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 an 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.

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

[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.

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 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.

[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.

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.

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).

---

[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.

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.

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.

---

[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.

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

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

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).

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

[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.

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*'.

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

[18] INCOTERMS 200, ICC publication n° 560.

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*].

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

[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.

[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 June 17, 1992.

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 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

[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 January 20, 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.

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 off-setting 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].

---

[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

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 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

---

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 March, 27 1985, *Bull. civ*. I, n°111, p. 102.

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

[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 spec. 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,

'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 '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'… Caselaw 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 '*Pflich* ', '*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,

---

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 à 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 pudence or diligence ».

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

[40] Along the same lines, Ph. JACQUES, *Regards sur l'article 1135 du Code civil*, Preface. F. Chabas, Dalloz, 2005, n°390 and following, spec. n°390-1, p. 832.

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

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 '*Verbindlichkei*t' (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 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 caselaw 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

[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.

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 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 had 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]).

---

[46] *Ibid,* n° 8, p. 763.

[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 caselaw. 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) ».

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 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 caselaw in order to sanction a party at fault on the basis of the principles of tort, the other is the restitutionnary duty 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

---

[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.

[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.

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*.

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

[57] See for example the Directive 93/13 of 5 April 1993, on unfair terms in consumer contracts OJEC L095 of 21/04/1993, p.29-34.

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 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, M. 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'. 'Messrs BAUDOUIN and 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

[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.

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 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.

[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. STOFFEL-MUNCK, *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 Gandolfi 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 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,

---

[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 Pilot Project for the reform of the law of obligations and limitations, which takes 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.

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*s' 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 '*engagement*s' arise out of the conclusion of a contract and of the 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

[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* ».

[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.

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 '*engagemen* ', 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 implied contracts ('*quasi-contrats*'). 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'.

The pilot project for the reform of the law on obligations and limitations also seems 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

[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.

[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 (...)* ».

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.

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 March 5, 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

---

[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 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.

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* ' are 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 pilot project for the reform of the law on obligations and limitations also occasionally uses 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'.

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

[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* ».

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.

[88] Here, the English translation uses the term « undertaking » to translate the term « *engagement* ».