance of a contract is contrary to principles recognised as fundamental in the laws of the Member States of the European Union, that contract is illegal.

Article 4:302: Ineffectiveness of Illegal Contracts (addition)

(1) A contract that is illegal at the date of its conclusion is of no effect.

(2) A contract, which becomes illegal after its conclusion, is of no effect as from the date that this illegality appeared.

§ 2 Violation of a Mandatory Rule

Article 4:303: Scope of Illegality (modification of article 15:102 (1): Contracts Infringing Mandatory Rules)

Where the conclusion or performance of a contract is contrary to a mandatory rule, which applies in accordance with article 1:303 (2), that contract is illegal.

Article 4:304: Identification of the Applicable Sanction (modification of article 15:102 (1) and (2): Contracts Infringing Mandatory Rules)

(1) An illegal contract is, in principle, subject to the sanction provided for by the mandatory rule which has been infringed.

(2) If the infringed mandatory rule does not provide for an applicable sanction, the contract may be rendered either totally or partially ineffective, or even be modified. The scope of the ineffectiveness must be proportional to what is required to make good the damaged interests.

Article 4:305: Total Ineffectiveness of Illegal Contracts (addition)

(1) The total ineffectiveness of a contract means that the contract is without effect from the date of its illegality.

(2) This applies when:

(a) the purpose of the contract is prohibited by mandatory rules,
(b) the contract constitutes a fraudulent infringement of the law,
(c) the illegality affects an essential element of the contract,
(d) the illegal term was determining for the consent of the parties, or
(e) partial effectiveness of the contract would deprive it of all usefulness for one of the parties or would substantially modify the balance of obligations.

Article 4:306: Partial Ineffectiveness of Illegal Contracts (rewording of article 15:103: Partial Ineffectiveness)

(1) In the case of partial ineffectiveness, only part of a contract or a term is rendered ineffective.
(2) When there is partial ineffectiveness of the contract, the person protected by the mandatory rule may nevertheless claim total ineffectiveness.
(3) When the illegality concerns an accessory (non fundamental) term of the contract, this term alone is rendered ineffective. However, the party who acted in good faith may ask for the total ineffectiveness of the contract if:
(a) the illegal term was determining for its consent,
(b) or if the mala fides of the other party compromises the successful outcome of the contract.

Article 4:307: Modification of an Illegal Contract (addition)

(1) A contract may be modified in order to remove the cause of illegality.
(2) The modification may result from a regularization of the contract by the parties.
(3) The modification may also be ordered by the court at the request of one of the parties, as long as the ineffectiveness of the contract has not been established. The modification must in such case protect the initial will of the parties and the usefulness of the contract in the interests of both parties.

§ 3 Violation of the Rights of Third Parties

Article 4:308: Scope of Illegality (addition)

(1) A contract concluded in fraud of the rights of third parties is illegal.
(2) Contracts which illegitimately infringe the actual or conditional rights of a third party, by compromising the performance of a contract or by decreasing the effectiveness of the contract, are fraudulent.

Article 4:309: Ineffectiveness of a Fraudulent Contract (addition)

(1) A fraudulent contract is only deprived of its effects as regards the third parties whose rights it infringes.
(2) However, the contract can be held to be totally ineffective when such a measure is necessary to restore full effectiveness of the third party's rights.
(3) In all cases, the third party affected by fraud can seek restitution from one or other of the parties, in order to re-establish its rights, or from someone who, having full knowledge of the fraud, nevertheless acquired rights over goods that were the subject matter of the fraudulent contract.

Section 4:
The Operation of Invalidation

§ 1 General Provisions

Article 4:401: Invalidation by Notice (partial addition)
(1) (modification of article 4:112: Notice of Avoidance). The invalidation of a void or ineffective contract must take place by way of notice, except in the case of a violation of fundamental principles governed by articles 4:411 et seq.
(2) (addition) With the exception of cases where the contract may be adapted, invalidity is complete when the party receiving notice fails to submit the matter to a court within a reasonable period of time under the circumstances.
(3) (addition) The notice must:
  (a) specify the purpose and the scope of the invalidity of the contract,
  (b) and state, in a clear fashion, the provisions of paragraph (2),
failing which it will be ineffective.

Article 4:402: The Parties Entitled to Give Notice of Invalidity (addition)
(1) The only party entitled to give notice of invalidity of a contract is the party who suffered from a mistake, fraud, threats or obviously excessive advantage by the other party.
(2) The ineffectiveness of a contract due to the violation of mandatory rules may be notified by any party who has an interest in the proceedings, except for the party who had contracted with the party protected by the rule infringed.
(3) The ineffectiveness of a contract due to the violation of the rights of third parties, may only be notified by a person whose rights have been infringed by the fraudulent act.

Article 4:403: Recipients of the Notice (addition)
(1) When a party invokes invalidity, notice must be sent to the other party.
(2) When a third party invokes invalidity, notice must be sent to each of the parties.

Article 4:404: Judicial Invalidation (addition)
In the absence of any notice by the parties and as long as the right to give notice is not prescribed, the invalidity of a contract may be judicially declared during legal proceedings if one of the parties or a third party raises such invalidity as a defence.

Article 4:405: Time Limits (partial addition)
(1) (Article 4: 113 (1) modified) Notice of invalidity must be given within a reasonable time, with due regard to the circumstances, after the party giving notice knew or ought to have known of the relevant facts or became capable of acting freely.
(2) The invalidity of a contract may not occur outside the prescription period fixed by legal provisions.
(3) If the contract or the litigious term has not been performed:
  (a) notice of invalidity may still be given, a reasonable time after the performance of the contract or the term was requested by a party,
  (b) equally invalidity may be raised every time the contract is invoked before the courts to support a claim.

Article 4:406: Interrogatory Action (addition)

The party entitled to give notice of invalidity may be put on notice, by the other party or any third party which has an interest in the proceedings, to proceed with notification within a reasonable time, failing which such party may lose its right.

Article 4:407: Confirmation (partial addition)

(1) (modification of article 4:114) Except where a mandatory rule has been violated, the party who is entitled to give notice of the invalidity of a contract can confirm the contract, expressly or impliedly, once it knows of the ground for invalidity, or, where the party has suffered a threat, becomes capable of acting freely.
(2) (addition) The confirmation operates only in respect of the ground of avoidance of which the contracting party was aware.
(3) (addition) The confirmation does not deprive the other parties entitled to give notice of invalidity to exercise such right.
(4) (addition) Subject to the rights of the third parties, the confirmation gives legal effect to the contract from the moment of its conclusion.

Article 4:408: Plurality of remedies (addition)

Where an action is brought before a court concerning the validity of a contract, the parties to the proceedings may claim any of the remedies offered by the present chapter without being bound by the terms of the notice of invalidity sent by application of article 4:401.

Article 4:409: Exclusion or Restriction of Remedies (article 4:118 modified)

(1) The parties cannot exclude or restrict the remedies for fraud, threats, obviously excessive advantage or illegality of contract.
(2) The parties may, subject to the principles of good faith and fair dealing, exclude or restrict the remedies for mistake and incorrect information.

Article 4:410: Remedies for Non-performance (article 4:119 completed)

(1) A party who is entitled to a remedy under this chapter in circumstances which afford that party a remedy for non-performance, may pursue either remedy.
(2) (addition) The choice of a remedy based on the non-performance will bring about the confirmation of the contract.
(3) (addition) The choice of a remedy set out in the present chapter will not affect the ability of a party to subsequently take advantage of a remedy based on non-performance.

§ 2 Special Provisions Concerning the Violation of Fundamental Principles

Article 4:411: Procedure for Invalidation (addition)

(1) A contract which infringes the principles recognised as fundamental in the laws of the Member States of the European Union is deprived of any effect.
(2) If, however, one of the parties or a third party attempts to rely on such a contract, a court must declare its total ineffectiveness, ex officio or at the request of any third party which has an interest in the proceedings.
(3) The total ineffectiveness of an illegal contract does not prevent the application of the rules concerning restitution or damages defined by section 5 of the present chapter.

Article 4:412: Regularization of an Illegal Contract (addition)
A contract that was initially illegal may take effect after the parties have modified it and removed the cause of the illegality.

Section 5:
Consequences of Invalidation

§ 1 General Provisions

Article 4:501: Principle (addition)
In the conditions laid down in the present section, the invalidation of a contract obliges each of the parties to return what they received under the contract and if necessary to indemnify the other party.

Article 4:502: Exclusion or Restriction of Remedies (addition)
(1) The parties cannot exclude or restrict the remedies which sanction the avoidance of a contract for fraud, threats, obviously excessive advantage or illegality of contract.
(2) The parties may, subject to the principle of good faith and fair dealing, exclude or restrict the remedies which sanction avoidance of a contract for mistake or incorrect information.

§ 2 Restitutions following the Invalidation

Article 4:503: Right to Restitution (modification of articles 4:115 & 15:104)
(1) (modification of article 4:115) As a consequence of invalidation, either party may claim restitution of whatever it has supplied under the contract or the invalid part of the contract, provided it makes concurrent restitution of whatever it has received.
(2) (addition) When the cause of invalidity arises during the performance, there is restitution only if it seems unjust for the parties to keep what they have already received with due regard to the nature and purpose of the contract.
(3) (addition) In all cases, the provisions of article 10: 201 concerning the right to suspend performance, apply with appropriate adaptations.

Article 4:504: Loss of Right to Restitution (addition)
The party who contracted in full knowledge of the cause of the invalidity or ought to have known of such cause may be deprived of its right to restitution.

Article 4:505: Restitution Regime (restatement of article 6:211 DCFR)
The claim for restitution and its subject matter are subject to the rules of article 10:312.

§ 3 Damages

Article 4:506: Damages payable in the Event of Invalidation (modification of articles 4:117 & 15:105)

(1) (fusion of articles 4:117 & 15:105) When a contract is invalidated, the party who did not know of the cause of invalidity, whilst the other party knew or ought to have known of such cause, may recover damages from the other party. These damages are awarded for the purpose of placing the party in the same position (insofar as possible) as it would have been in if the contract had not been concluded.

(2) (article 4:117 (3) extended) For other matters, damages shall be awarded in accordance with the relevant provisions of chapter 9, section 5, with appropriate adaptations.

Article 4:507 Damages without Invalidation of the Contract (modification of article 4:117 (2))

(1) (modification of article 4:117 (2)) If a party has the right to avoid a contract under this chapter, but does not exercise that right or has lost that right under the provisions of articles 4:405, 4:406, 4:407 or 4:410 (2), it may recover damages, from the other party, limited to the loss suffered as a result of the cause for the avoidance, if the other party knew or ought to have known of the cause for the avoidance.

(2) (extension of article 4:117 (2)) In all other respects, the damages shall be awarded in accordance with the relevant provisions of chapter 9, section 5, with appropriate adaptations.

Chapter 5: Interpretation

Article 5:101: General Rules of Interpretation of Contract (restatement of article 5:101 (1) & (3))

(1) A contract is to be interpreted according to the common intention of the parties even if this differs from the literal meaning of the words.

(2) If a common intention cannot be established, the contract is to be interpreted according to the meaning that reasonable persons of the same kind as the parties would give to it in the same circumstances.

Article 5:102: Rules for Interpreting Declarations and Conduct (rewording of paragraph 2 of article 5:101)

The declarations and the conduct of a party are to be interpreted according to the intention of their author when the other party knew or could not have been unaware of this intention.

Article 5:103: Rules of Interpretation of Non-Contractual Acts (addition)

(1) The rules of articles 5:101 and 5:102 apply to non-contractual acts, with the necessary adaptations.

(2) In the interpretation of a unilateral act, the real intention of its author must prevail or, if that cannot be established, it should be interpreted in the most reasonable way.

(3) In the interpretation of a collective decision, the common intention of the authors of the decision must prevail or, if that cannot be established, it should be interpreted in the way which is closest to the common interest of all members of the group.

Article 5:104: Relevant Circumstances (modification of article 5:102)

When interpreting a contract, particular account shall be taken of:

(a) the circumstances in which it was concluded, including the preliminary negotiations;
(b) the conduct of the parties, even that subsequent to the conclusion of the contract;
(c) the nature and purpose of the contract;
(d) the interpretation which has already been given to similar clauses by the parties and to practices that the parties have established between themselves;
(e) the meaning commonly given to such terms and expressions in the branch of activity concerned and the interpretation similar clauses may already have received;
(f) usages.

Article 5:105: Preferential Interpretation (modification of article 5:103)

When a contractual rule has been established under the dominant influence of one party, if there is any doubt, the provision must be interpreted in favour of the other party.
In particular, terms of the contract will be interpreted against the party which supplied them.

Article 5:106: Preference to Negotiated Terms (restatement of article 5:104)

Terms which have been individually negotiated take preference over those which have not been.

Article 5:107: Reference to the Contract as a Whole (completion of article 5:105)

Terms are to be interpreted in the light of the whole contract in which they appear.
In a series of interdependent contracts, such contracts shall be interpreted by reference to the set of contracts of which they form part.

Article 5:108: Terms to Be Given Effect (restatement of article 5:106)

An interpretation which renders the terms of a contract lawful, or effective, is to be preferred to one which does not.

Article 5:109: Linguistic Discrepancies (restatement of article 5:107)

Where a contract is drawn up in two or more language versions, none of which is stated to be authoritative, there is, in case of discrepancy between the versions, a preference for the interpretation according to the language version in which the contract was originally drawn up.

Chapter 6:
Contents and Effects

(formerly articles 6:101 to 6:108 of PECL)

Article 6:101: Determination of the Contents (addition)
The contents of a contract are made up of express or implied obligations. The contents include the type of service provided, the time for execution, and the price.

Article 6:102: Implied Terms (modification of articles 6:101 and 6:102)
(1) (rewording of article 6:102) Implied terms are determined by reference to the intention of the parties and their usual relations. They are also determined by considering the nature and the purpose of the contract as read in the light of law, common practice and equity.
(2) (rewording of article 6: 101) In the absence of a merger clause, an implied term can be deduced from a statement made by a party before the conclusion of contract if the statement could reasonably have been understood as such by the contracting party in the circumstances. This will be the case depending on:
   (a) the apparent importance of the statement to the other party;
   (b) usual business practice;
   (c) market conditions;
   (d) the relative expertise of both parties.

Article 6:103: Obligations to Use Best Efforts and Obligations to achieve a Particular Result (addition)
(1) The debtor of an obligation to achieve a particular result undertakes to provide the promised result. The failure to fulfil this obligation is established by the sole fact that the result was not achieved, except in the case of an impediment within the meaning of article 9:107.
(2) The debtor of an obligation to use best efforts undertakes to execute the obligation with the care and diligence of a reasonable person of the same position, placed in the same situation. The failure to fulfil this obligation must be proved.
(3) In order to determine if an obligation is an obligation to use best efforts or to achieve a particular result, the following will be taken into account:
   (a) the intention of the parties, which can be established by reference to the quality of the service performed and how it relates to the agreed price
   (b) the degree of hazard normally encountered in the pursuit of the required result
   (c) the influence the debtor can have on the execution of the obligation
   (d) the nature and the purpose of the contract.

Article 6:104: Determination of the Quality of Performance (modification of article 6:108)
Where this cannot be determined or ascertained according to the indications given by the parties, the quality of the service performed must be at least equal to the average performance with regard to the general economy of the contract. To determine this, the following are taken into consideration:
(a) the practices of the profession and/or the type of operation
(b) the amount of the consideration.

Article 6:105: Determination of the Duration of a Contract (addition)
In the absence of a fixed duration or where a duration cannot be ascertained from the indications of the parties, the agreement is considered to be entered into for a reasonable minimum duration taking into account the general economy of the contract. In particular, the investments required and the time necessary for their amortization will be taken into account.

Article 6:106: Determination of the Price (modification of article 6:104)
In the absence of a fixed price or where a price cannot be ascertained from the indications of the parties, the agreement is considered to relate to a reasonable price taking into account market prices at the time of the conclusion of the contract.

Article 6:107: Unilateral Determination by a Party (completion of article 6:105)
Where the price or any other contractual term is to be unilaterally determined by one party and the determination is grossly unreasonable, then, notwithstanding any provision to the contrary, a reasonable price or any other reasonable term shall be substituted. The same applies when a party who was to fix the price or any other term of the contract, fails to do so.

Article 6:108: Determination by a Third Party (modification of article 6:106)
Where the price or any other contractual term is to be determined by a third person, and the third party fails to do so, the parties are presumed to have empowered the court to appoint another person. If a price or any other term fixed by a third person is grossly unreasonable, a reasonable price or any other reasonable term shall be substituted.

Article 6:109: Reference to a Non Existent Factor (restatement of article 6:107)
Where the price or any other contractual term is to be determined by reference to a factor which does not exist or has ceased to exist or to be accessible, the nearest equivalent factor shall be substituted.

Article 6:110: A Future Thing (addition)
A contract may contain an obligation relating to a thing that does not yet exist.

Chapter 7:
Effects of Contract

(formerly articles 6:103; 6:109 to 6:111 of PECL)

Article 7:101: Change of Circumstances (modification of article 6:111)
(1) If a contract becomes deeply unbalanced during its execution due to a change of circumstances that could not reasonably be foreseen, the parties must renegotiate it in order to revise or terminate the contract.
(2) If, in spite of the good faith of the contracting parties, the renegotiations do not succeed within a reasonable time, the parties can terminate the contract by common agreement; if this does not happen, a court can equitably revise the contract or deprive it of future effect.

Article 7:102: Clauses relating to the Allocation of Risk (addition)

A clause which allocates the major part of the risk of a change of circumstances to one of the parties is only valid where it does not bring about unreasonable consequences for that party. The clause cannot be applied when the change of circumstances is due, either completely or in part, to the party to whose benefit such a clause operates.

Article 7:103: Contract for an Indefinite Duration (modification of article 6:109)

When a contract is for an indefinite duration, each contracting party can terminate the contract unilaterally, by giving a period of notice that complies with the requirements of law, professional practices, contractual previsions or, failing that, a period of reasonable length.

Article 7:104: Fixed-Term Contracts (addition)

When the contract is of a fixed duration, each contracting party must perform its obligations until the term expires and no party can demand its renewal unless legal or conventional provisions provide otherwise.

Article 7:105: Extension of Fixed-Term Contracts (addition)

(1) When a fixed-term contract is extended according to the wishes of the parties, expressed before its expiry, the contents and effects of the contract are retained until the new expiry date.
(2) The extension of the contract cannot adversely affect the rights of third parties, unless legal provisions provide otherwise.

Article 7:106: Renewal of Fixed-Term Contracts (addition)

(1) When the law allows for the renewal of a fixed-term contract or when such renewal is the result of a tacit agreement between the parties, in the initial contract, or following an express agreement at the expiry of the initial contract, the renewed contract is, as regards its contents and effects, distinct from the expired contract, unless otherwise agreed.
(2) When, at the expiry of a fixed-term contract, the contracting parties continue to execute their obligations, the tacitly renewed contract is for an indefinite period.

Article 7:107: Stipulation in Favour of a Third Party (modification of article 6: 10)

The contracting parties may conclude a contract under which one of them undertakes to perform an obligation in favour of a third party which must be capable of being determined at the time of the execution of the promise.
As long as the third party has not accepted the benefit of the stipulation made in its favour, the stipulation may be freely revoked by the party making the stipulation.
The third party is the beneficiary of a direct right against the promisor and can invoke any defences arising out of the contract with the party making the stipulation.

Article 7:108: Simulation (modification of article 6:103)

(1) When the parties have concluded an apparent contract and a concealed contract, they are legally bound by the concealed contract, except in the case of fraud.
(2) The concealed contract does not have any effect as regards third parties, but third parties may rely on it.

Chapter 8:
Performance

(formerly chapters 7 and 16 of PECL)

Section 1:
Conditions and Time Limits affecting when the Contractual Obligations become Due

Sub-section 1:
Future Events Deferring Performance

§ 1 Condition

Article 8:101: Suspensive and Resolutory Conditions (modification of article 16:101)

(1) A contractual obligation may be made conditional upon the occurrence of an uncertain future event, so that the obligation takes effect only if the event occurs (suspensive condition) or comes to an end if the event occurs (resolutory condition).

(2) The condition may be legal, judicial or voluntary.

Article 8:102: Impossible or Illegal Conditions (addition)

(1) A condition that is dependent on an impossible or illegal event is ineffective.

(2) The ineffectiveness of a condition results in the ineffectiveness of the contract which depends thereon when this condition was determining in obtaining the consent of one of the parties, unless otherwise provided by law.

Article 8:103: "Potestative" Condition (addition)

(1) A condition which makes performance of the obligation dependent on an event, the occurrence of which is in the sole power of the debtor, so that there is no real commitment on the debtor's part, is ineffective.

(2) This ineffectiveness may no longer be invoked once the obligation contracted under such condition has been voluntarily executed.

Article 8:104: Conditions in the Sole Interest of One of the Parties (addition)

(1) When a condition is inserted into a contract in the sole interest of one of the parties, that party may, before the fulfilment or failure to fulfil such condition, waive the condition. The obligation then becomes unconditional.

(2) The beneficiary of the condition may still waive it, after the event occurs or fails to occur:
   (a) if the other party did not act as a result of the occurrence or non-occurrence of the event,
   (b) and if the time fixed for fulfilment of the condition is not expired.

Article 8:105: Conditions in the Interest of Both Parties (addition)
When a condition is inserted into a contract in the interest of both parties, the parties can waive the condition by common agreement. However, if this waiver occurs after the performance or the failure to perform the condition, a new contract is formed.

§ 2 Specified Time Period for Performance

Article 8:106: Suspensive and Extinctive Time Periods (addition)
(1) A contractual obligation may be dependent on a definite future event, which either postpones performance until the event occurs (suspensive time period) or ends performance when the event occurs (extinctive period).
(2) The suspensive or extinctive time period may be legal, judicial or voluntary.

Article 8:107: Determination of Specified Period for Performance (rewording of article 7:102)
An obligation must be performed:
(a) at the time fixed by the contract or at a time determinable from the contents of the contract, usage, the circumstances in question or the previous relations between the parties.
(b) in all other cases, within a reasonable time after the conclusion of the contract unless the circumstances indicate that obligation must be performed immediately.

Article 8:108: Waiving the Advantage of Suspensive Time Period (addition)
(1) The party in whose sole interest the suspensive time period has been fixed may waive the benefit of the time period and perform its obligations at any time.
(2) When the obligation involves a sum of money, it is presumed that the time of performance was fixed in the interest of the obligor.

Article 8:109: Establishing the Specified Time Period for Performance (addition)
The time when the contract must be performed is established according to the rule set out in article 1:304.

Sub-section 2: The Effects of an Obligation before the Occurrence of an Event

§ 1 Conduct of the Parties

Article 8:201: Duty of Good Faith (addition)
From the formation of the contract, each party is bound to do nothing which compromises the performance of the future entitlement of the other party or which decreases its usefulness.

Article 8:202: Care and Cooperation for the Fulfilment of a Condition (addition)
(1) When the occurrence of a conditional event is dependent on one of the parties, that party must take appropriate care to promote such occurrence.

(2) When the occurrence of the conditional event depends on both of the parties, they must cooperate to ensure such occurrence.

Article 8:203: Interference with Conditions (modification of article 16:102)

The condition is deemed to be fulfilled or not fulfilled when the inaction or fault of one of the parties caused the failure to fulfill or fulfilment of the condition to the detriment of the other party.

Article 8:204: Forfeit of a Suspensive Time Period (addition)

(1) The performing party may not take advantage of the benefit of a suspensive time period where:
   (a) it did not respect its duty of to act in good faith, or;
   (b) the party does not supply the securities promised to creditor or decreases the value of the securities it has given by its own action.
(2) The same applies if the performing party is insolvent or subject to liquidation proceedings.

§ 2 Prerogatives of a creditor

Article 8:205: Preservation of the Right to Claim Performance of an Obligation (addition)

(1) A creditor may take all steps to preserve its rights, even before the occurrence of an event on which an obligation is dependent.
(2) In particular the creditor may act to render ineffective the acts of the performing party carried out in order to defraud its rights.

Article 8:206: Transferability (addition)

Before the occurrence of the event on which the performance of obligation depends
   (a) the right of the creditor is transferable either inter vivos or upon death;
   (b) the obligation of the performing party is transferable only to its heirs.

§ 3 Early performance

Article 8:207: Early Performance of an Obligation Subject to a Suspensive Time Period (rewording of article 7:103)

(1) Where the suspensive time period was inserted into the contract in the sole interest of one of the parties or in the interest of both parties, the creditor may decline an offer of performance made before it is due, unless the performing party can establish that this early performance would not unreasonably prejudice the interests of the creditor.
(2) A party's acceptance of early performance does not affect the time fixed for the performance of its own obligation, unless otherwise agreed.

Article 8:208: Impossibility of Early Performance of a Conditional Obligation (addition)

An obligation contracted under a suspensive condition cannot be performed until after the occurrence of the conditional event, unless the benefit of this condition has been waived.

Sub-section 3:
Effects of an Obligation upon the Occurrence of the Suspensive Event

Article 8:301: Significance of the Occurrence of a Suspensive Event (rewording of article 16:103 (1))

(1) Where the performance of an obligation has been suspended, the obligation only takes effect from the date when the event, (whether certain or uncertain) occurs.
(2) However when liquidating their assets, the parties may agree on a retroactive effect.

Article 8:302: Significance of the Occurrence of an Extinctive Event (addition)

(1) (article 16:103 (2) rewritten) The obligation lapses upon the occurrence of an event (either certain or uncertain) on which the termination of the obligation depended, unless the parties otherwise agree.
(2) When the termination gives rise to restitutions, the obligation to make restitutions is subject to the rules laid down for obligations subject to a suspensive condition.

Article 8:303: Acts Carried Out in Violation of the Rights of the Creditor (addition)

From the day of the conclusion of a contract, any act carried out by the performing party in violation of its obligation, which is subject to a suspensive time period or condition, has no effect as against the creditor, excluding rights acquired by third parties acting in good faith.

Article 8:304: Consequences of Managerial Acts and Income (addition)

(1) The occurrence of the certain or uncertain event does not undermine managerial acts carried out in good faith following the conclusion of the contract.
(2) The income received is owed from the date the event occurred, unless otherwise agreed, with regard to liquidation of their rights.

Article 8:305: Allocation of Risk (addition)

(1) When an obligation has been contracted subject to a suspensive condition or a suspensive time period, the risk relating to the property that is the subject of the agreement is borne by the performing party, which is bound to deliver the property only when the condition is fulfilled. When the obligation was contracted subject to a resolutory condition, as long as this condition is not fulfilled, the risk relating to the property is borne by the creditor, which is also under a conditional obligation of restitution.
(2) If the property is entirely destroyed, the obligation lapses, without prejudice to the liability of the debtor, if the loss is due to the debtor's fault.
(3) If the property is damaged, the creditor has the choice of terminating the obligation, or to demand the property in its current state, without a decrease in price; this occurs without prejudice to the liability of the debtor if the deterioration is due to its fault.
(4) The parties can agree to modify the allocation of risk.

Section 2:
Other Methods of Enforcement

Article 8:401: Place of Performance (modification of article 7:101)

(1) If the place of performance of an obligation is not determined by or determinable from the contract it shall be:
   (a) in the case of an obligation to pay money, the creditor's place of business or if that cannot be established, the creditor's habitual residence;
   (b) in the case of an obligation other than to pay money, the debtor's place of business or if that cannot be established, the creditor's habitual residence.
(2) If a party has more than one place of business, the place of business is that which has the closest link with the main performance under the contract, having regard to the circumstances known to or contemplated by the parties at the time of conclusion of the contract.
(3) The party which changes its place of business or place of residence after the conclusion of the contract will provide for the increase in expenses which may affect the performance of obligations.

Article 8:402: Order of Performance (modification of article 7:104)

The simultaneous performance of the obligations is the rule in every case where it is in the nature of the contract, unless the contract, expressly or impliedly, indicates otherwise.

Article 8:403: Alternative Obligations (modification of article 7:105)

(1) An obligation is alternative when it gives the debtor a choice of several different types of performance. By agreement to the contrary, the choice can fall to the creditor.
(2) If there is no contractual time period, such choice must be made within a reasonable time.
(3) If the party who is to make the choice fails to do so within the time period, the other party may either,
   (a) grant an additional period in which to make the choice, or;
   (b) after a notice to the other party remains without effect, make the choice itself.

Article 8:404: Performance by a Third Person (modification of article 7:106)

(1) Except where a contract requires personal performance, a third party
   (a) may be authorized by the debtor to perform the contract unless the creditor refuses such performance because it would cause loss or damage to the creditor, or
   (b) a third party which has a legitimate interest in the performance of a contract may perform the contract in the place of the debtor when the latter has failed to perform or it is clear that the debtor will not perform at the time performance becomes due.
(2) Performance by a third person in accordance with paragraph (1) discharges the debtor. In case of non-performance by the third party, the debtor remains legally bound.

Article 8:405: Form of Payment (modification of article 7:107)

Payment of money due may be made in any form used in the ordinary course of business.

Article 8:406: Currency of Payment (modification of article 7:108)

(1) The parties may agree that payment shall be made only in a specified currency.
(2) When the currency of an obligation to pay a sum of money is not specified, the payment may be paid in the currency of the place where payment is due.

Article 8:407: Appropriation of Payments (modification of article 7:109)

(1) The debtor of an obligation which is subject to interest or carries arrears, cannot, without the assent of the creditor, appropriate to arrears or interest a payment which it makes in respect of the principal: a payment made in respect of the principal and interest, but which does not cover the whole amount is appropriated as a payment against the interest.
(2) A party who owes several obligations has the right to declare, when it pays, which obligation it intends to discharge;
(3) Where the debtor does not appropriate, the parties may contractually appropriate the payment to an obligation. If the appropriation is recorded on a receipt delivered by the creditor, its mere receipt by the debtor does not lead to an assumption that it has been accepted;
(4) If there is no appropriation under the preceding conditions, a payment must be appropriated according to the following provisions:
   1° if the debtor is subject to obligations that are due and to others which are not yet due, the appropriation is made in priority to the obligations which are due;
   2° if several obligations are due, the payment is appropriated to the obligation that the debtor has the most interest in discharging;
   3° if the obligations due are of an equal nature, the payment is appropriated to the obligation that is first in time; if all the obligations are contemporary the appropriation is done proportionally;
   4° If the appropriation of payment is made only in respect of obligations that have not yet fallen due, rules 2° and 3° must be followed;
(5) In the event of multiple obligations, the appropriation of payment to any of them follows rule (1), if necessary.

Article 8:408: Property or Money Not Accepted (modification of articles 7:110 and 7:111)

(1) A party who is left in possession of tangible property other than money because of the other party's failure to accept or retake the property must take reasonable steps to protect and preserve the property.
(2) The party left in possession may discharge its duty to deliver or return:
   (a) by consigning the property to a third party, on reasonable terms, to be held to the order of the other party, and notifying the other party of this at the time of consignment; or
   (b) by selling the property on reasonable terms after notice to the other party, and paying the net proceeds to that party.
(3) However, in an emergency situation, such as when the property is liable to rapid deterioration or its preservation is unreasonably expensive, the party must take reasonable steps to dispose of it, without having to give preliminary notification to the other party. It may discharge its duty to deliver or return by paying the net proceeds to the other party.
(4) The party left in possession of property is entitled to be reimbursed or to retain any expenses reasonably incurred out of the proceeds of sale.

(5) Where a party fails to accept money properly tendered by the other party, that party may after notice to the first party discharge its obligation to pay by depositing the money to the order of the first party in accordance with the law of the place where payment is due.

Article 8:409: Costs of Performance (article 7:112 renumbered)

Each party shall bear the costs of performance of its obligations.

Chapter 9:
Non-performance and Remedies in General

Article 9:101: Use of Remedies Available to the Creditor (modified)

(1) Whenever a party fails to perform an obligation under the contract, the aggrieved party may resort to any of the remedies set out in chapter 10, subject to provisions of this article.
(2) Where a party's non-performance is excused under article 9:107, the aggrieved party may resort to any of the remedies set out in chapter 10 except claiming performance and damages.
(3) Where a party's non-performance is excused under article 9:108, the aggrieved party may not resort to any of the remedies set out in chapter 10.

Article 9:102: Cumulation of Remedies (renumbered)

Remedies which are not incompatible may be cumulated. In particular, a party is not deprived of its right to damages by exercising its right to any other remedy.

Article 9:103: Fundamental Non-Performance (renumbered)

A non-performance of an obligation is fundamental to the contract if:

(a) strict compliance with the obligation is of the essence of the contract; or
(b) the non-performance substantially deprives the aggrieved party of what it was entitled to expect under the contract, unless the other party did not foresee and could not reasonably have foreseen that result; or
(c) the non-performance is intentional and gives the aggrieved party reason to believe that it cannot rely on the other party's future performance.

Article 9:104: Cure by the Performing Party (modified)

(1) The performing party has the right to take any measure intended to correct performance that is not in compliance with the contract if the date for performance has not yet passed or if the delay would not constitute a fundamental non-performance.
(2) The correction does not exclude a claim for damages by the aggrieved party.

Article 9:105: Assurance regarding Performance (modified)

A party who reasonably believes that there will be a fundamental non-performance by the other party may demand adequate assurances regarding due performance and meanwhile may withhold performance of its own obligations.
The party demanding assurances may terminate the contract if these assurances are not provided within a reasonable time, provided it gives notice of such termination without delay.

Article 9:106: Notice Fixing Additional Period for Performance (modified)

(1) In any case of non-performance the aggrieved party may, by notice to the other party, grant an additional period of time for performance.
(2) During the additional period, the aggrieved party may not resort to any other remedy. However, when the non-performance is not minor, the aggrieved party may withhold performance of its own reciprocal obligations and may claim damages. If it receives notice from the other party that the latter will not perform within the additional period, or if upon expiry of that period due performance has not been carried out, the aggrieved party may resort to any of the remedies that may be available under chapter 10.
(3) If, in the case of a delay in performance which is not fundamental, the aggrieved party has given notice fixing an additional period of time of reasonable length such party may terminate the contract at the end of this period if the debtor has not performed. The aggrieved party may in its notice provide that if the other party does not perform within the period fixed by the notice the contract shall terminate automatically. If the additional period given is not reasonable, the aggrieved party may only terminate after a reasonable period from the date of notice.
(4) The preceding paragraph does not apply when the delay in the performance constitutes minor non-performance.
(5) The additional period is determined according to circumstances and to the type of obligation. It can only be granted by the aggrieved party and not by the courts or an arbitrator.

Article 9:107: Excuse Due to an Impediment (modified)

(1) Subject to provisions of article 9:101 (2) a party's non-performance is excused if the party proves that it is due to an event that is outside the party's control and that the party could not reasonably have been expected to take the event into account at the time of the conclusion of the contract, or to have avoided or overcome the event or its consequences.
(2) Where an impediment is only temporary the excuse provided by this article is only effective for the period during which the impediment exists. However, if the delay amounts to a fundamental non-performance, the aggrieved party may treat it as such.
(3) The party who cannot perform must ensure that notice of the existence of the impediment and of its effect on the party's ability to perform is received by the other party. If the notice does not arrive at destination within a reasonable time after the non-performing party knew or ought to have known of this impediment, the other party is entitled to damages for any loss resulting from the non-receipt of such notice.

Article 9:108: Excuse Due to an Act of the Aggrieved Party (addition)

The non-performing party is excused from the consequences of its non-performance to the extent that this non-performance was due to an act of the aggrieved party.

Article 9:109: Clause Excluding or Restricting Remedies (modified)

Remedies for non-performance may be excluded or restricted by a contractual clause. This clause is without effect if its implementation is contrary to good faith, for example in the case of non-performance which is deliberate or of particular gravity.

Chapter 10:
Particular Remedies for Non-performance

Section 1:
Right to Performance

Article 10:101: Monetary Obligations (9:101 renumbered)
(1) The creditor is entitled to recover money which is due.
(2) Where the creditor has not yet performed its obligation and it is clear that the debtor will be unwilling to receive performance, the creditor may nonetheless proceed with its performance and may recover any sum due under the contract unless:
  (a) it could have made a reasonable substitute transaction without significant effort or expense; or
  (b) performance would be unreasonable in the circumstances.

Article 10:102: Non-Monetary Obligations (modified)
(1) The aggrieved party is entitled to specific performance of a non-monetary obligation, including the remedying of defective performance.
(2) Specific performance cannot, however, be obtained where:
  (a) performance would be unlawful or impossible; or
  (b) performance would cause the debtor unreasonable effort or expense; or
  (c) performance would affect the debtor in its personal capacity, or
  (d) the aggrieved party may reasonably obtain performance from another source.
(3) The aggrieved party will lose the right to specific performance if it fails to seek it within a reasonable time after it has or ought to have become aware of the non-performance.

Article 10:103: Damages Not Precluded (renumbered)
The fact that a right to performance is excluded under this section does not preclude a claim for damages.

Section 2:
Withholding Performance

Article 10:201: Right to Withhold Performance (renumbered)
(1) A party who is to perform simultaneously with or after the other party may withhold performance until the other has tendered performance or has performed. The first party may withhold the whole of its performance or a part of it as may be reasonable in the circumstances.
(2) A party may similarly withhold performance for as long as it is clear that there will be a non-performance by the other party when the other party's performance becomes due.

Section 3:
Termination Of The Contract

Article 10:301: Right to Terminate the Contract (modified)
(1) A party may terminate the contract if the other party's non-performance is fundamental.
(2) The termination must be effected by giving notice, as described in article 10:303.
(3) In the case of delay the aggrieved party may also terminate the contract under article 9:106 (3).

Article 10:302: Contract to be Performed in Parts (modified)
If the contract may be performed in separate parts by each of the parties, the fundamental non-performance of an obligation in relation to one part of the contract entails the termination of that part only. The contract may be terminated as a whole only if the non-performance is fundamental to the contract as a whole.

Article 10:303: Notice of Termination (modified)
(1) The termination of the contract occurs by the giving of notice.
(2) With the exception of cases where adaptation of the contract is possible, termination is complete if the party who receives the notice does not bring the matter before a court within an reasonable time, with due regard to the circumstances.
(3) The notice must:
  a) specify the cause of the termination of the contract and the scope of the termination;
  b) and stipulate, in a clear way, the provisions of the paragraph (2), failing which it will be ineffective.

Article 10:304: Parties Entitled to give Notice of Termination (addition)
Only the aggrieved party is entitled to give notice of the termination of the contract.

Article 10:305: Recipients of the Notice (addition)
When a party claims termination of contract, notice must be sent to the other contracting party.

Article 10:306: Judicial Termination (addition)
In the absence of any notice, and as long as the right to notify has not expired, the termination of the contract may be judicially pronounced in the course of legal proceedings if one of the parties claims termination as a defence.

Article 10:307: Time Limits (addition)
(1) Notice of termination must be given within a reasonable time (in the particular circumstances) from the moment that the party entitled to give notice was aware or ought to have become aware of the relevant facts, or was able to act freely.
(2) The termination of the contract cannot take place after the expiry of the prescription period fixed by law.
(3 The party entitled to give notice of termination may be put on notice by the other party or any third party which has an interest in the proceedings, to give notice within a reasonable time, failing which it loses its right.

Article 10:308: Anticipatory Non-Performance (modification)

(1) Where, prior to the time when performance is due by a party, its statements or its conduct indicate that there will be a fundamental non-performance on its part, the other party may terminate the contract.
(2) When the fundamental non-performance is not obvious, the aggrieved party merely has grounds to request an assurance of performance, in accordance with article 9:105.

Article 10:309: Resolutory Clauses (addition)

(1) Resolutory clauses must expressly indicate the obligations, the non-performance of which will result in the termination of the contract.
(2) The termination is subject to the defaulting party being put on formal notice, if it has not been agreed that termination would result from the mere fact of non-performance. The formal notice is only effective if it restates in clear terms the resolutory clause.
(3) In any event, termination becomes effective from the date of reception of the notice given to the performing party.

Article 10:310: Effects of the Termination in General (modification)

Under the terms provided in this section, the termination of the contract requires each of the parties to restore that which it received under the contract and, if necessary, to indemnify the other party.

Article 10:311: Exclusion or Limitation of Remedies (addition)

The parties cannot, subject to the requirements of good faith and fair dealing, exclude or restrict the remedies which sanction the consequences of the termination.

Article 10:312: Right to Restitution (addition)

(1) As a result of termination, each party is entitled to ask for the return of what it supplied under the contract, so long as it simultaneously returns what it received.
(2) When the cause of termination arises in the course of performance, restitution will take place only if it seems unfair, having regard to the nature and the purpose of the contract, for the parties to keep what they have already received
(3) The provisions of article 10:201 concerning the right to suspend performance apply to all cases.
(4) The claim for restitution and its subject matter are subject to the rules of articles 10:303-10:307.

Article 10:313: Subject matter of Restitution (addition)

(1) After breach of the contract, and insofar as it is possible, the principle is that of restitution in kind.
(2) When restitution in kind is impossible, the party which supplied the performance without receiving any consideration may obtain a reasonable sum corresponding to the value to the other party of the performance.

Article 10:314: Damages Owed in Case of Termination of the Contract (addition)

In the case of termination, the aggrieved party may obtain damages from the other party. These damages are intended to place the aggrieved party, insofar as possible, in the situation it would have found itself had the contract been performed.

Article 10:315: Damages in the Absence of Termination (addition)
When a party is entitled to terminate a contract under the present chapter but does not exercise such right, or when the party had this right but lost it by application of the provisions of articles 10:303 and 10:307, it may obtain damages from the other party, limited to the damage incurred as a result of the cause for termination.

Section 4:
Price Reduction

Article 10:401: Right to Reduce Price (renumbered)
(1) A party who accepts a tender of performance not conforming to the contract may reduce the price. This reduction shall be proportionate to the decrease in the value of the performance at the time this was tendered compared to the value which a conforming tender would have had at that time.
(2) A party who is entitled to reduce the price under the preceding paragraph and who has already paid a sum exceeding the reduced price may recover the excess from the other party.
(3) A party who reduces the price cannot also recover damages for reduction in the value of the performance but remains entitled to damages for any further loss it has suffered so far as these are recoverable under section 5 of this Chapter.

Section 5:
Damages and Interest

Article 10:501: Right to Damages (renumbered)
(1) The aggrieved party is entitled to damages for loss caused by the other party's non-performance, which is not excused under Article 9:107.
(2) The loss for which damages are recoverable includes:
    (a) non-pecuniary loss; and
    (b) future loss which is reasonably likely to occur.

Article 10:502: General Measure of Damages (renumbered)
The general measure of damages is such sum as will put the aggrieved party, as nearly as possible, into the position in which it would have been if the contract had been duly performed. Such damages cover the loss which the aggrieved party has suffered and the gain of which it has been deprived.

Article 10:503: Foreseeability of Damages (renumbered)
The non-performing party is liable only for loss which it foresaw or could reasonably have foreseen at the time of conclusion of the contract as a likely result of its non-performance, unless the non-performance was intentional or grossly negligent.

Article 10:504: Loss Attributable to Aggrieved Party (addition)
The aggrieved party may not claim for compensation for the part of the damage imputable to its own actions.

Article 10:505: Mitigation of Loss (renumbered)

(1) The non-performing party is not liable for loss suffered by the aggrieved party to the extent that the aggrieved party could have reduced the loss by taking reasonable steps.
(2) The aggrieved party is entitled to recover any expenses reasonably incurred in attempting to reduce the loss.

Article 10:506: Substitute Transaction (modified)

(1) In the case of termination, where the aggrieved party has made a substitute transaction within a reasonable time period and under reasonable conditions, it may recover the difference between the contract price and the price of the substitute transaction.
(2) The aggrieved party can also recover damages for any other loss.

Article 10:507: Current Price (modified)

(1) In the case of the termination of a speculative contract, the aggrieved party which does not make a substitute transaction, is entitled, if the performance contracted for has a current price, to recover the difference between the contract price and the current price at the time the contract is terminated. The current price is the general market price.
(2) The aggrieved party can also recover damages for any other loss.

Article 10:508: Delay in Payment of Money (modified)

(1) If payment of a sum of money is delayed, the aggrieved party is entitled to interest on that sum from the time that payment fell due to the time of payment.
(2) The interest rate is set with reference to the average commercial bank short-term lending rate to prime borrowers prevailing for the contractual currency of the payment at the place where payment is due. Parties are free to agree on a contractual interest rate.
(3) The aggrieved party can also recover damages for any other loss.

Article 10:509: Agreed Payment for Non-performance (modified)

(1) Where the contract provides that a party who fails to perform is to pay a specified sum to the aggrieved party for such non-performance, the aggrieved party shall be awarded that sum irrespective of the actual loss suffered.
(2) However, in spite of any agreement to the contrary the specified sum may be reduced or increased to a reasonable amount where it is grossly excessive or derisory in relation to the loss resulting from non-performance and other circumstances.

Article 10:510: Currency by which Damages to be measured (modified)

Damages are to be evaluated in the currency of the contract except if the use of another currency will better place the aggrieved party in the situation in which it would have found itself had the contract not been performed. The parties are free to choose the currency which suits them.

Chapter 11:
Substitution Of Parties

(formerly chapters 11 & 12 of PECL)

Section 1:
Assignment of claims

Sub-section 1:
General principles

Article 11:101: Scope of the chapter (renumbered)
(1) This chapter applies to the assignment, by agreement, of a right to performance ("claim") under an existing or future contract.
(2) Except where otherwise stated or the context otherwise requires, this Chapter also applies to the assignment by agreement of other transferable claims.
(3) This chapter does not apply:
  (a) to the transfer of a financial instrument or investment security where, under the law otherwise applicable, such transfer must be by entry in a register maintained by or for the issuer; or
  (b) to the transfer of a bill of exchange or other negotiable instrument or of a negotiable security or a document of title to goods where, under the law otherwise applicable, such transfer must be by delivery (with any necessary endorsement).
(4) In this chapter "assignment" includes an assignment by way of security.
(5) This chapter also applies, with appropriate adaptations, to the granting by agreement of a right in security over a claim otherwise than by assignment.

Article 11:102: Contractual Claims Generally Assignable (renumbered)
(1) Subject to articles 11:109 and 11:110, a party to a contract may assign a claim under it.
(2) A future claim arising under an existing or future contract may be assigned if at the time when it comes into existence, or at such other time as the parties agree, it can be identified as the claim to which the assignment relates.

Article 11:103: Partial Assignment (renumbered)
A claim which is divisible may be assigned in part, but the assignor is liable to the debtor for any increased costs which the debtor thereby incurs.

Article 11:104: Form of Assignment (renumbered)
An assignment need not be in writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses.

Sub-section 2:
Effects of Assignment as between Assignor and Assignee

Article 11:105: Rights Transferred to Assignee (renumbered)

(1) The assignment of a claim transfers to the assignee:
  (a) all the assignor's rights to performance in respect of the claim assigned; and
  (b) all accessory rights securing such performance.
(2) Where the assignment of a claim under a contract is associated with the substitution of the assignee as debtor in respect of any obligation owed by the assignor under the same contract, this article takes effect subject to section 3 of this chapter.

Article 11:106: When Assignment Takes Effect (renumbered)

(1) An assignment of an existing claim takes effect at the time of the agreement to assign or such later time as the assignor and assignee agree.
(2) An assignment of a future claim is dependent upon the assigned claim coming into existence but thereupon takes effect from the time of the agreement to assign or such later time as the assignor and assignee agree.

Article 11:107: Preservation of Assignee's Rights against Assignor (renumbered)

An assignment is effective as between the assignor and assignee, and entitles the assignee to whatever the assignor receives from the debtor, even if it is ineffective against the debtor under article 11:109 or 11:110.

Article 11:108: Undertakings by Assignor (renumbered)

By assigning or purporting to assign a claim the assignor undertakes to the assignee that:
(a) at the time when the assignment is to take effect the following conditions will be satisfied except as otherwise disclosed to the assignee:
  (i) the assignor has the right to assign the claim;
  (ii) the claim exists and the assignee's rights are not affected by any defences or rights (including any right of set-off) which the debtor might have against the assignor; and
  (iii) the claim is not subject to any prior assignment or right in security in favour of any other party or to any other encumbrance;
(b) the claim and any contract under which it arises will not be modified without the consent of the assignee unless the modification is provided for in the assignment agreement or is one which is made in good faith and is of a nature to which the assignee could not reasonably object; and
(c) the assignor will transfer to the assignee all transferable rights intended to secure performance which are not accessory rights.

Sub-section 3:
Effects of Assignment as between Assignee and Debtor

Article 11:109: Contractual Prohibition of Assignment (renumbered)

(1) An assignment which is prohibited by or is otherwise not in conformity with the contract which the assigned claim arises is not effective against the debtor unless:
  (a) the debtor has consented to it; or
  (b) the assignee neither knew nor ought to have known of the non-conformity; or
  (c) the assignment is made under a contract for the assignment of future rights to payment of money.

(2) Nothing in the preceding paragraph affects the assignor's liability for the non-conformity.

Article 11:110: Other Ineffective Assignments (renumbered)

An assignment to which the debtor has not consented is ineffective against the debtor so far as it relates to a performance which the debtor, by reason of the nature of the performance or the relationship of the debtor and the assignor, could not reasonably be required to render to anyone except the assignor.

Article 11:111: Effect on Debtor's Obligation (renumbered)

(1) Subject to articles 11:109, 11:110, 11:115 and 11:116, the debtor is bound to perform in favour of the assignee if and only if the debtor has received a notice in writing from the assignor or the assignee which reasonably identifies the claim which has been assigned and requires the debtor to give performance to the assignee.

(2) However, if such notice is given by the assignee, the debtor may within a reasonable time request the assignee to provide reliable evidence of the assignment, pending which the debtor may withhold performance.

(3) Where the debtor has acquired knowledge of the assignment otherwise than by a notice conforming to paragraph (1), the debtor may either withhold performance from or give performance to the assignee.

(4) Where the debtor gives performance to the assignor, the debtor is discharged if and only if the performance is given without knowledge of the assignment.

Article 11:112: Protection of Debtor (renumbered)

A debtor who performs in favour of a person identified as assignee in a notice of assignment under article 11:111 is discharged unless the debtor could not have been unaware that such person was not the person entitled to performance.

Article 11:113: Competing Demands (renumbered)

A debtor who has received notice of two or more competing demands for performance may discharge liability by conforming to the law of the due place of performance, or, if the performances are due in different places, the law applicable to the claim.

Article 11:114: Place of Performance (renumbered)

(1) Where the assigned claim relates to an obligation to pay money at a particular place, the assignee may require payment at any place within the same country or, if that country is a Member State of the European Union, at any place within the European Union, but the assignor is liable to the debtor for any increased costs which the debtor incurs by reason of any change in the place of performance.
(2) Where the assigned claim relates to a non-monetary obligation to be performed at a particular place, the assignee may not require performance at any other place.

Article 11:115: Defences and Rights of Set-Off (renumbered)

(1) The debtor may set up against the assignee all substantive and procedural defences to the assigned claim which the debtor could have used against the assignor.
(2) The debtor may also assert against the assignee all rights of set-off which would have been available against the assignor under Chapter 13 in respect of any claim against the assignor:
    (a) existing at the time when a notice of assignment, whether or not conforming to article 11:111(1), reaches the debtor; or
    (b) closely connected with the assigned claim.

Article 11:116: Unauthorised Modification not binding on Assignee (renumbered)

A modification of the claim made by agreement between the assignor and the debtor, without the consent of the assignee, after a notice of assignment, whether or not conforming to article 11:111(1), reaches the debtor does not affect the rights of the assignee against the debtor unless the modification is provided for in the assignment agreement or is one which is made in good faith and is of a nature to which the assignee could not reasonably object.

Sub-section 4:
Order of Priority between Assignee and Competing Claimants

Article 11:117: Priorities (renumbered)

(1) Where there are successive assignments of the same claim, the assignee whose assignment is first notified to the debtor has priority over any earlier assignee if at the time of the later assignment the assignee under that assignment neither knew nor ought to have known of the earlier assignment.
(2) Subject to paragraph (1), the priority of successive assignments, whether of existing or future claims, is determined by the order in which they are made.
(3) The assignee's interest in the assigned claim has priority over the interest of a creditor of the assignor who attaches that claim, whether by judicial process or otherwise, after the time the assignment has taken effect under article 11:106.
(4) In the event of the assignor's bankruptcy, the assignee's interest in the assigned claim has priority over the interest of the assignor's insolvency administrator and creditors, subject to any rules of the law applicable to the bankruptcy relating to:
    (a) publicity required as a condition of such priority;
    (b) the ranking of claims; or
    (c) the avoidance or ineffectiveness of transactions in the bankruptcy proceedings.

Section 2:
Substitution of New Debtor (renumbered)

Article 11:201: Substitution: General rules (modification of article 12:101)

(1) A third person may undertake with the agreement of the debtor and the creditor to be substituted as debtor, with the effect that the original debtor is discharged.
(2) A creditor may agree in advance to a future substitution. Provided there is no abuse of process, the substitution takes effect only when the creditor is given notice by the new debtor of the agreement between the new and the original debtor.

Article 11:202: Effects of Substitution on Defences and Securities (re-organisation of article 12:102)

(1) The new debtor cannot invoke, against the creditor, any rights or defences arising from the relationship between the new debtor and the original debtor.
(2) The new debtor may invoke, against the creditor, all defences which the original debtor could have invoked against the creditor.
(3) The discharge of the original debtor also extends to any securities the original debtor had given to the creditor for the performance of the obligation, unless the security is over an asset which is transferred to the new debtor as part of a transaction between the original and the new debtor.
(4) Upon discharge of the original debtor, a security granted by any person other than the new debtor for the performance of the obligation is released, unless that other person agrees that it should continue to be available to the creditor.

Section 3:
Transfer of contract

Article 11:301: Principle of Transfer of contract (modification of article 12:201 (1))

A party to a contract may agree with a third person that that person is to be substituted as the contracting party.

Article 11:302 Acceptance by the Assigned Party (addition)

(1) The assignment takes effect as against the assigned party when it is accepted by that person.
(2) The assigned party may agree to a future assignment which will be effective as against it only after it has been given notice thereof.

Article 11:303 Scope of the Acceptance (addition)

(1) As a rule, acceptance of an assignment by the assigned party frees the assignor.
(2) Nevertheless, the assigned party may limit the scope of its acceptance. Notably, it may declare to keep the assignor as a debtor in case of non-performance of the contract by the assignee.

Article 11:304 Effect of Transfer in the Absence of Acceptance (addition)

(1) In the absence of consent on the part of the assigned party and unless the contract requires a personal performance, the assignment is effective as between the assignor and assignee.
(2) The assigned party may then bring an action against both the assignee and the assignor for performance, the assignee and assignor being jointly liable for the consequences of the non-performance.

Article 11:305 Reference to assignment of claim and debt (modification of article 12:201 (2))

Insofar as reasonable, regarding all claims and debts arising from or which may arise from a contract, to the extent that the substitution of a contracting party implies an assignment of rights of performance (claims), then the provisions of section 1 of this chapter apply; to the extent that there is an assignment of debt, the provisions of section 2 of the present chapter apply.

Article 11:306 Exclusion (addition)

The provisions of this section apply subject to mandatory rules applicable to the contract by reason of its nature or its particular purpose, or by reason of the operation in which the assignment of the contract finds its place.