

**GUIDING PRINCIPLES OF EUROPEAN  
CONTRACT LAW**

## **GENERAL INTRODUCTION**

1. At a time when the elaboration of a European contract law has the attention of the legal community it is possible to ask whether the construction of a common legal foundation would not be helped by the elaboration of guiding principles of European contract law. The object of such principles would differ slightly from the object of the Principles of European Contract Law. The latter project has as its ambition the general regulation of contract law. To this end, it comprises a collection of diverse specific rules aimed at governing the formation and performance of a contract. Such a system could be usefully completed by general rules which would preside over the elaboration of each of the specific rules contained in the Principles of European Contract Law. It is no longer a question of providing a legal solution to each of the questions posed in contract law, but of determining the ideas through which we can construct a European contract law as a whole.

2. The elaboration of these principles is not intended to replace the Principles of European Contract Law. On the contrary, the two projects are intended to complete each other. On the one hand the Principles of European Contract Law constitute the principal source allowing the identification of the Guiding Principles. On the other hand the Guiding Principles can hereafter form a useful guide to the interpretation and application of the Principles of European Contract Law. Indeed, the meaning of each of the provisions can be clarified by the Guiding Principle of which it is but a particular application. As a result it makes perfect sense to associate the two projects. To this end, the Guiding Principles could easily and usefully be placed in front of the Principles of European Contract Law, in the form of a first chapter.

3. Naturally, it was from the text and contents of the Principles of European Contract Law that the Guiding Principles were able to be identified. In the first instance, the provisions of the first chapter on 'General Provisions' were rich with information. However, it was also possible to usefully supplement the results obtained by cross referring to provisions from each of the other chapters. Thus, although the first chapter makes perfectly clear the importance of freedom of contract<sup>1</sup> and contractual fairness<sup>2</sup>, a study of all the provisions showed that the Principles of European Contract Law are equally permeated by the principle of contractual certainty.

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<sup>1</sup> See Article 1.102

<sup>2</sup> See Articles 1.201 and 1.202

4. As a result, it was possible to build the constituent parts of the Guiding Principles around these three pillars: freedom of contract, contractual fairness and contractual certainty. It remained only to identify the content of these three ideas as they appear throughout the contractual process. To do this, in addition to the information gained from a study of the applications contained in the Principles of European Contract Law, it was necessary to look to an analysis of comparative law for support. The principles of freedom of contract, contractual fairness and contractual certainty are indeed present in the laws of all the Member States of the European Union. However, their scope varies from one country to another. Nevertheless, the search for guiding principles aimed to identify a common core within the national laws. The study essentially concentrated on the laws of Germany, the Netherlands, Switzerland<sup>3</sup>, France, Italy, Spain and England and Wales. However, where possible, references have also been made to the legislative provisions of the other countries of the European Union.

This study of comparative law could not be limited to the analysis of the above legal systems alone. The scope of the principles of freedom of contract, contractual fairness and contractual certainty can also be illuminated by two other supplementary sources: first, International law<sup>4</sup> and European Community Law, and secondly various codifications of legal scholarship. With regard to the latter, the study concentrated on the content of the Unidroit Principles, the European Code of Contract Preliminary Draft and the Proposals for Reform of the Law of Obligations and the Law of Prescription. These different projects were obviously important sources since, in the same way as the Principles of European Contract Law, they aim to regulate contractual affairs, while, for the present, being deprived of normative value.

5. From the research undertaken it has been possible to equip the principles of freedom of contract, contractual fairness and contractual certainty with a concrete content. Although the aim of the proposed text is to prescribe general principles, it appeared nonetheless preferable not to proceed by way of abstraction. As a result the provisions have been written in the hope that the rule posed is accessible and intelligible.

The Guiding Principles of European Contract Law are broken into three sections which treat respectively freedom of contract (Chapter 1), contractual certainty (Chapter 2) and contractual fairness (Chapter 3).

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<sup>3</sup> Swiss law has been included in the study of European legal systems as it has been built around numerous diverse influences, in particular those of French and German law, and today it is impossible to hide the influences of European law. To this end see P. Engel, *Contrats de droit suisse (Traité des contrats de la partie spéciale du Code des obligations, de la vente au contrat de société simple, articles 184 à 551 CO, ainsi que quelques contrats innommés)* Stämpfli éditions SA, Berne, 2000, n°6, p. 9.

<sup>4</sup> Only the Vienna Convention of 11 April 1980 on Contracts for the International Sale of Goods (CISG) was examined.

# **CHAPTER 1. FREEDOM OF CONTRACT**

## **Article 0-101: Freedom of the parties to enter into a contract**

### **I. General presentation of the principle**

6. In opening the chapter on freedom of contract, it is necessary to clearly state the principle of freedom of contract itself. This principle can only be understood within a framework of respect for mandatory rules. Although freedom of contract is without doubt a fundamental principle of contract law, it by no means results in authorising parties to derogate from mandatory rules. This limit should therefore appear clearly.

7. In addition it appears necessary to clarify the scope of the principle of freedom of the parties to contract. It is important to indicate to the parties exactly what they are allowed to do when entering into a contract. Two points are therefore considered:

- The freedom to choose with whom to enter into the contract.
- The freedom to choose the content of the contract as well as the form. On this last point the principle of freedom of contract necessarily implies the principle of consensualism.

### **II. Application of the principle in PECL**

#### **➤ Direct applications**

8. First, there is a provision that states the principle of freedom of contract in the current version of PECL: Article 1: 102. This provision reads:

*(1) Parties are free to enter into a contract and to determine its contents, subject to the requirements of good faith and fair dealing, and the mandatory rules established by these Principles.*

*(2) The parties may exclude the application of any of the Principles or derogate from or vary their effects, except as otherwise provided by these Principles.*

Given that freedom of contract is a fundamental principle of contract law, it is proposed that it should be made a guiding principle. In this light, two remarks can be made:

On the one hand, in order to exactly specify the scope of this principle it is important, noting of course the reserve due to compliance with the mandatory rules, to be more precise

than the current Article 1:102 paragraph 2 in order to indicate the scope of freedom of contract.<sup>5</sup> The examination of several provisions contained in PECL does indeed make it possible to clarify this range.

- Article 2:301 concerning '*Negotiations Contrary to Good Faith*'. Before reserving the liability of the party who negotiates in bad faith, the provision starts by affirming the freedom of the parties to negotiate, which is nothing other than an expression of freedom of contract at a precontractual stage<sup>6</sup>.
- Article 2:101 concerning '*Conditions for the Conclusion of a Contract*'. This provision establishes, without giving it a name, the principle of consensualism as it states first of all that the contract is concluded by the agreement of the parties '*without any further requirement*' (1). In addition, it is expressly foreseen that '*a contract need not be concluded or evidenced in writing nor is it subject to any other requirement as to form (...)*' (2)<sup>7</sup>. Freedom of contract is therefore understood in this sense as a freedom of form.

On the other hand, it does not appear useful to reproduce the rule from para 2 of Article 1.102 which details to what extent it is possible to derogate from the Principles of European Contract Law rules. This rule could be maintained within Chapter 1 as it disposes of the statement of the general principle of freedom of contract itself in order to specify one of its particular applications.

9. Secondly, Article 1:103 of the Principles of European Contract Law details the limiting of freedom of contract by mandatory rules.

This provision allows parties, when the applicable law, determined by the choice of law rules of the forum before which the dispute is brought, so allows, to '*choose to have their contract governed by the Principles, with the effect that national mandatory rules are not applicable*' (1), with the exception of those rules which apply regardless of the governing law (2). The freedom of the parties to submit their contract to the Principles of European Contract

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<sup>5</sup> **Acquis Group** (European Research Group on Existing EC Private Law: study group responsible for drafting the Acquis-Principles): a principle of contractual freedom is posed, together with limits. Natural and legal people are free to contract and to determine the content of their contract. However, mandatory rules may limit that freedom of contract. These limits (in particular those relating to the free determination of the content of the contract) are justified by the unequal nature of the relationship which may exist between the parties (an imbalance resulting from a difference in economic power, knowledge ...). The working group proposes to further clarify the limits to this principle of freedom of contract and to define what a consumer is.

It was originally proposed that an article pertaining to 'non-mandatory rules' be inserted, which was to lay out that 'a law pertaining to contracts is not mandatory, subject to contrary provisions'. This proposition does not appear to have been adopted. On the other hand, the drafting of Article 1:102 has evolved as freedom of contract is not simply limited by 'the mandatory rules posed by these present principles' but by 'any mandatory rules'.

<sup>6</sup> Article 2:301 PECL '*(1) A party is free to negotiate and is not liable for failure to reach an agreement. (2) However, a party who has negotiated or broken off negotiations contrary to good faith and fair dealing is liable for the losses caused to the other party. (...)*'

<sup>7</sup> Compare similarities with Article 11:104 PECL which states that, concerning assignment '*an assignment need not be in writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses*'.

Law can thus allow them to elude the application of certain national mandatory rules, which the commentary has christened ‘ordinary’ mandatory laws in contrast to the so-called ‘directly applicable laws’ which are applicable irrespective of which law governs the contract<sup>8</sup>. According to the commentary, these directly applicable rules are rules which ‘*are expressive of a fundamental public policy of the enacting country and to which effect should be given when the contract has a close connection to this country*’<sup>9</sup>. Thus the freedom of contract of the parties to submit their contract to the Principles of European Contract Law does not, in any case, allow them to elude the application of national, supranational or international mandatory rules which always apply to the contract regardless of the governing law. The freedom of the parties to contract is therefore systematically limited by fundamental mandatory rules<sup>10</sup>.

### ➤ Indirect applications

**10.** A large number of the rules contained within the Principles are specific applications of the principle of freedom of contract. The freedom to determine the content of the contract implies for example the freedom to determine the obligations’ place of execution (Article 7:101 (1) PECL), the contract’s date of execution (Article 7:102 PECL) or the currency of payment (Article 7:108 PECL). Equally, freedom of contract implies that of simulation (Article 6:103 PECL). Between the parties, the prevalence of the covert act is, according to the commentary, a consequence of the principle of freedom of contract<sup>11</sup>.

**11.** Within the limits posed by mandatory rules, it is important to take into account the rules in the current Chapter 15 which specify the effect of illegality on contracts or contractual provisions. The contract is deprived of effect to the extent that it is contrary to principles recognised as fundamental by the laws of the Member States of the European Union<sup>12</sup>. The Principles retain a wide conception of the fundamental principles and avoid heterogeneous national concepts of immorality, illegality, public policy and morals<sup>13</sup>. The commentary on

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<sup>8</sup> *Principles of European Contract Law, Part I and II*: Prepared by The Commission on European Contract Law and Part I and II edited by Ole Lando and Hugh Beale, 2000 p. 102 (hereafter, *Principles of European Contract Law, Part I and II op. cit.*). *Principles of European Contract Law, Part III* edited by Ole Lando, Eric Clive, André Prüm and Reinhard Zimmermann (hereafter *Principles of European Contract Law, Part III op. cit.*).

<sup>9</sup> *Ibid* p101.

<sup>10</sup> In respect of Community Law, the Convention of Rome distinguishes implicitly between three different categories of mandatory rules: ‘ordinary’ mandatory rules (see articles 3(3), 5(2) and 6(1)), ‘directly applicable rules’ (see article 7) and rules of international public policy (see article 16). The directly applicable rules and the rules of public policy express particularly important public policy requirements of the Member State which prescribed them. As a result, the freedom of the parties to decide that the contract is subject to the rules of the PECL can allow them to elude the application of ‘ordinary’ mandatory rules, but in every case they remain limited by the directly applicable rules and the rules of public policy.

<sup>11</sup> *Principles of European Contract Law, Part I and III op. cit.* p. 306

<sup>12</sup> See Article 15:101

<sup>13</sup> *Principles of European Contract Law, Part III op. cit.* p. 211.

Article 15:102 states that, although the Principles constitute a self-contained system of rules applicable to the contracts governed by them, it is still not possible to ignore altogether the provisions of national law or the other rules of positive law applying to such contracts, in particular those rules or prohibitions expressly or impliedly making contracts null, void, voidable, annulable or unenforceable in certain circumstances. It is therefore necessary to return to the distinction between mandatory rules laid down in Article 1:103 of the Principles<sup>14</sup>.

### **III. Applications of the principle in comparative law**

#### **A. National laws**

12. The freedom of parties to contract according to conditions of their choice is recognised in all Member States<sup>15</sup>. In the majority of national laws a rule expressly states the principle of freedom of contract<sup>16</sup>. Points of convergence can also be seen with regard to the content and limits of freedom of contract.

#### **➤ Statement of the principle of freedom of contract**

13. In respect of the statement of the principle of freedom of contract, it is possible to distinguish between legal systems which recognise a direct commitment to freedom of contract, through one particular provision, and those where the principle, unanimously recognised, is recognised through its various applications.

#### **• Direct commitment**

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<sup>14</sup> Article 1:103: '(1) Where the otherwise applicable law so allows, the parties may choose to have their contract governed by the Principles, with the effect that national mandatory rules are not applicable. (2) Effect should nevertheless be given to those mandatory rules of national, supranational and international law which, according to the relevant rules of private international law, are applicable irrespective of the law governing the contract.'

<sup>15</sup> *Principles of European Contract Law, Part I and II, op. cit.* p. 99.

<sup>16</sup> Germany: Article 2(1) of the German Constitution; Greece: Article 5(1) of the Hellenic Constitution and Article 3 of the Civil Code; Denmark: Article 5.1.1 Danske Lov (old Danish Code of 1683); Spain: Article 6 and 1255 of the Civil Code; France, Belgique and Luxembourg: Article 6, 1123 and 1134 para 1 of the Civil Code indirectly; Italy: Article 1322 of the Civil Code; The Netherlands: Article 6:248 BW; Portugal: Article 405 of the Civil Code; Austria: § 859 ABGB.



14. Article 1322, paragraph 1 of the Italian Civil Code poses the principle of freedom of contract within the limits laid down by the law. It results from this that all illicit, illegal, immoral and non-binding contracts are forbidden<sup>17</sup>.

Equally, in Spanish law, the freedom of the parties to contract according to terms of their choice is affirmed by Article 1255 of the Spanish Civil Code<sup>18</sup>. This freedom is not however without limits: the above mentioned provision states that contracts cannot be contrary to statute, to morality or to public policy or Article 6 of the same code<sup>19</sup>.

- **Indirect commitment**

15. Although they do not dedicate a specific provision to the principle of freedom of contract, some legal systems nevertheless attach freedom of contract to a textual provision.

This is firstly the case in German law. Although there is no provision of the BGB which expressly states the principle of freedom of contract, the principle is nevertheless attached to a written provision, that of Article 2 of the German Constitution. Thus, although the principle of freedom of contract (*Vertragsfreiheit*), itself a concretisation of the principle of private autonomy (*Privatautonomie*) is not explicitly formulated by § 311 I BGB<sup>20</sup>, the principle has, according to the Federal Constitutional Court, constitutional value, as it is ‘included at least implicitly in Article 2 [I] of the Fundamental Law which guarantees to each person the right to free development of his personality’<sup>21</sup>. The principle of freedom of contract consists of ‘the freedom to contract or not to contract (*Abschlussfreiheit*)’<sup>22</sup>.

Another such example is French law. Even though no provision of the Civil Code expressly envisages the principle of freedom of contract, Article 1123, concerning the rules on capacity, can be considered an illustration of the principle. In stating that ‘any person may

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<sup>17</sup> M.-C. Diener, *Il contratto in generale*: Giuffrè editore, Milano, 2002, §. 1. 3. 3 onwards.

<sup>18</sup> Article 1255 Civil Code: ‘Los contratantes pueden establecer los pactos, cláusulas y condiciones que tengan por conveniente, siempre que no sean contrarios a las leyes, a la moral ni al orden público’.

<sup>19</sup> Article 6, 3° Civil Code: ‘Los actos contrarios a las normas imperativas y a las prohibitivas son nulos de pleno derecho, salvo que en ellas se establezca un efecto distinto para el caso de contravención’ (Acts contrary to mandatory or prohibitive norms are void by operation of law unless they envisage a distinct effect in the case of violation.)

<sup>20</sup> ‘In order to create an obligation by legal transaction and to alter the contents of an obligation, a contract between the parties is necessary, unless otherwise provided by statute’ (translation: Bundesministerium der Justiz [http://bundesrecht.juris.de/englisch\\_bgb/index.html](http://bundesrecht.juris.de/englisch_bgb/index.html)).

<sup>21</sup> ‘... Inclus au moins implicitement dans l’art. 2 [I] de la Loi fondamentale qui garantit à toute personne le droit au libre épanouissement de la personnalité’, M. Pédamon, *op. cit.* n. 22. - Adde R. Zimmermann, *The New German Law of Obligations (Historical and Comparative Perspectives)*: Oxford University Press Inc., New York, 2005, p.160, 205, 207 onwards: ‘Of course, contract law is, and remains, based on freedom of contract. But it has long been recognized that freedom of contract is not an end in itself. Rather, it must be regarded as a means of promoting the self-determination of those who wish to conclude a contract.’ (p. 205).

<sup>22</sup> ‘La liberté de contracter ou de ne pas contracter’, M. Pédamon, *op. cit.* n°22. – This freedom is exceptionally limited by an obligation to contract (Kontrahierungszwang ou Abschlusspflicht): e.g. the obligation to subscribe to an insurance policy. – See also M. Pédamon *ibid.* n°36 on the Law of 27 July 1957 relative to restrictions of competition (Gesetz gegen Wettbewerbsbeschränkungen).

enter into a contract, unless he has been declared incapable of it by law<sup>23</sup>, the Civil Code lays down two rules: the principle of capacity (a lack of capacity being the exception) and freedom of contract. In the same way, the principle of freedom of contract appears from an *a contrario* reading of Article 6 of the Civil Code. To the extent that this article provides that ‘*statutes relating to public policy and morals may not be derogated from by private agreements*’, it follows that the parties are free to derogate from norms that do not fall within this provision.

**16.** In other legal systems, the principle of freedom of contract is recognised as a fundamental principle without being attached, directly or indirectly, to a written provision.

This is the case in Swiss law. In effect, ‘*la liberté de faire des contrats*’ (the freedom to make contracts) is considered as one of the four ‘*libertés fondamentales*’ (fundamental freedoms) on which Swiss civil law rests<sup>24</sup>. A case of the Swiss Federal Tribunal, 1<sup>st</sup> Civil Court, 7 May 2002<sup>25</sup> illustrates this point. This case holds that ‘*private law rests on the principle of private autonomy. In the law of obligations, this principle solidifies into the principle of freedom of contract. This freedom presents diverse facets (freedom to contract, freedom in the choice of contractual partner, freedom of object, form and to bring an end to contractual relations ...)*’<sup>26</sup>. While no provision expressly states the principle of freedom of contract, it is nevertheless admitted that ‘*each person is free to enter into contracts or to refuse to contract*’<sup>27</sup>. In addition, ‘*the obligation to contract is the exception; it must result from the law or be imposed by virtue of morality*’<sup>28</sup>, and ‘*the refusal to contract considered as contrary to morality appears rarely in practice*’<sup>29</sup>.

It is the same again in Dutch law. The principle of freedom of contract does not have a textual base yet it is universally accepted and understood as in the Principles of European

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<sup>23</sup> Translation: [www.legifrance.gouv.fr](http://www.legifrance.gouv.fr).

<sup>24</sup> P. Engel, *Traité des obligations en droit suisse (Dispositions générales du CO)*, Staempfli éditions SA Berne, 2<sup>nd</sup> ed. 1997, p. 97 citing W. Yung ‘*Eugène Huber et l’esprit du Code civil (Grandes figures et grandes œuvres juridiques)*’, Published by the Law Faculty of Geneva University, 1948 (hereafter cited as, P. Engel, *Traité...*, *op. cit.*).

<sup>25</sup> La Poste c. Acusa, ATF 129/2003 III p.35, 42.

<sup>26</sup> ‘*Le droit privé repose sur le principe de l’autonomie privée. En droit des obligations, ce principe se concrétise dans celui de la liberté contractuelle. Cette liberté présente diverses facettes (liberté de contracter, liberté dans le choix de son partenaire contractuel, liberté de l’objet, de la forme et de mettre un terme aux relations contractuelles...)*’. Cited by P. Engel ‘*L’évolution récente de la partie générale du droit des obligations*’, in P. Engel, C. Chappuis, S. Marchand, A. Morin *L’évolution récente du droit des obligations*, The work of the study day organised at the Université de Lausanne 10 February 2004, ed. by M. Blanc, Centre du droit de l’entreprise de l’Université de Lausanne, Publication CEDIDAC 61, Lausanne, 2004, p.8.

<sup>27</sup> ‘*Chacun est libre de conclure des contrats ou de refuser d’en conclure*’, P. Engel, *Traité... op. cit.* p. 97.

<sup>28</sup> ‘*L’obligation de contracter est l’exception; elle doit résulter de la loi ou s’imposer en vertu des bonnes mœurs*’, *ibid.* p. 98.

<sup>29</sup> ‘*Le refus de contracter considéré comme contraire aux mœurs apparaît rarement en pratique*’, *ibid.* p.100. - *Addé* by the same author ‘*L’évolution récente de la partie générale du droit des obligations*’, article cited above, p.10 onwards.

Contract Law. Literally, Article 6:248(1) BW<sup>30</sup> refers only to one element of freedom of contract, that of choosing the content of the contract<sup>31</sup>.

Lastly, in English law, the principle of freedom of contract finds its roots in the economic theory of *laissez-faire*<sup>32</sup>, the self-regulation of the market by the principle of supply and demand<sup>33</sup> and the idea that each contracting party, as the best judge and best defender of their own interests, should not be hindered in their contractual efforts. In the same way as French law, with the classically adopted presentation of free will (*autonomie de la volonté*), the absolute reign of freedom of contract is an exaggeration of reality: the judiciary have always intervened, in a way that over the passage of time can certainly be seen as evolutive, to regulate contractual relations and to make sure that, initially *a minima*, contractual relations respect a certain degree of fairness. This informal, specific but regular intrusion in contractual relations by the judiciary became more and more frequent during the 20<sup>th</sup> century. The intervention is sometimes however provided and regulated by Parliament, which has, for example, enacted the *Unfair Contract Terms Act 1977* (relating to the prevention and punishment of unfair terms).

#### ➤ **Content and limits of freedom of contract**

- **Limits: Compliance with mandatory rules**

17. All the legal systems within the European Union recognise that freedom of contract is limited by mandatory rules. The majority of these legal systems distinguish between mandatory rules and non-mandatory, supplementary rules<sup>34</sup>.

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<sup>30</sup> ‘A contract has not only the juridical effects agreed to by the parties, but also those which, according to the nature of the contract, result from the law, usages or the requirements of reasonableness and equity.’ Translated in D. Busch, E. H. Hondius, H. J. van Kooten, H. N. Schelhaas, W. M. Schrama (ed.) *The Principles of European Contract Law and Dutch Law, A commentary: Ars Aequi Libri* (Nijmegen) & Kluwer Law International (The Hague/London/New York) 2002 p.33). (Cited hereafter, D. Busch, E. H. Hondius et alii, *op. cit.*).

<sup>31</sup> Cited *infra* D. Busch, E. H. Hondius et alii.

<sup>32</sup> See in particular G. H. Treitel, *An outline of the Law of Contract*, Oxford University Press, 6th edition 2004, pp. 3-5.

<sup>33</sup> ‘Do nothing, and let the market resolve any problem that arises’.

<sup>34</sup> Known in French law as *règles impératives* and *règles supplétives*, commentary on Article 1 :103 of the PECL (*Principles of European Contract Law, Part I and II op. cit. p101*) states that this distinction is found in many countries: The Netherlands: mandatory rules are called *regels van openbare orde* or *dwingende rechtsregels* and non-mandatory rules *aanvullende rechtsregels* or *regelend recht*; Germany: mandatory rules are called *zwingende Rechtsvorschriften* and non-mandatory rules *abdingbare* or *dispositive Rechtsvorschriften*; Italy: recognises a distinction between mandatory norms and dispositive norms; Spain: Article 1255 Civil Code creates a distinction between mandatory rules (*normas cogentes*) and non-mandatory rules (*normas dispositivas*). On the other hand, the distinction between mandatory and non mandatory rules within the Common law is relatively recent. In respect of performance and non-performance very few mandatory rules have existed until recent years. However, the distinction has begun to be recognised: for example in England and Wales: see the Sale of Goods Act 1979 and the Unfair Contract Terms Act 1977; for Ireland: see the Sale of Goods and Supply of Service Act 1980.

**18.** Contracts contrary to fundamental principles of morality or those contrary to public policy cannot in principle produce effects. This principle is known to all European legal systems with varying levels of express or implicit acknowledgement<sup>35</sup>. Several legal systems use concepts of public policy and morality to determine what is considered to be a lawful contract<sup>36</sup>. Generally, these unlawful contracts are considered void<sup>37</sup>. In English, Irish and Scottish law, contracts contrary to public policy or those deemed immoral are frequently presented as being unenforceable before a court of law. The parties can claim neither damages nor performance in kind.

The system in Germany is a little different. Freedom of contract is recognised as having two types of limit<sup>38</sup>: the general provisions of the BGB and the specific rules in § 307 to 309 BGB on general contractual conditions. In respect of these general provisions, we are concerned with, on the one hand, § 134<sup>39</sup> on the void nature of a legal transaction that violates a ‘*statutory prohibition*’ unless the statute implies otherwise<sup>40</sup>, and on the other hand, § 138<sup>41</sup> on the void nature of a transaction ‘*contrary to public policy*’. ‘*The unlawfulness or immorality of the subject*’ can be sanctioned by declaring void ‘*the acts contrary to legal mandatory provisions and morality*’<sup>42</sup>. It is therefore the concept of morality, understood in a specific sense, which constitutes an important limit on freedom of contract<sup>43</sup>. Moreover, the Federal Constitutional Court ensures that these limits on freedom of contract are well respected. In a decision<sup>44</sup> that has been described as ‘*spectacular*’<sup>45</sup>, the Court enjoined the

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<sup>35</sup> *Principles of European Contract Law, Part III, op. cit.* p 211 onwards

<sup>36</sup> See Articles 6 and 1133 of the French Civil Code; Article 1343 of the Italian Civil Code; Articles 280 and 281 of the Portuguese Civil Code; Article 3. 40 BW for the Netherlands; Articles 1255 and 1273 (3) of the Spanish Civil Code; Article 19 of the Swiss Code of Obligations.

<sup>37</sup> It must be noted however that Austrian law is more nuanced in that it provides that a contract that violates legal rules relating, not to the content of the contract but to the mode, place and moment of conclusion of the contract, will be maintained.

In Swiss law the sanction is, in principle, the invalidity of the act (Article 20 I CO) – subject to ‘*the special case of mesures d’ordre (or prescriptions d’ordre, Sollvorschriften as opposed to Mussvorschriften): the infringement of these measures can lead to civil sanctions (damages) or administrative sanctions, or even penal sanctions (fines). However, the act accomplished in contravention of such a measure remains valid: invalidity would result in undermining the rights of innocent third parties and the needless compromise of legal certainty.*’ (P. Engel, *Traité...*, *op. cit.* p.111).

<sup>38</sup> M. Pédamon, *op. cit.* n° 105 onwards.

<sup>39</sup> ‘*A legal transaction that violates a statutory prohibition is void, unless the statute leads to a different conclusion*’.

<sup>40</sup> This article also makes it possible to sanction situations of evasion of the law via fraud. See M. Pédamon, *op. cit.* n° 107.

<sup>41</sup> ‘*A legal transaction which is contrary to public policy is void*’.

<sup>42</sup> ‘*L’illicéité ou l’immoralité de l’objet [peut être sanctionnée par la nullité] des actes contraires aux dispositions légales impératives et aux bonnes mœurs*’, M. Pédamon, *op. cit.* n° 92.

<sup>43</sup> In Austrian Law, § 879 ABGB is also aimed at morality.

<sup>44</sup> BVerfGE89, 214 ff.

<sup>45</sup> R. Zimmerman, *The New German Law of Obligations...op. cit.* p.207 onwards: ‘*This development was initiated by a spectacular decision of the Federal Constitutional Court enjoining the Federal Supreme Court, when applying open-ended provisions as such as §§ 138 I and 242 BGB, to pay due attention to the guarantee of the autonomy of private individuals, as enshrined in Article 2 I of the Basic Law (Grundgesetz, 66). Such autonomy, the Court held, is not properly safeguarded by a regime of unrestricted freedom of contract. On the contrary, the civil courts are bound to control the content of contracts which are unusually burdensome for one of the parties and which result from a structural inequality of bargaining power*’.

*Bundesgerichtshof*, when it applies provisions such as § 138 and 242 BGB, to be vigilant in guaranteeing private autonomy as is provided in Article 2 I of the Fundamental Law: according to the Federal Constitutional Court, this autonomy is not safeguarded by a limitless freedom of contract. On the contrary, the civil law jurisdictions are bound to control the contents of contracts which are unduly imbalanced to the detriment of one of the parties, where the imbalance results from a structural inequality in the negotiating powers of the parties.

- **Content of freedom of contract**

19. In the majority of the legal systems studied freedom of contract includes the freedom to break off contractual negotiations. As a result, all the Member States of the European Union hold that the breaking off of contractual negotiations is free<sup>46</sup>, subject, more often than not, to a requirement of good faith<sup>47</sup>. In addition, freedom of contract implies more often than not a freedom to choose the other party to the contract, a freedom to determine the content of the contract and a freedom from restraints of form.

20. Freedom of contract first of all allows each contracting party to choose the other party to the contract. German and Swiss law both include this freedom of choice of party<sup>48</sup> and only limit it to the extent necessary to maintain balanced competition<sup>49</sup>. Equally, in French law compliance with mandatory rules sometimes leads to limiting the free choice of contracting party<sup>50</sup>. However the principle of freedom of choice remains.

21. The majority of foreign legal systems also hold that freedom of contract implies a freedom of the parties to determine the content and terms of their contract. Thus in German law it is established that the principle of freedom of contract covers '*the freedom to shape the content of the contract (Gestaltungsfreiheit)*', which '*allows the parties to arrange their*

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<sup>46</sup> *Principles of European Contract Law, Part I and II, op. cit.* p. 191

<sup>47</sup> However, English law, for its part, does not impose on the parties any duty to enter into or continue negotiations in good faith. See *Walford v. Miles* [1992] A. C. 128, H. L. cited in: *Principles of European Contract Law, Part I and II, op. cit.* p. 192.

<sup>48</sup> In respect of German law see M. Pédamon, *op. cit.* n° 22. – For Swiss law see P. Engel, *Traité...*, *op. cit.* p. 97, 102; *adde* Swiss Federal Tribunal, 1<sup>st</sup> Civil Court, 7 May 2002, *La Poste c. Acusa*, previously cited by P. Engel '*L'évolution récente...*', article cited above, p.8.

<sup>49</sup> See in German law the law of 27 July 1957 concerning restrictions on competition (*Gesetz gegen Wettbewerbsbeschränkungen*) – discriminatory practices and refusal to sell (see M. Pédamon, *op. cit.* n° 36). – For Swiss law, see P. Engel, *Traité, op. cit.* p. 102, which holds that '*the Federal law on cartels and analogous organisations of 20 December 1985 can indirectly impose a contractual partner on [a person] who, if they do not accept this partner, would be seen as breaking the law*'.

<sup>50</sup> This can be the case with legal rights of pre-emption (for example, the right of pre-emption belonging to a residential leaseholder: Article 15 of the law of 6 July 1989)

*contractual relations as they want and to dispose, totally or partially, of non-mandatory contractual models; it also allows the parties to create new types of contract*<sup>51</sup>.

However, each legal system admits that the freedom to determine the content and terms of the contract only operates within a framework fixed by mandatory rules. Thus in French law the free determination of the content of the contract gives way when the law requires the insertion of a specific clause in the contract<sup>52</sup>. Equally, in Italian law, the parties are never free to determine the terms and content of the contract outside of what the law states is permissible: thus, even atypical contracts remain subject to the provisions of the Code<sup>53</sup>. In addition, Article 1339 of the Italian Civil Code leads to the automatic insertion in the contract of the terms relating to the price of goods and services imposed by the law, which includes replacing those laid down by the parties; Article 1340 provides for its part that customary terms (in the sense of regular use) are considered inserted into the contract if the parties did not intend to exclude them<sup>54</sup>.

**22.** Finally, freedom of contract implies a freedom of form<sup>55</sup>. This rule is recognised by the majority of the Member States of the European Union: in general neither writing nor any other formality is required for a contract to be valid<sup>56</sup>.

## **B. International law and Acquis communautaire**

**23.** The **Vienna Convention** does not expressly dedicate a provision to the principle of freedom of contract. Only the specific application of freedom of contract which permits parties to exclude the application of the Convention or to derogate from its provisions is included<sup>57</sup>. The UNCITRAL Secretariat's explanatory note on the United Nations Convention on Contracts for the International Sale of Goods considers that this provision is an

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<sup>51</sup> *'La liberté de façonner le contenu du contrat (Gestaltungsfreiheit), [qui] autorise les parties à aménager comme elles l'entendent leurs rapports contractuels, à s'écarter totalement ou partiellement des modèles de contrats réglementés de manière non impérative par la loi; elle les autorise également à créer des types contractuels nouveaux'*, M. Pédamon, *op. cit.* n° 22.

<sup>52</sup> See for example the obligatory insertion of fixed words / expressions in particular in consumer law, such as Articles L.341-2 and L.341-3 of the Consumer Code.

<sup>53</sup> Article 1232 of the Italian Civil Code

<sup>54</sup> M.-C. Diener, *op. cit.* §. 3. 4. 1.

<sup>55</sup> **Acquis Group:** a guiding principle was proposed. The idea was not retained as the Draft Common Frame of Reference proposed to rewrite Article 2:101 (2) PECL. See DCFR II. 1:107: Form: (1) *A contract or other juridical act need not be concluded, made or evidenced in writing nor is it subject to any other requirement as to form.*; (2) *Particular rules may require writing or some other formality.*

<sup>56</sup> See to this end the commentary on Article 2:101: *Principles of European Contract Law, Part I and II, op. cit.* p. 142: Germany: impliedly from § 125 BGB; Austria: § 883 ABGB.; Denmark: Article 5.1.1 Danske Lov.; Spain: Article 1258 Civil Code, Article 51 Commercial Code; Finland: Hoppu 36; Portugal: Article 219 onwards Civil Code; Sweden: Aldercreutz I 14; Netherlands: Article 3: 37 (1) BW; Italy, Articles 1326 and 1350 implicitly; Switzerland: Article 11 I of the Code of Obligations.

<sup>57</sup> See Article 6: *'The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions.'*

expression of the *'fundamental principle of freedom of contract'*. However, this approach corresponds more with paragraph 2 of the current Article 1:102<sup>58</sup> than with the statement of a guiding principle.

The Vienna Convention does not include a general principle of compliance with *'mandatory laws'*.

The principle of consensualism is clearly affirmed by the Convention<sup>59</sup>. Article 11 states that *'a contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses'*.

**24.** The place occupied by freedom of contract in **Community law** is important, above all in the case law and the secondary legislation<sup>60</sup>, and its recognition within the guiding principles of material Community law is not in any doubt. It began in effect with the Treaty of Rome putting in place a Common Market which goes, *'well beyond the introduction of a free trade area'*<sup>61</sup> and which constitutes *'above all a whole framework of activity for economic operators'*<sup>62</sup>. Thus, freedom of contract appears as a factor in the effective realisation of intra-Community economic exchanges.

**25.** The principle of freedom of contract can be compared to other principles present in Community law, which helps to reinforce its place within the Community sphere.

First, outside of contract law *stricto sensu*, freedom of contract is directly linked to the general principle of *free movement*, the central notion of the EC Treaty, which manifests itself in the economic areas of free movement of goods<sup>63</sup> and workers<sup>64</sup>, freedom of establishment and the free movement of services<sup>65</sup> and free movement of capital<sup>66</sup>, as well as the non-economic area of free movement of persons<sup>67</sup>. Naturally, it is the first facet of free movement which relates to freedom of contract since this is one of the corollaries of the economic liberalism which permeates Community law<sup>68</sup>. The implementation of freedom of contract is

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<sup>58</sup> See *supra*.

<sup>59</sup> Subject to the provisions of Article 12: *'Any provision of article 11, article 29 or Part II of this Convention that allows a contract of sale or its modification or termination by agreement or any offer, acceptance or other indication of intention to be made in any form other than in writing does not apply where any party has his place of business in a Contracting State which has made a declaration under article 96 of this Convention. The parties may not derogate from or vary the effect of this article.'*

<sup>60</sup> See *infra* the cited references.

<sup>61</sup> *'... Bien au-delà de l'instauration d'une zone de libre-échange'*. J.-P. Jacquet, *Droit institutionnel de l'Union européenne*, Dalloz, 3<sup>e</sup> éd., 2004, especially n° 58.

<sup>62</sup> *'... Avant tout un cadre d'activités pour les opérateurs économiques'*, *ibid.*

<sup>63</sup> Articles 23 – 31 EC

<sup>64</sup> Articles 39 – 42 EC

<sup>65</sup> Articles 43 – 55 EC

<sup>66</sup> Articles 56 – 60 EC

<sup>67</sup> Articles 61 – 69 EC, see also Article 18 §1 EC

<sup>68</sup> To this end Article 4 §1 EC states that *'the activities of the Member States and the Community shall include ... the adoption of an economic policy ... conducted in accordance with the principle of an open market economy with free competition'*.

therefore expressed by the fact that an individual, a national of a Member State and exercising their right to free movement, is able to contract in another Member State under the same conditions as a national of that Member State; more often than not these are cross-border contracts<sup>69</sup>. The above illustration applies to each of the Community freedoms.

The principle of freedom of contract should also be read in the light of the principle of '*autonomie de la volonté*' (autonomy of will) of which freedom of contract is a positive expression. This is expressed in 'supplementary'<sup>70</sup> Community law, for example the Convention of Rome on the law applicable to contractual obligations<sup>71</sup> which states in Article 3 the principle of freedom of choice by reference to the role of the parties in the choice of the applicable law for their contract. Within the framework of the Brussels Convention on *jurisdiction and the enforcement of judgments in civil and commercial matters*<sup>72</sup>, today transformed into a Community regulation<sup>73</sup>, the ECJ has also had the opportunity to pronounce on the place of the autonomy of will in this sphere. Thus it has '*attached the requirements of the [ex] article 17 of the Convention in respect of the clause attributing jurisdiction to the establishment by this text [of the aforesaid principle]*'<sup>74</sup>. The ECJ also states that '*article 17 of the Convention embodies the principle of the parties' autonomy to determine the court or courts with jurisdiction, the third paragraph of that provision must be interpreted in such a way as to respect the parties' common intention when the contract was concluded...*'<sup>75</sup>.

**26.** There are numerous applications of the principle of freedom of contract in Community law. One finds for example the freedom to enter into a contract *or not*. Thus, leading the consumer to contract against his wishes by '*creating the impression that the consumer cannot leave the premises until a contract is formed*'<sup>76</sup> is labelled as an 'aggressive commercial practice' by Community law, and, as a result, prohibited by Directive 2005/29/EC<sup>77</sup>.

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<sup>69</sup> See *infra* freedom of contract and international private law rules.

<sup>70</sup> A doctrinal expression indicating the norms resulting from an International Convention to which the Member States of the Community are parties in the absence of a relevant Community legal base to make such provisions.

<sup>71</sup> Rome Convention 80/934 CEE 19 June 1980 on the law applicable to contractual obligations, OJ n° L 266 09/10/1980 p. 0001 - 0019.

<sup>72</sup> Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, OJ n° L 299 31/12/1972 p. 0032 - 0042.

<sup>73</sup> Regulation (EC) No 44/2001 22 December 2000 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters OJ L 12 16.01.2001.

<sup>74</sup> '*... Rattach[é] les exigences de l'[ex]-article 17 de la Convention en matière de clause attributive de juridiction à la consécration par ce texte [dudit principe]*', H. Adida-Canac, *Contribution à l'étude du droit communautaire des obligations*, ANRT, 2003, t. 1, n° 351.

<sup>75</sup> Point 14, ECJ, 24 June 1986, *Rudolf Anterist v Crédit lyonnais*, Aff. 22/85, Rec. 1986 p. 01951.

<sup>76</sup> Point 24 on 'aggressive commercial practices', Annex 1 in Directive 2005/29/EC 11 May 2005 on unfair business-to-consumer commercial practices in the internal market (Unfair Commercial Practices Directive) OJ L 149 11.6.2005, p 22-39

<sup>77</sup> Directive 2005/29/EC 11 May 2005 on unfair business-to-consumer commercial practices in the internal market, cited above.



In the same way, simple contractual negotiations can be freely broken off in order to preserve the right not to enter into a contract, for example if the parties do not reach agreement over one or other condition of the contract.

In addition, freedom of contract is expressed through the free choice of the other party to the contract. Directive 2004/113/EC 13 December 2004 *implementing the principle of equal treatment between men and women in the access to and supply of goods and services*<sup>78</sup> takes the precaution of stating in its Article 3 §2 that only a discriminatory choice, based on the sex of the other party, can threaten the rule according to which ‘*all individuals enjoy ... the freedom to choose a contractual partner for a transaction*’<sup>79</sup> even where it is for ‘*subjective reasons*’<sup>80</sup>.

**27.** The limit placed on freedom of contract by compliance with mandatory rules can also be found in Community law, particularly secondary Community law. This is undoubtedly explained by the fact that contractual provisions resulting from Community law ‘*have the protection of the contracting party in a weak position as their essential function*’<sup>81</sup>; mandatory rules are the ideal tool to do this in that they impose public policy requirements on the wills of the parties. For example, Directive 94/47/EC 26 October 1994 *on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis* in Article 4 requires Member States to make provision to ensure that ‘*the contract, which shall be in writing, includes at least the items referred to in the Annex*’<sup>82</sup>.

## **C. Codifications by legal scholars**

### **➤ Statement of the principle of freedom of contract**

**28.** In respect of the other projects that can be compared to the Principles of European Contract Law, it is necessary to distinguish between those that directly commit to the principle of freedom of contract itself, and those that only retain its specific applications.

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<sup>78</sup> OJ L 373 21.12.2004, p.37-43

<sup>79</sup> Whereas 14.

<sup>80</sup> *Ibid.*

<sup>81</sup> ‘... [ont] pour fonction essentielle la protection du contractant en situation de faiblesse’, H. Aubry, *L’influence du droit communautaire sur le droit français des contrats*, op. cit., n°12.

<sup>82</sup> Article 4 of the Directive 94/47/EC of the European Parliament and Council 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis, OJ L 280 29.10.1994, p 83-87.

- **Direct commitment**

29. The **European Code of Contract Preliminary Draft** commits directly to the principle of freedom of contract in its '*preliminary provisions*'. Article 2 § 1 concerning '*contractual autonomy*' states that '*the parties can freely determine the content of the contract, within the limits imposed by mandatory rules, morality and public policy ...*'. In the same way, Article 1.1. of the **Unidroit Principles**, entitled, '*freedom of contract*' expressly states the principle of freedom of contract: '*the parties are free to enter into a contract and to determine its content*'.

- **Indirect commitment**

30. The principle of freedom of contract is not expressly stated as such in the **Proposals for Reform of the Law of Obligations and the Law of Prescription** in any one individual provision. However, it is the natural basis of many other provisions. In addition to the specific variations considered hereafter, it also implies for example that the initiation and the conduct of negotiations is free (see Article 1104, paragraph 1).

➤ **Content and limits of freedom of contract**

- **Limits: Compliance with mandatory rules**

31. In a general sense, all the texts taken into account limit freedom of contract by reserving compliance with mandatory rules.

Article 2 § 1 of the **European Code of Contract Preliminary Draft**, entitled, '*contractual autonomy*', states that '*the parties can freely determine the content of the contract, within the limits imposed by mandatory rules, morality and public policy, as established in this Code, Community law or the national laws of the Member States of the European Union...*'. If the agreement is contrary to public policy, morals, a mandatory law etc it is sanctioned by holding the contract void<sup>83</sup>. It is also specifically envisaged that '*the*

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<sup>83</sup> Article 140: '*1. Unless the law states otherwise, a contract is void*

*(a) if it is contrary to public policy or morals or to a mandatory rule adopted for the protection of the general interest or for the safeguarding of situations of primary importance for society;*

*(b) if it is contrary to any other applicable mandatory rule;*

*(c) if it lacks any of the essential elements of a contract indicated in Art 5 para 3 and para 4;*

*(d) in the other cases indicated in this Code and in the applicable laws of the European Union and its Member States;*

*(e) in all other cases, in this Code or an applicable law, where it is stated that some element is necessary in order for the contract not to be void or in order to give validity to an act, or where equivalent expressions are used.'*

*content of the contract must be (...) lawful (...)*<sup>84</sup>. It is lawful ‘when it is not contrary to mandatory rules of this Code, to Community law or national law, or to public policy or morals’<sup>85</sup>.

According to Article 1.4 (‘mandatory rules’) of the **Unidroit Principles**, ‘nothing in these Principles shall restrict the application of mandatory rules, whether of national, international or supranational origin, which are applicable in accordance with the relevant rules of private international law’.

The **Proposals for Reform of the Law of Obligations and the Law of Prescription** do not contain a general reservation of compliance with ‘mandatory rules’ as it is inferred from Article 6 of the French Civil Code<sup>86</sup> (see *supra* the study of French law). It is nevertheless stated that ‘a thing which forms the subject-matter of the undertaking must be lawful’ (Article 1121-2); if it is not the contract is null with absolute nullity (Article 1122). Equally, the cause of the contract must be lawful (Article 1124); in default of which the contract is once again null with absolute nullity (Article 1124-1).

- **Content of freedom of contract**

**32.** The different projects all provide that freedom of contract necessitates that the parties are free to negotiate the contract and to break off negotiations, subject to good faith.

Within the **Unidroit Principles** this principle manifests itself in freedom to negotiate and the absence of liability in the case of failure to reach an agreement<sup>87</sup>.

The freedom to break off pre-contractual negotiations is expressly stated in the **Proposals for Reform of the Law of Obligations and the Law of Prescription**<sup>88</sup>. The first paragraph of Article 1104 declares that ‘the parties are free to begin, continue and break off negotiations, but these must satisfy the requirements of good faith’<sup>89</sup>.

Finally, the freedom to break off negotiations is implicitly found in the **European Code of Contract Preliminary Draft** where it excludes, as a matter of principle, the liability of the parties if the negotiations do not succeed<sup>90</sup>.

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<sup>84</sup> Article 25: ‘The content of the contract must be useful, possible, lawful, and determined or capable of determination’.

<sup>85</sup> Article 30 § 1.

<sup>86</sup> Which is outside the field of the proposals.

<sup>87</sup> Article 2.1.15(1): ‘A party is free to negotiate and is not liable for failure to reach an agreement.’

<sup>88</sup> See in particular Article 1104, para 1: ‘L’initiative, le déroulement et la rupture des pourparlers sont libres, mais ils doivent satisfaire aux exigences de la bonne foi’.

<sup>89</sup> J. Cartwright and S. Whittaker, *Proposals for Reform of the Law of Obligations and the Law of Prescription* (English translation of the Avant-projet de réforme du droit des obligations et de la prescription), <http://denning.law.ox.ac.uk/iecl/research.shtml>, (hereafter, J. Cartwright and S. Whittaker, *op. cit.*).

<sup>90</sup> See Article 6 ‘obligation of good faith’, specifically §1: ‘each of the parties is free to undertake negotiations with a view to concluding a contract without being held at all responsible if said contract is not drawn up, unless his behaviour is contrary to good faith’.

**33.** The studied texts all hold, more often than not expressly, that the form of the contract, as well as the proof of it, is free.

Article 1.2 of the **Unidroit Principles**, '*no form required*', states that the Principles do not require the contract to be concluded or evidenced by writing, and that it can be proved by any means, including witnesses.

The principle of consensualism is equally demonstrated by the **Proposals for Reform of the Law of Obligations and the Law of Prescription**. Its Article 1127 holds that '*as a general rule, contracts are completely formed by the mere consent of the parties regardless of the form in which this may be expressed*'<sup>91</sup>.

Only the **European Code of Contract Preliminary Draft** does not expressly state the principle of consensualism. Nevertheless, no other article requires that a particular form be used for a contract to be valid. Only contracts that are specially designated require writing for their validity<sup>92</sup>.

#### **IV. Proposed text**

##### **Article 0-101: Freedom of the parties to enter into a contract**

Each party is free to contract and to choose the other party

The parties are free to determine the content of the contract and the rules of form which apply to it.

Freedom of contract operates subject to compliance with mandatory rules.

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<sup>91</sup> J. Cartwright and S. Whittaker, *op. cit.*

<sup>92</sup> See in particular Article 35 for contracts relating to real goods (§1, 2 and 3) or gifts (§4)

## ***Article 0-102: Respect for the freedom and rights of third parties***

### **I. General presentation of the principle**

34. In the chapter dedicated to freedom of contract it is important to clarify how this freedom is integrated within the pre-existing legal order. The contract produces two types of effect. On the one hand, because of the obligations it creates, it produces an obligatory effect which links the parties. On the other hand, it has results which take effect as social facts and integrate into the pre-existing legal order. As a result, it is advisable to clarify to what extent the parties are free to produce these effects with their contract. Their freedom is necessarily limited by the rights of third parties to the contract.

In the first place, although the parties are free to contract, their contract can in principle only produce a binding effect between the parties to it, and not in respect of third parties, who by assumption, have not consented to the act. There are however legal exceptions to this principle (notably the stipulation in favour of a third party).

Secondly, even if the parties are free to contract, they cannot enter into a contract which ignores the existing rights of third parties. It is a question here of transposing, from the point of view of the effects of a contract, the general principle according to which no one can harm another. Thus, when contracting, the parties cannot, by their agreement, illegitimately undermine the pre-existing rights of third parties. This principle must apply throughout the contractual process, from the time of entering into the contract until its discharge, as well as during the performance of the contract and if it is modified.

### **II. Application of the principle in PECL**

#### **➤ Relative effect of the contract**

35. The principle according to which the contract can only produce effects between the parties does not figure in the Principles of European Contract Law itself. The Principles only include an exception to this principle, in Article 6:110 which deals with the stipulation in favour of a third party (*stipulation pour autrui*). It provides that the third party is able to require the performance of the obligation if the right ‘has been expressly agreed upon

*between the promisor and the promisee, or when such agreement is to be inferred from the purpose of the contract or the circumstances of the case*<sup>93</sup>.

As a result there is no provision which states that, apart from the exceptions specifically envisaged, the principle remains that the contract will only produce effects between the parties<sup>94</sup>.

Such a provision could be placed within the chapter concerning the effects of the contract<sup>95</sup>. However, it appeared that the regulation of the effects of the contract with regard to third parties was better dealt with in the guiding principles<sup>96</sup>. The determination of what the parties have the right to do and what the parties do not have the right to do vis-à-vis third party rights is in effect clarifying the scope of freedom of contract, since in reality third party rights limit this freedom.

### ➤ **Respect for the rights of third parties**

**36.** No provision in the Principles of European Contract Law specifies the effect of a contract on third parties. This is almost certainly explained by the fact that, in a more general sense, there is no text dealing with the situation of third parties to the contract, with the exception of the stipulation in favour of a third party<sup>97</sup>. However, even if the contract is ‘the thing’ of the parties, the fact remains that it does produce effects in the pre-existing legal order, and that for this reason its effects impact on third parties.

As a general system of regulation of contract law, the Principles cannot ignore the place and situation of third parties. It is therefore important to fill the current gaps. Here again the decision to create a guiding principle has been taken, instead of creating new provisions in the chapter concerning the effects of the contract.

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<sup>93</sup> See Article 6:110(1) PECL

<sup>94</sup> **Acquis Group:** No provision on the effect of the contract in respect of third parties has been proposed.

<sup>95</sup> See *infra* the general observations on this chapter.

<sup>96</sup> For the position of third parties with regard to contractual certainty, see *infra* Article 0-203.

<sup>97</sup> See *supra* Article 6:110. – A comparison may be made with the provisions concerning assignment of claims (Chapter 11) and transfer of contract (Chapter 12) if we consider the assigned debtor as a third party to the contract of transfer. Several provisions state that the transfer cannot aggravate his situation.

### **III. Applications of the principle in comparative law**

#### **A. National laws**

##### **➤ Relative effect of the contract**

37. The principle according to which the contract only produces effects between the parties is recognised in the majority of national laws. Sometimes, the principle is the subject of an express provision.

This is the case with French law. Article 1165 of the Civil Code states that *'agreements produce effect only between the contracting parties; they do not harm a third party, and they benefit him only in the case'* of the stipulation in favour of third parties. This provision is considered to be the textual basis of the principle of relative effect. According to a classical analysis, the second proposition of the provision signifies that it is not possible for the parties to make a third party the debtor or the creditor of the contract other than in the case of the stipulation in favour of a third party. Article 1119 of the Civil Code entertains the same idea as it states that *'as a rule, one may, bind oneself and stipulate in his own name, only for oneself'*. It results from this provision that, once again, a party may only in principle contract for himself.

Equally, in Italian law, Article 1372, paragraph 3 of the Civil Code expressly envisages that the contract *'only produces effects with regard to third parties in the cases provided for by the law'* while paragraph 1 states that *'the contract has the force of law between the parties'*. The principle of relative effect of the contract with regards to third parties is presented as a limit and also a guarantee of freedom of contract: you only undergo the consequences of an act if you have signed up to it<sup>98</sup>. Among the cases where the law admits that the contract does bind a third party, Article 1411 of the Civil Code deals with the stipulation in favour of a third party.

In the same way again, Article 1257 of the Spanish Civil Code poses the principle of the relative effect of the contract, which therefore cannot threaten the rights of third parties. The same provision nevertheless then recognises contracts in favour of a third party (stipulation pour autrui) and contracts that are the obligation of a third party (in this case a sort of promise of to stand as surety).

38. In other legal systems, the principle of relative effect is clearly acknowledged, without forming the object of a particular legal text.

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<sup>98</sup> M.-C. Diener, *op. cit.* § 1. 3. 9.

In German law, although the BGB does not contain any general provision on the effects of the contract with regard to third parties, the principle ‘*is that a contract of an obligatory type [...] only has effect between the contracting parties, that it does not give rise to any contractual relationship, any obligation or any claim on the part of a third party; this principle can be inferred from certain specific provisions of the BGB (§ 311, 328, 333). It appears as the negative side of freedom of contract*’<sup>99</sup>. However, ‘*the principle of relative effect is placed to one side when the contract produces beneficial effects for the third party or [...] when the third party is included in the contractual relationship of obligation (§328 onwards)*’<sup>100</sup>. Contracts for the benefit of third parties are *Verträge zugunsten Dritter*. ‘*The BGB establishes two sorts of contracts of this nature*’<sup>101</sup>: *the true contract for the benefit of third parties (echter Vertrag zugunsten Dritter) which resembles the stipulation pour autrui of [French] law; the false contract for the benefit of third parties (unechter Vertrag zugunsten Dritter) which can be clearly distinguished. In the first instance, the third party ‘directly acquires the right to require performance’ from the promisor (§ 328 I). In the second case, the third party, whose position is more fragile, does not acquire any right against the promisor (§ 328 II); only the stipulant can require the performance which is due to him*’<sup>102</sup>.

Originally Dutch law contained a provision, analogous<sup>103</sup> to Article 1165 of the French Civil Code, which stated the principle of relative effect. However, this provision was repealed by the new code. Nevertheless, the principle remains recognised<sup>104</sup>. The principle of relative effect is not however an obstacle to the stipulation in favour of a third party (Article 6:253<sup>105</sup>, 6:254<sup>106</sup> and 6:256 BW), provided that it is based on the agreement of the parties

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<sup>99</sup> ‘*Est que le contrat de type obligatoire [...] n’a d’effet qu’entre les parties contractantes, qu’il ne fait naître aucun rapport contractuel ni aucune obligation ni créance à la charge ou au bénéfice de tiers; ce principe peut se déduire de quelques dispositions particulières du BGB (§ 311, 328, 333). Il apparaît comme la face négative de la liberté contractuelle*’, M. Pédamon, *op. cit.* n° 151.

<sup>100</sup> ‘*Le principe de la relativité contractuelle est tenu en échec lorsque le contrat produit des effets au profit de tiers ou [...] lorsque des tiers sont inclus dans le rapport contractuel d’obligation (§ 328 et s.)*’, M. Pédamon, *ibid.*

<sup>101</sup> § 328. *Contracts for the benefit of third parties:*

(1) *Performance to a third party may be agreed by contract with the effect that the third party acquires the right to demand the performance directly.*

(2) *In the absence of a specific provision it is to be inferred from the circumstances, in particular from the purpose of the contract, whether the third party is to acquire the right, whether the right of the third party is to come into existence immediately or only under certain conditions, and whether the power is to be reserved for the parties to the contract to terminate or alter the right of the third party without his approval.*

<sup>102</sup> ‘*Le BGB consacre deux sortes de contrats de cette nature: le véritable contrat au profit de tiers (echter Vertrag zugunsten Dritter) qui s’apparente à la stipulation pour autrui [du] droit [français]; le faux contrat au profit de tiers (unechter Vertrag zugunsten Dritter) qui, lui, s’en distingue nettement. Dans le premier cas le tiers ‘acquiert directement le droit d’exiger la prestation’ du promettant (§ 328 I). Dans le second cas le tiers, dont la position est plus fragile, n’acquiert aucun droit contre le promettant (§ 328 II); seul le stipulant peut exiger la prestation qui lui est due*’, M. Pédamon, *op. cit.* n° 158.

<sup>103</sup> See the former Article 1376.

<sup>104</sup> D. Busch, E. H. Hondius et alii *op. cit.* p.283; A. S. Hartkamp ‘*Law of obligations*’, *Introduction to Dutch Law*, J. Chorus, P.-H. Gerver et E. Hondius (ed.), 4<sup>e</sup> ed. Kluwer Law International, 2006, p.160.

<sup>105</sup> ‘*1. A contract creates the right for a third party to claim a prestation from one of the parties or to invoke the contract in another manner against one of them, if the contract contains a stipulation to that effect and if the third person accepts it.*



and that the third party beneficiary can renounce as well as accept the right that has been conferred.

In Swiss law, despite the absence of any provision in this respect, the principle of relative effect is recognised and implies ‘a primary concern for the interested parties; third parties remain at a secondary level’<sup>107</sup>. The Code of Obligations contains a chapter entitled ‘de l’effet des obligations envers les tiers’<sup>108</sup> aimed notably at subrogation (Article 110 CO), the promise to stand as surety (Article 111) and the stipulation in favour of a third party (Article 112)<sup>109</sup>.

In English law, the principle of relative effect of contracts is reflected in the unwritten rule of the *Doctrine of Privity of Contract*<sup>110</sup> or *Privity Rule*. According to this rule, only the parties to a contract can request the performance of it or be pursued in order to perform it. According to the doctrine, the *Privity Rule* is used to distinguish between the rights arising from the law of contract and the law of property. According to this presentation, whereas the rights arising from property are universally opposable and ‘binding on the world’, the rights drawn from contract are only binding on the other parties to the contract. These rights drawn from the contract can only form the subject of an action to enforce them or to require their respect if it is the parties themselves who are exercising the rights<sup>111</sup>. Even if the third parties are interested in the contract, they may not pursue performance of the contract<sup>112</sup> and may not be pursued<sup>113</sup>.

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2. Until its acceptance, the stipulation can be revoked by the stipulator.

3. Acceptance or revocation of the stipulation takes place by a declaration addressed to one of the two persons involved.

4. An irrevocable stipulation which, with respect to the third person, has been made by gratuitous title, is deemed accepted if it has come to the attention of the third person and he has not rejected it without delay’ (translated in D. Busch, E. H. Hondius et alii *op. cit.* p.282).

<sup>106</sup> ‘1. Once the third party has accepted the stipulation, he is deemed to be a party to the contract.

2. The third party can also derive rights from the stipulation during the period prior to acceptance if this is in conformity with the necessary implication of the stipulation’ (translated D. Busch, E. H. Hondius et alii *op. cit.* p.283).

<sup>107</sup> ‘Sont essentiellement en cause les seuls intéressés et que la collectivité comme les tiers restent au second plan’, P. Engel, *Traité... op. cit.* p.103. – Adde P. Gauch, W. R. Schluep et P. Tercier, *La partie générale du droit des obligations (sans la responsabilité civile)*, Schulthess, Zurich, 1982, t.2, n°1579 onwards also deals with the principle of relativity of contracts.

<sup>108</sup> P. Engel, *Traité... op. cit.* p. 417 onwards.

<sup>109</sup> ‘I. The party who, acting in his own name, has stipulated an obligation in favour of a third party has the right to require performance of that obligation for the benefit of the third party.

II. The third party or his successors in title may also personally demand performance, when this was the intention of the parties or it is customary.’

<sup>110</sup> On this theory see G. H. Treitel, *An outline of the Law of Contract*, Oxford University Press, 6th edition 2004, pp. 97 - 101. – S. A. Smith, *Atiyah’s Introduction to the Law of Contract*, Clarendon Law Series, Oxford University Press, 6<sup>th</sup> edition, 2005, pp. 335 and 336.

<sup>111</sup> For an examination of this distinction with respect to the doctrine of ‘privity of contract’, see S. A. Smith, *op. cit.*, p. 335: ‘(...) Indeed, the principle [of Privity of Contract] has long been regarded as a distinguishing feature between the law of contract and the law of property. True proprietary rights are “binding on the world” in the lawyer’s traditional phrase. Contractual rights, on the other hand, are (in the traditional law) only binding on, and enforceable by, the immediate parties to the contract (...)’.

<sup>112</sup> ‘(...) The third party cannot enforce a benefit purposed to be granted by the contract (...)’ (C. Elliott and F. Quinn, *op. cit.* p. 249).

<sup>113</sup> C. Elliot and F. Quinn, *op. cit.* p. 247.

Over the course of a relatively long evolution<sup>114</sup>, exceptions to the *Privity Rule* have been admitted, notably in order to allow contracts to be entered into in favour of third parties and to allow these third parties to benefit from the advantages that it was contractually envisaged would be conferred on them. In 1996 the *Law Commission* therefore wrote and disseminated a report specially dedicated to the question, entitled *Privity of Contract: Contracts for the Benefit of Third Parties*. This report led to a major reform in the law, the *Contracts (Rights of Third Parties) Act 1999* which has reduced this aspect of the *Privity Rule* (the impossibility for third parties to demand performance of a contract which they are not parties to) to very marginal applications<sup>115</sup>. By virtue of this new law, third parties to the contract can enforce performance in two situations: when the contract expressly confers on them the possibility, or where the contract is entered into for the benefit of the third party.

### ➤ **Respect for the rights of third parties**

39. A comparative analysis shows that with regard to a taking into account of third party rights, each national legal system maintains their own individual method. Nevertheless, there are certain common points amongst them. First, the majority of the legal systems do not recognise an express provision forbidding parties to impinge on third party rights. This can be explained by the fact that the above is simply a specific application of the fundamental principle, recognised by all the legal systems studied, which holds that no one can harm another. Following from this rule, each of the national legal systems recognises a more or less successful system for preserving third party rights<sup>116</sup>. In some legal systems, the effect of the contract with regard to third parties is particularly strongly regulated. In others it is only through the sanctioning of the violation of third party rights that these effects are taken into account.

40. French law, thanks to the work of legal scholars at the beginning of the 20<sup>th</sup> century, is certainly one of the legal systems where the effect of the contract with regard to third parties is explicitly regulated. In effect, thanks to the analyses carried out on the notion of opposability (*opposabilité*)<sup>117</sup>, it can be said that the contract, in so far as it is integrated in the legal order, constitutes a social fact that third parties make take into account. It is a question

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<sup>114</sup> For the refusal of any exception to the doctrine of privity of contract, see *Tweddle v. Atkinson* (1861). - *Beswick v. Beswick*, (1968).

<sup>115</sup> On this question, see notably G. H. Treitel, *op. cit.* pp. 255-259.

<sup>116</sup> In English law, it must be noted that the taking into account of third party rights does not give rise to general solutions or approaches as this would be to limit the freedom of contract of the parties.

<sup>117</sup> See A. Weill, *Le principe de la relativité des conventions en droit privé français*, thèse Strasbourg, 1938. - S. Calastreng, *La relativité des conventions, étude de l'article 1165 du code civil*, thèse Toulouse, Gaillac, 1939, p. 12. - See also, E. Juille, *Effets des actes juridiques à l'égard des tiers*, thèse Lille, 1904. - L. Delcourt, *De l'effet des actes juridiques à l'égard des tiers*, thèse Paris 1902. - R. Demogue, *Traité des obligations*, tome VII, 1932, n° 702 s. - For a complete study of opposability, see J. Duclos, *L'opposabilité, essai d'une théorie générale*, thèse LGDJ, tome 179, 1984.

of the opposability of the contract to third parties. However, the study of this situation leads to the recognition that the contract is integrated into a legal order where third parties are themselves the holders of rights which must be respected. The opposability of third party rights to parties to the contract results in a limitation on freedom of contract: the parties cannot act in a way that would illegitimately undermine third party rights as their contract will produce, as a social fact, effects with regard to everyone. This principle, which is normally considered as being without textual basis, is the foundation of several of French law's tools and techniques for dealing with third parties. Entering into a contract should not be a way of threatening third party rights. Thus, the parties cannot enter into a contract that compromises the performance of a right of a third party. The most frequent illustrations concern the situation where a debtor, already obliged to an initial creditor, enters into a contract which has the effect of compromising the performance of his obligation. While the debtor incurs liability in respect of his initial creditor, the case law holds that, with regards to the other party, *'every person who, with knowledge, helps another to breach his contractual obligations, commits a delictual fault in respect of the victim of the infraction'*<sup>118</sup>. A recent decision, which resulted in a similar outcome, was based on the notion of opposability itself<sup>119</sup>. There are many applications of this position. For example, a person, who knowingly enters into a contract in contempt of a non-compete clause which another party is subject to, will be liable as he has ignored the right of the beneficiary of the clause which was opposable to him<sup>120</sup>. Another example can be found in disputes relating to preliminary contracts (*avant-contrats*), important to French law. For example, the contracting parties are not authorised to conclude a sale if it would violate a prior unilateral promise of sale contractually given by the seller. The sale would compromise the rights of the beneficiary of the unilateral promise of sale, which would not be allowed even though the beneficiary is a third party in respect of the purchaser<sup>121</sup>. Although, more often than not, the third party gets their opposable right from a contract they have entered into with one of the parties, this is not always the case. For example, the legally bound subject of an obligation to maintain or support sees his freedom of contract limited: he may not enter into a contract which leaves him unable to honour his obligation. Such a contract would, in effect, be fraudulent.

This position results more generally from the operation of Article 1167 of the Civil Code<sup>122</sup> which allows creditors, whatever the origin of their right, to attack the acts by which

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<sup>118</sup> *'Toute personne qui, avec connaissance, aide autrui à enfreindre les obligations contractuelles pesant sur lui, commet une faute délictuelle à l'égard de la victime de l'infraction'*, Cass. com. 11 oct. 1971: D. 1972, 120; 13 mars 1979: D. 1980, 1, note Serra. – Civ. 1<sup>ère</sup>, 26 janv. 1999: Bull. civ. I, n° 32; RTD civ. 1999, p. 405 obs. Jourdain; *ibid.* p. 625 obs. Mestre.

<sup>119</sup> Cass. civ. 1<sup>ère</sup>, 17 oct. 2000: Bull. civ. I n° 246; D. 2001, p. 952, note Billiau et Moury; JCP 2001 I 338, n° 6 s. obs. Viney.

<sup>120</sup> Cass. com., 13 mars 1979: D. 1980, jurispr. p. 1, note Y. Serra. – Cass. com., 3 mai 2000: Contrats, conc. consom. 2000, comm. 111, obs. M. Malaurie-Vignal; D. 2001, p. 1312, obs. Y. Serra

<sup>121</sup> See for example Cass. civ. 3<sup>ème</sup>, 8 juil. 1975: Bull. civ. III n° 249.

<sup>122</sup> Paragraph 1 states that creditors *'may also, on their own behalf, attack transactions made by their debtor in fraud of their rights'*.

their debtor has compromised the performance of their rights. This is the *action paulienne*<sup>123</sup>. Here again, it is because respect for the creditor's right is imposed not only on the debtor, but more widely on everyone, that the debtor as well as the person who has entered into the contract with him sees their freedom of contract limited: they are not permitted to enter into a contract which compromises the performance of the creditor's right.

41. Italian law also acknowledges the effect of the contract with regard to third parties. Legal scholarship distinguishes between the direct and indirect effects of the contract in respect of third parties. The direct effects are only those created by the stipulation in favour of third parties<sup>124</sup>. The indirect effects are, on the one hand, those effects on third parties which result from the legal activity of another. This is for example the case with a contract for a lease which has effect with regard to the ultimate acquirer of the leased goods. On the other hand, the indirect effects are those which result from the contract being unlawful in respect of the third parties<sup>125</sup>. In addition, Italian law also sanctions, on a specific basis, the case of infringements of the rights of the specific third party who is the creditor of one of the parties. The *action révocatoire*, directed against fraudulent acts, is regulated in a detailed way by Articles 2901 to 2904 of the Civil Code.

42. Other legal systems regulate the effect of the contract with regard to third parties less rigorously.

This is the case with German law where there is no provision that limits freedom of contract in the name of third party rights<sup>126</sup>. Nevertheless, if a contract is entered into in violation of the rights of others (*Verträge zu Lasten Dritter*), 'the contract can be declared void by an application of § 138 BGB [...] when it constitutes a 'particularly brutal or unfair' act with regard to a third party and, according to the case law, a fraudulent collusion with a view to causing the failure of a pre-emption agreement will for example fulfil this condition'<sup>127</sup>. The conditions required for such an avoidance are however very strict.

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<sup>123</sup> On this, see L. Sautonie-Laguionie, *La fraude paulienne*, thèse Bordeaux IV, 2006.

<sup>124</sup> M.-C. Diener, *op. cit.* § 7. 3. 3.

<sup>125</sup> *Ibid.*

<sup>126</sup> However, one can find the basic elements which led to the recognition of the principle of opposability in French law in Ihering: See R. Von Ihering, *Etudes complémentaires de l'esprit du droit romain*: translation O. De Meulenaere, Paris, Marescq, 1903, p. 331 to 498, especially p. 335 and 337. This author distinguishes between the active and passive effects of rights. The active effects are those which the right produces for its holder. The passive effects are those which correspond 'to the limited state in which the right places the person or the thing [subject of the right] and which is characterised vis-à-vis the successor in title as legal subordination and vis-à-vis all other persons as a legal exclusion'. This 'legal exclusion' therefore expresses the effect of the rights with regard to third parties and the obligation on each person not to impinge on them.

<sup>127</sup> 'La nullité du contrat peut être prononcée en application du § 138 BGB [...] lorsqu'il constitue un acte 'particulièrement brutal ou déloyal' à l'égard d'un tiers et, selon la jurisprudence, une collusion frauduleuse en vue de faire échec à un pacte de préférence remplit par exemple cette condition'. R. Wintgen, *Etude critique de la notion d'opposabilité. Les effets du contrat à l'égard des tiers en droit français et allemand*, Lgdj 2004, Bibliothèque de droit privé t.426, n°185 et n. 25 citing BGH NJW 64,540 et 85,2953 et Palandt BGB 61e éd. 2002 § 138 n°61.

German law also protects the rights third party creditors<sup>128</sup>. § 161 BGB also details the consequences of a lack of necessary compliance with third party rights. It renders a contract ineffective if it disregards the conditional right of another, even if that condition has not yet been realised<sup>129</sup>.

43. In the absence of any general regulation on the effects of contracts with regard to third parties, the majority of national legal systems nevertheless sanction the case where the rights of specific third parties who are creditors of one of the other parties are threatened. An action against fraud on the rights of creditors is indeed present in many legal systems<sup>130</sup>. In addition to the previously discussed French and Italian law, this is the case in Dutch law<sup>131</sup>, Spanish law<sup>132</sup>, Belgian law<sup>133</sup> and Quebec law<sup>134</sup>. This action can still be found in other legal systems even if it is not integrated in the provisions concerning contract law but those relevant to bankruptcy. This is the case in English law<sup>135</sup> and Swiss law<sup>136</sup>.

## B. International law and Acquis communautaire

44. The **Vienna Convention** does not contain any provision stating that the parties may only contract for themselves.

In the same way, there is no provision that requires the parties to respect the rights of third parties. Admittedly, it is expressly envisaged that the seller must deliver the goods free from all third party rights (see especially Article 41: *'The seller must deliver goods which are free from any right or claim of a third party, unless the buyer agreed to take the goods subject*

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<sup>128</sup> Originally, the *action paulienne* appeared to be an action in revocation regulated by the Bankruptcy Code created by the law of 10 February 1877. The scission of the two bodies of rules was instigated by the law of 21 July 1879. The Insolvency Code was reformed by a law of 5 October 1994 and entered into force on the 1<sup>st</sup> January 1999. The revocation of fraudulent acts outside of bankruptcy was also reformed by another law of 5 October 1994.

<sup>129</sup> § 161: *'If a person has disposed of a thing, and the disposition is subject to a condition precedent, any further disposition which he makes as regards the thing in the period of suspense is ineffective on the satisfaction of the condition to the extent that it would defeat or adversely affect the effect subject to the condition'*. This rule applies equally to cases where a time has been specified, by reference to Article §163.

<sup>130</sup> For a recent study of some European systems, see *La protección del crédito en Europa: la acción pauliana*, J. J. Forner Delaygua (editor): Bosch, Barcelona, 2000.

<sup>131</sup> Articles 3: 45 to 3: 48 BW. See A. S. Hartkamp, *op. cit.* p.158.

<sup>132</sup> Article 1211 of the Civil Code, and Articles 1290 onwards.

<sup>133</sup> Article 1167 of the Civil Code.

<sup>134</sup> Articles 1631 to 1636 of the Civil Code.

<sup>135</sup> The original text allowing creditors to act against fraudulent acts is *The Statute of Fraudulent Conveyances (13 Elizabeth, 1, c. 5) 1571*, which is still in force in some Common law countries. In England and Wales, it is now *The Insolvency Act 1986* which, in its provisions concerning bankruptcy, governs fraud on creditors' rights (see especially sections 423-425 concerning *'transactions defrauding creditors'*, which reproduce the provisions of *The Statute of Fraudulent Conveyances 1571* in modern law).

<sup>136</sup> See the law of 11 April 1889, part X. – In a more general sense, it is considered in Swiss law that fraud on the law is distinct from *'the abusive threat to the subjective right of another resulting from a contract or from statute (Vertragsumgehung) [...]* it is not that the law is hijacked for another purpose, but where the subject paralyzes the subjective right of another contrary to good faith', P. Engel, *Traité...*, *op. cit.* p.282 onwards.

to that right or claim'<sup>137</sup>), but the rule, in the Convention, only concerns the relations between the parties. It does not allow third parties to act against the sale.

**45.** The requirement for the parties to take into account the right of third parties is present in **Community law**. According to one author, '*the contract can always be invoked against third parties and produces, on their part, all of its effects other than binding force, when it is not likely to be disadvantageous to them*'<sup>138</sup>, which the decisions of the Court confirm<sup>139</sup>. In addition, European law on groups of companies, composed of harmonising Directives on the Company law of Member States, is largely centred on the protection of third parties to the contract constituting the company. For example, the first Directive of 9 March 1968<sup>140</sup> aims to explicitly ensure the '*protection of the interests of third parties*' with regard to companies limited by shares in so far as they only offer their authorized capital as guarantee<sup>141</sup>, and in order to do this it imposes, for example, the compulsory disclosure of some of the company's original documents<sup>142</sup>. Lastly, the ECJ has recognised that, within the framework of competition disputes<sup>143</sup>, all third parties<sup>144</sup> can assert the nullity of an agreement prohibited by Article 81 EC and can demand compensation for the harm suffered if there is a causal link between it and the prohibited agreement<sup>145</sup>. If the anti-competitive agreement can be called into question by third parties, it is because it unlawfully impinges on their rights.

## C. Codifications by legal scholars

### ➤ Relative effect of the contract

**46.** According to the various different projects, the principle of relative effect of the contract is either directly or indirectly stated.

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<sup>137</sup> Adde Article 42 for the right or claim of a third party based on industrial property or other intellectual property.

<sup>138</sup> '*Le contrat peut toujours être opposé aux tiers et produire à leur égard tous ses effets autre que la force obligatoire, lorsqu'il n'est pas susceptible de leur être défavorable*', H. Adida-Canac, *Contribution à l'étude du droit communautaire des obligations*, *op. cit.*, especially, t. 2, n° 949.

<sup>139</sup> For example ECJ, 26 February 1992, *Royal Belge v Robert Joris*, aff. C-333/90, *Rec. I*, p. 1135, cited by H. Adida-Canac, *Contribution à l'étude du droit communautaire des obligations*, *op. cit.*, n° 949.

<sup>140</sup> First Council Directive 68/151/EEC 9 March 1968, on co-ordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community, OJ L 65 14.3.1968, p. 8–12.

<sup>141</sup> *Mémento Pratique Francis Lefebvre - Union européenne*, 2006-2007, *op. cit.*, especially n° 6806.

<sup>142</sup> Article 2 of the Directive.

<sup>143</sup> ECJ, 13 July 2006, *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA (C-295/04)*, *Antonio Cannito v Fondiaria Sai SpA (C-296/04)* and *Nicolò Tricarico (C-297/04)* and *Pasqualina Murgolo (C-298/04) v Assitalia SpA*, Aff. joint C-295/04 to C-298/04, *Rec. 2006* page I-06619.

<sup>144</sup> The consumer and the end-user of a service.

<sup>145</sup> See the arguments of the above case.

In the **Proposals for Reform of the Law of Obligations and the Law of Prescription**, the principle is clearly stated by Article 1165 which holds that ‘*contracts bind only the contracting parties: they have no effect on third parties except in the situations and subject to the limitations explained below*’<sup>146</sup>.

In the **Unidroit Principles**, the principle only appears from an *a contrario* reading of Article 1.3. on the binding character of contract, which states that ‘*a contract validly entered into is binding upon the parties. [...]*’. *A contrario*, it cannot therefore benefit or obligate other people. The stipulation in favour of a third party is expressly provided for by Articles 5.2.1 onwards.

Lastly, the principle according to which the parties only contract for themselves is implicitly posed in the **European Code of Contract Preliminary Draft**. Although Article 42 states that ‘*a contract has the force of law between the contracting parties*’ it adds that it ‘*has effects for the benefit of third parties as laid down in the rules contained in this Chapter*’. This final part shows however the exceptional character of the effect of the contract with regard to third parties, limited to the case envisaged by Articles 72 onwards, that is to say the stipulation in favour of a third party.

#### ➤ **Respect for the rights of third parties**

47. The rights of third parties are taken into account as limits on the freedom of the parties to a lesser or greater extent depending on the project.

The **Unidroit Principles**, in the same way as the Principles of European Contract Law, are not overly preoccupied with third party rights. The section concerning ‘*third party rights*’ (Articles 5.2.1. onwards) is only really concerned with the stipulation in favour of a third party. No provision deals with the effectiveness of the contract with respect to third party rights.

In the **Proposals for Reform of the Law of Obligations and the Law of Prescription** the choice was made to develop the provisions relating to *fraude paulienne*. As a result, specific third parties who are the creditors of one of the other parties are allowed to set aside the effects of the contract which threaten their right. Thus Article 1167 paragraph 1 states that ‘*in addition, a creditor can challenge in his own name any juridical act made by his debtor in fraud of his rights, although in the case of a non-gratuitous act he can do so only if he establishes that the other party contracting with his debtor knew of this fraud*’<sup>147</sup>.

However, it is without doubt the **European Code of Contract Preliminary Draft** which goes furthest in limiting freedom of contract by virtue of third party rights. Article 2 §1 *in fine* states that ‘*the parties can freely determine the contents of the contract [...] provided always that the parties do not aim thereby solely to harm others*’. By doing this, the project

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<sup>146</sup> J. Cartwright and S. Whittaker, *op. cit.*

<sup>147</sup> *Ibid.*

usefully states that the contract cannot be used by the parties as a way of harming others. Freedom of contract cannot go so far as to authorise such interference with the rights of others. This draft therefore prohibits fraud on third party rights in the same way that fraud on the law is ordinarily prohibited.

In addition, this draft project also sanctions the case where the parties have used the contract to undermine the rights of the specific third parties who are creditors of one of the parties. Thus, according to Article 154, the contract '*concluded between two parties with the intent of both to defraud the creditor of one*' is not opposable to the latter.

#### **IV. Proposed text**

##### **Article 0-102: Respect for the freedom and rights of third parties**

Each party can only contract for themselves, unless otherwise provided.

A contract can only produce an effect in as much as it does not result in an infringement of unlawful modification of third party rights.



## **Article 0-103: Freedom of the parties to modify or put an end to the contract**

### **I. General presentation of the principle**

48. The final article of the chapter on freedom of contract should specify how such freedom is exercised, not only when entering into or during the course of the contract, but also in cases of modification or termination of the contract. It is a question of clarifying whether this freedom allows the parties to release themselves, at their liking, from their contractual undertaking. None of the legal systems studied attribute such a wide interpretation as this to freedom of contract, at least not on an individual basis to each party. Just as the agreement of the parties is needed to form the contract, so an agreement is needed to modify it or bring it to an end.

49. It remains however to except the case of contracts for an indefinite period. In this case, the above rule must be reconciled with the principle prohibiting perpetual undertakings<sup>148</sup>. A contracting party cannot be indefinitely maintained in a contractual relationship for the reason that the other party refuses to bring the contract to an end. For these contracts it is suitable to uphold the classical analysis, that unilateral termination is possible.

The drafting of Article 0-103 therefore needs on the one hand to clarify the conditions of modification and termination of the contract, and on the other hand to allow unilateral termination in contracts of indefinite duration.

### **II. Application of the principle in PECL**

50. The Principles of European Contract Law do not contain any provisions dedicated to the possibility of parties ending the contract or modifying it. However, according to Article 1:107, entitled '*Application of the Principles by Way of Analogy*', the Principles (including Article 1.102 which deals with freedom of contract) apply '*with appropriate modifications to agreements to modify or end a contract (...)*'. It follows that the parties are free to modify or

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<sup>148</sup> The prohibition on perpetual undertakings is conceived of as a specific application, in contractual matters, of the principle encased in Article 4(1) of the European Convention of Human Rights which states that '*no one shall be held in slavery or servitude*'. See in this respect, *Principles of European Contract Law, Part I and II, op. cit.* p. 317.

put an end to their contract. However, nothing is specified as to the scope of freedom of contract in this case<sup>149</sup>. There should therefore be a guiding principle relating to this question.

**51.** On the other hand, contracts of indefinite duration are the subject of a provision of the Principles of European Contract Law. Article 6:109 states that ‘*a contract for an indefinite period may be ended by either party by giving notice of reasonable length*’. The commentary indicates that the rule was conceived notably to avoid perpetual undertakings<sup>150</sup>. In so far as the object of the envisaged guiding principle is to clarify the scope of freedom of contract in the case of modification or termination of the contract, and not to govern the question of contracts of indefinite duration, there is no need to remove the current provision and place it within this chapter. It suffices to clarify that unilateral termination of contracts of an indefinite duration is possible.

### **III. Applications of the principle in comparative law**

#### **A. National laws**

##### **➤ Modification and termination of the contract**

**52.** With the exception of Dutch law, where no rule expressly states that the agreement of the parties allows for termination of the contract<sup>151</sup>, the majority of national laws admit that the agreement of the parties is sufficient to modify and to end a contract.

This is the case in Spanish law, and again in Italian law where Article 1372 paragraph 2 of the Civil Code allows the parties to bring the contract to an end by their agreement.

In French law, the possibility of modifying or ending the contract by common accord is simply an expression of the autonomy of will: when the wills are in agreement, together they may modify or undo the contract in the same way that they created the contract. This idea is present in the French Civil Code, in Article 1134 paragraph 2. According to this provision, contracts ‘*may be revoked only by mutual consent, or for causes authorized by law*’. Even if this provision only expressly deals with *mutuus dissensus*, it is unanimously accepted that it is also applicable to modifications of the contract.

In German law, ‘*the contract may disappear [...] by the mutual consent of those who entered into it (contrarius consensus): the contracting parties undo and revoke, that which*

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<sup>149</sup> **Acquis Group:** The fundamental principles proposed do not refer to the freedom to end or modify the contract.

<sup>150</sup> *Principles of European Contract Law, Part I and II, op. cit.*, p. 317.

<sup>151</sup> D. Busch, E. H. Hondius et alii *op. cit.* p. 278.

they previously did – we speak of *Aufhebungsvertrag*<sup>152</sup>. This rule results implicitly from § 311 I BGB<sup>153</sup>.

In English law, *agreement* is one possible cause of discharge of the contract<sup>154</sup>. The idea is the following: to undo the contract the same elements are required as to make it, namely consideration (a concept dealing with the balance and equivalence of the obligations and benefits<sup>155</sup>), and, in some circumstances, the correct formalities. The latter are required when the contract must be proved by writing<sup>156</sup>. The agreement of the parties is therefore not sufficient to modify or bring an end to the contract. It is necessary to comply with certain formalities which vary in their requirements depending on the modifications that one wishes to make<sup>157</sup>. According to the judgment given in *Morris v. Baron (1918)*, the requirement to respect formalities in the case of a contract which must be proved by writing depends on the extent to which the parties intend to alter their existing contractual relationship. The judges distinguished three situations:

- partial discharge: when, pursuant to a new agreement, the parties intend only to modify the terms of their previous contract, without importing any real substantial changes to their undertaking, then the agreement must be proved by writing. If this is not done, their original contract, in its original terms, remains applicable.
- complete discharge: if the parties intend to completely abandon their original contract and put an end to their contractual relationship, this release need not be formalised in writing.
- fresh agreement: if the intention of the parties is rather to unravel their original contract and replace it with a new agreement, simple verbal accord is sufficient to discharge the first contract, but the second must be proved in writing.

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<sup>152</sup> 'Le contrat peut disparaître [...] par le consentement mutuel de ceux qui l'ont conclu (contrarius consensus): les contractants défont alors, révoquent, ce qu'ils avaient fait précédemment – on parle d'*Aufhebungsvertrag*', M. Pédamon, *op. cit.* n°245. - *Adde* n° 161: 'contractual regulation [...] is irrevocable (unwiderruflich) unilaterally [...]; only the mutual consent of the interested parties may destroy or modify it'.

<sup>153</sup> § 311 I BGB: 'In order to create an obligation by legal transaction and to alter the contents of an obligation, a contract between the parties is necessary, unless otherwise provided by statute.'

<sup>154</sup> For the different causes of *discharge of contracts* namely *performance, agreement, breach or frustration*, see C. Elliott and F. Quinn, *op. cit.* p. 273 onwards. – For *agreement* in particular, *ibid.* p. 294 onwards.

<sup>155</sup> For an explanation of the concept of consideration, see C. Elliott and F. Quinn, *op. cit.* p. 79: '(...) in English Law, an agreement is not usually binding unless it is supported by what is called consideration. Put simply, that each party must give something in return for what is gained from the other party, so if you wish to enforce someone's promise to you, you must prove that you gave something in return for that promise (...)'. – On the similarities and differences between the concept of cause and consideration, see H. Beale, A. Hartkamp, H. Kotz, D. Tallon, *Cases, Materials and Text on Contract Law, Ius commune casebooks on the Common Law of Europe*, Hart Publishing 2002, pp. 127-154.

<sup>156</sup> See for example the Law of Property Act 1925.

<sup>157</sup> On the question of the impact and role of formalism, see Beale, A. Hartkamp, H. Kotz, D. Tallon *op. cit.* pp. 164-167.

## ➤ Contracts of indefinite duration

53. The majority of national laws<sup>158</sup> hold that in the case of contracts of indefinite duration unilateral termination is allowed, subject only to compliance with a notice period, which normally corresponds to reasonable notice. The faculty to unilaterally terminate contracts of indefinite duration is generally seen as an expression of the prohibition of perpetual undertakings.

English law however recognises a slightly different system as it does not in principle refuse to recognise perpetual contracts. Nevertheless, a clause imposing an obligation to provide water at a fixed price throughout the entirety of the subsequent period was interpreted in the sense that the contract could be brought to an end by means of notice<sup>159</sup>.

In French law, termination is subject to compliance with a notice period. This notice period is not, on a general basis, provided for in any provision. However, some special provisions fix a notice period (for example, Article L. 122-4 onwards of the Employment Code) or refer to common practice (for example Article 1736 of the Civil Code in respect of leases). In the absence of a text, the case law has intervened in some areas to require that the parties respect a ‘reasonable’ notice period<sup>160</sup>. In addition, the French case law requires that the termination is not abusive, notably in respect of the expectations of the other party<sup>161</sup>. The ability to unilaterally terminate contracts of indefinite duration, by means of compliance with a notice period, was recognised as a rule of constitutional value by a decision of the Conseil constitutionnel of 9 November 1999 concerning the law on Pacts (Pactes civil de solidarité)<sup>162</sup>.

In German law, *‘in contracts for an indefinite period each party may, as in French law, unilaterally bring an end to the contractual relationship. The withdrawal is qualified as ordinary (odentliche Kündigung); the withdrawal need not, in principle, be reasoned but it must respect a period of notice [...] fixed either by statute [...] or by the contract’*<sup>163</sup>.

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<sup>158</sup> Austria: § 1117, 1118, 1162, 1210 ABGB; Belgium: see in particular, Cass. Belge, 22 novembre 1973, Arr. Cass. 327; Spain: Article 1732 for mandate, Article 1750 for the loan of an object, Article 1705 for companies, Article 1581 for rental leases; France and Luxembourg: Article 1780 para 1 Civil Code (hiring of services); Italy: Art. 2118 for the contract of employment; Portugal: Jorge 212; England and Wales: Staffordshire Area Health Authority v. South Staffordshire Waterworks Co (1978) 1 WLR 1387 (C.A.). – See also, *Principles of European Contract Law, Part I and II, op. cit.* p. 317.

<sup>159</sup> See the case of Staffordshire Area Health Authority v. South Staffordshire Waterworks Co (1978) 1 WLR 1387 (C. A).

<sup>160</sup> Ex: Cass. 1<sup>ère</sup> civ., 3 fév. 2004, Bull. civ. I, n°34.

<sup>161</sup> Cass. com. 5 oct. 2004, Bull. civ. IV, n° 181.

<sup>162</sup> According to the Conseil, *‘if contract is the law that is common to both parties, the freedom which follows from Article 4 of the Declaration of the right of man and the citizen 1789 justifies that a private law contract of indefinite duration can be broken off unilaterally by one or other of the contracting parties, although informing the other party to the contract and the reparation of any eventual harm resulting from the conditions of breaking off the contract are guaranteed; in this respect, because of the necessity of assuring, in certain contracts, the protection of one of the parties, the task of specifying the causes allowing such a withdrawal as well as the modalities of it, in particular compliance with a period of notice belongs to the legislator’*, (Cons. Const., 9 novembre 1999, RTDciv. 2000, p. 109, obs. J. Mestre et B. Fages).

<sup>163</sup> *‘Dans les contrats à durée indéterminée chacune des parties peut, comme en droit français, mettre fin unilatéralement au rapport contractuel. La résiliation est qualifiée d’ordinaire (odentliche Kündigung); elle n’a*

However, German law does not include the general principle of reasonable notice, but contains special rules for certain types of contract<sup>164</sup>.

In Spanish law, the case law allows, in a general fashion, unilateral termination when the contract was entered into without determination of its length, in so far as it is contrary to one's liberty to be indefinitely bound<sup>165</sup>. Legal writing<sup>166</sup> holds that the exercise of the unilateral right to terminate must conform to the requirements of good faith, which implies, in particular, the respect of a notice period.

**54.** Whilst the most common model is therefore that of unilateral termination of contracts of indefinite duration subject to a reasonable notice period, some foreign systems recognise a wider variety of rules.

Firstly, in Dutch law, in the absence of any legal or contractual provision, the revocable character of the contract of indefinite duration is uncertain, as is the question of whether it suffices to have a reasonable notice period<sup>167</sup>.

Generally, termination must comply with standards of reasonableness and equity. In deciding whether one party can bring an end to the contract, the judge bases his decision on the criteria in Article 6:258 BW<sup>168</sup> (termination for unforeseen circumstances), namely if the contracting party, according to the criteria of what is fair and reasonable, could anticipate the continuation of the contract. The incidence of unforeseen circumstances is not necessary<sup>169</sup>: the judge is able to take into account all circumstances<sup>170</sup> as well as the interests of the other contracting party<sup>171</sup>. If the contract is revocable, the standards of reasonableness and equity can, with regard to the circumstances, impose a requirement of giving sufficient reasons<sup>172</sup> and compliance with a reasonable notice period<sup>173</sup>.

Second, Italian law envisages the situation where one party may put an end to a contract without having any recourse to a judge in circumstances going beyond the case of contracts of indefinite duration. First, in the case of non-performance by the debtor, Article 1454 of the Italian Civil Code allows the creditor to serve notice to perform on the debtor before the expiry of a certain period of time under penalty of termination of the contract. If the obligation is not performed by the time laid down, the contract is terminated by operation of

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*pas besoin en principe d'être motivée mais elle implique le respect d'un préavis [...] fixé soit par la loi [...] soit par le contrat*, M. Pédamon, *op. cit.* n° 256.

<sup>164</sup> § 565 BGB for leases; § 620 (2), 622 and 624 for services; § 671 for mandates; § 723 for civil societies.

<sup>165</sup> Sentencia de 14 de febrero de 1973.

<sup>166</sup> MM. Luis Díez-Picazo and Antonio Gullón: *Sistema de derecho civil*, Vol. II (*El contrat en general. La relacion obligatoria. Contratos en especial. Cuasi contratos. Enriquecimiento sin causa. Responsabilidad extracontractual*), 9<sup>ème</sup> éd., Tecnos, 2005.

<sup>167</sup> D. Busch, E. H. Hondius et alii *op. cit.* p.278 onwards.

<sup>168</sup> Cited *infra*, Article 0-201(3).

<sup>169</sup> Hoge Raad, 25 juin 1999, Vereniging voor de Effecenhandel v. CSM, NJ 1999, 602.

<sup>170</sup> Hoge Raad, 21 avril 1995, Kakkenberg v. Kakkenberg, NJ 1995, 437.

<sup>171</sup> Hoge Raad, 3 déc. 1999, Bouwer v. Nationale Nederlanden, NJ 2000, 254.

<sup>172</sup> Hoge Raad, 3 déc. 1999, Maison Louis Latour v. De Bruijn Wijnkopers, NJ 2000, 120.

<sup>173</sup> Hoge Raad, 23 déc. 1994, Lengs v. Banque Paribas Nederland, NJ 1995, 263.

law, without recourse to the courts. Commentators see this as a potestative right, belonging to the creditor, allowing him to unilaterally end the contract<sup>174</sup>. Secondly, Article 1457 deals with the existence of a fixed term which can be considered essential to both parties. If, at the expiry of this term, the obligation has not been performed and the creditor has not let the debtor know within three days that he will accept a subsequent performance, the contract is automatically terminated. This article applies even if the term is not expressly envisaged in the contract.

Spanish law also recognises some specific situations where one party can unilaterally end a contract<sup>175</sup>.

Lastly, German law, which corresponds to the traditional model for contracts of indefinite duration<sup>176</sup>, recognises however in certain cases that termination can take place without notice. § 314 I BGB<sup>177</sup> envisages a unilateral power to terminate without notice for a compelling reason. It is therefore an extraordinary termination (*ausserordentliche Kündigung aus wichtigem Grunde*). This article is the result of the codification of a Praetorian general principle<sup>178</sup>.

## B. International law and Acquis communautaire

**55.** The **Vienna Convention** holds in Article 29(1) that ‘*a contract may be modified or terminated by the mere agreement of the parties*’.

**56. Community law** also recognises the principle of freedom to break the contract by mutual agreement of the parties. It should be noted that a party is not able to block the other party’s right to terminate. Thus, according to the Directive on unfair commercial practices, ‘*any ... barriers imposed by the trader where a consumer wishes to exercise rights under the contract, including rights to terminate a contract or to switch to another product or another trader*’ are prohibited<sup>179</sup>.

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<sup>174</sup> M.-C. Diener, *op. cit.* § 16. 5. 2.

<sup>175</sup> For example, Article 1700, 4° and 1705 concerning the dissolution of a company on the wishes of only one member or Article 1732, 1° and 2°, concerning mandate which refers to the revocation by the representee and the renunciation of the representor.

<sup>176</sup> See *supra*.

<sup>177</sup> § 314 I BGB: ‘*Each party may terminate a contract for the performance of a continuing obligation for a compelling reason without a notice period. There is a compelling reason if the terminating party, taking into account all the circumstances of the specific case and weighing the interests of both parties, cannot reasonably be expected to continue the contractual relationship until the agreed end or until the expiry of a notice period*’.

<sup>178</sup> M. Pédamon, *op. cit.* n°257; Adde W.-T. Schneider ‘*La codification d’institutions prétorienne*’, La réforme du droit allemand des obligations (Colloque du 31 mai 2002 et nouveaux aspects), dir. C. Witz et F. Ranieri, Soc. Législ. Comp. 2004 p.43 onwards).

<sup>179</sup> Art 9 (d) of Directive 2005/29/EC of the European Parliament and Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market.

An illustration of the power to unilaterally terminate contracts of indefinite duration subject to notice can be found in Directive 86/653/EEC of the Council of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents<sup>180</sup>. Its Article 15(1) states that *‘where an agency contract is concluded for an indefinite period either party may terminate it by notice. (...)’*.

## C. Codifications by legal scholars

### ➤ Modification and termination of the contract

57. All of the studied projects include a provision which requires the agreement of the parties to terminate or modify the contract.

According to Article 1.3 of the **Unidroit Principles**, the parties may only modify or terminate the contract *‘by agreement or as otherwise provided in these Principles’*.

In the **Proposals for Reform of the Law of Obligations and the Law of Prescription** Article 1134, paragraph 2 states that contracts *‘can be modified or revoked only by the parties’ mutual consent or on grounds which legislation authorises’*<sup>181</sup>.

In the same way again, Article 43 §1 of the **European Code of Contract Preliminary Draft** holds that *‘the contract can be altered, renegotiated or dissolved by mutual consent of the parties, or in the cases provided for in this Code or by national or Community provisions’*.

### ➤ Contracts of indefinite duration

58. Whilst the **Unidroit Principles**<sup>182</sup> and the **European Code of Contract Preliminary Draft**<sup>183</sup> retain the classic position of unilateral termination of contracts of indefinite duration, the **Proposals for Reform of the Law of Obligations and the Law of Prescription** does not for its part dedicate a provision to this question.

Concerning the notice period which must precede termination, the **Unidroit Principles** envisage notice being given *‘a reasonable time in advance’* while the **European Code of Contract Preliminary Draft** envisages a notice period which is *‘in conformity with the nature of the contract, usage and good faith’*.

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<sup>180</sup> OJ n° L 382 31/12/1986 p. 17 – 21.

<sup>181</sup> J. Cartwright and S. Whittaker, *op. cit.*

<sup>182</sup> Article 5.1.8 *‘Contract for an indefinite period’*: *‘A contract for an indefinite period may be ended by either party by giving notice a reasonable time in advance’*.

<sup>183</sup> Article 57 § 2: *‘In contracts for continuous or periodic performance where there is no expiry time fixed by the parties, either party can set a time to end the contract by giving notice to the other party in conformity with the nature of the contract, usage and good faith’*.

## **IV. Proposed text**

### **Article 0-103: Freedom of the parties to modify or put an end to the contract**

By their mutual agreement, the parties are free, at any moment, to terminate the contract or to modify it.

Unilateral termination is only effective in respect of contracts for an indefinite period.



## **CHAPTER 2. CONTRACTUAL CERTAINTY**

## **Article 0-201: Principle of binding force**

### **I. General presentation of the principle**

59. The second chapter of the Guiding Principles of European Contract Law is dedicated to contractual certainty. As is logical, the chapter opens with an article dedicated to the binding force of contract. Once again<sup>184</sup>, so as not to proceed by pure abstraction, it is important not only to define the principle of binding force but also to clarify its range.

With regards to a definition of binding force, it is possible to adopt a simple formula, inspired by those which can be found in numerous national laws (see *infra*).

With regards to the scope of binding force of contract, it is important to clarify what the consequences of the obligatory effect of the contract are for the parties. Naturally, the binding force of the contract requires the parties to perform all the obligations arising from the contract. However, they are also obliged to act fairly in a way that does not contradict the scope of their undertaking. The parties undertake to perform their contract but also to do nothing which may compromise that performance. Before detailing in chapter three the scope of contractual fairness<sup>185</sup>, it is important to mention now that the binding force of contract necessarily supposes that the parties adopt an attitude that does not contradict the undertaking that they have entered into.

Again with regard to clarifying the scope of the binding force of contract, it is equally important to determine if it is always an intangible principle or whether, in certain situations, it is possible to call it into question. This question is that of the revision of the contract for change of circumstances (*imprévision*). Should we disregard the unforeseeable change of circumstances in order to promote at all costs the binding force of the contract, or is it admissible in this case to reconsider its absolute nature? The current content of the Principles of European Contract Law leads to admitting the reconsideration of the binding force of contract in cases of unforeseeable change of circumstance.

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<sup>184</sup> See *supra*. the presentation on Article 0-101.

<sup>185</sup> See *infra*.

## II. Application of the principle in the PECL

### ➤ Binding force of contract

60. The principle of binding force of contract is not as such explicitly stated within the Principles of European Contract Law. The commentary however frequently refers to it<sup>186</sup>. In the same way, many provisions of the Principles are nothing other than illustrations of the consequences of the binding force of contract.

This is certainly the case with Article 6: 111 (1) according to which the parties must perform their obligations, even if the performance is more onerous than previously foreseen. This article states that ‘*a party is bound to fulfil its obligations even if performance has become more onerous, whether because the cost of performance has increased or because the value of the performance it receives has diminished*’. The commentary indicates clearly that this paragraph recalls the principle of the binding force of contract (or sanctity of contract)<sup>187</sup>.

61. Other provisions demonstrate equally the obligatory character of the undertaking.

This is sometimes demonstrated by the imperative wording adopted by the provision in question: see for example Article 7: 102, concerning the ‘*Time of Performance*’ which states that ‘*A party **has** to effect its performance [...]*’.

In other cases, the provisions state that the debtor is ‘bound’: see for example Article 10: 101 (1) ‘*Obligations are solidary when all the debtors are **bound** to render one and the same performance*’ (and for a similar example where the language is slightly different in the English, Article 9: 201 (1) ‘*A party **who is to** perform*’).

With regard to the creditor, the binding force of contract is the basis of the ‘*right to performance*’ of the contract<sup>188</sup>. See more specifically, Article 9: 101 (1) ‘*The creditor is entitled to recover money which is due*’ and 9: 102 (1) ‘*The aggrieved party is entitled to specific performance of an obligation other than one to pay money [...]*’.

Finally, in a general sense, the principle of the binding force of contract is at the origin of all the rules contained in Chapter 7 (Performance), Chapter 8 (Non-performance and Remedies in General) and Chapter 9 (Particular Remedies for Non-performance).

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<sup>186</sup> See *infra*.

<sup>187</sup> *Principles of European Contract Law, Part I and II*, p. 323.

<sup>188</sup> See the title of Section 1, Chapter 9 ‘*Right to Performance*’

Since the principle of binding force of contract is the basis of numerous provisions of the Principles of European Contract Law, and yet there is no express statement of it, it is logical that it should be found within the Guiding Principles<sup>189</sup>.

➤ **Consequences of the obligatory effect of the contract**

**62.** Since the contract has binding force, the parties are bound to perform all the obligations that arise from it, whether they have been expressly laid down or not. Article 6: 102 states that the contract may contain implied obligations ‘*which stem from (a) the intention of the parties, (b) the nature and purpose of the contract, and (c) good faith and fair dealing*’. The commentary indicates that this text allows the filling of any gaps in the contract. For this, three factors are to be considered: the presumed intention of the parties (that which the parties, acting in good faith, would have agreed upon if they had negotiated), the nature and the purpose of the contract (the way in which it can best produce its effects) and good faith and fair dealing.

**63.** With regard to imposing a requirement of honest conduct on the parties, we must again look to Article 6: 102. This article states in part (c) that implied obligations can include those which stem from good faith and fair dealing. As a result, this means that outside of the contractual provisions themselves, certain obligations weigh on the parties from the simple fact of good faith. An illustration of the duties which the parties are subject to in the name of good faith is given by Article 16: 102. According to this article, ‘*if fulfilment of a condition is prevented by a party, contrary to duties of good faith and fair dealing or co-operation, and if fulfilment would have operated to that party's disadvantage (or advantage), the condition is deemed to be fulfilled (or not to be fulfilled)*’. To regard the condition as fulfilled or not, according to the case, when a party was dishonestly involved in its failure (or achievement) is evidence of a willingness to promote the duties of good faith and cooperation<sup>190</sup>.

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<sup>189</sup> **Acquis Group:** The ‘*Binding force of contract*’ figures amongst the seven fundamental principles elaborated by this working group.

(2) Binding force of contract: ‘*A contract will be enforced or recognised by law if it is based on the parties agreement, as this has been expressed by each to the other, and there is no basis for it to be treated as invalid or set aside*’.

<sup>190</sup> *Principles of European Contract Law, Part III, op. cit.*, p. 235

As a result of these different applications of the principle of binding force of contract it is clear that a mention of the obligatory character of the duty of contractual fairness must be inserted in the guiding principle<sup>191</sup>.

➤ **Unforeseeable change of circumstances**

**64.** The Principles of European Contract Law contain an article concerning unforeseeable change of circumstances. According to Article 6: 111, the parties are required to renegotiate the contract if a change of circumstances intervenes in the conditions envisaged by part (2) of the article. In the absence of modification or termination intervening within a reasonable period, the tribunal may itself modify or terminate the contract.

Article 6: 111 *‘Change of Circumstances’*

*‘(1) A party is bound to fulfil its obligations even if performance has become more onerous, whether because the cost of performance has increased or because the value of the performance it receives has diminished.*

*(2) If, however, performance of the contract becomes excessively onerous because of a change of circumstances, the parties are bound to enter into negotiations with a view to adapting the contract or terminating it, provided that:*

- (a) the change of circumstances occurred after the time of conclusion of the contract,*
- (b) the possibility of a change of circumstances was not one which could reasonably have been taken into account at the time of conclusion of the contract, and*
- (c) the risk of the change of circumstances is not one which, according to the contract, the party affected should be required to bear.*

*(3) If the parties fail to reach agreement within a reasonable period, the court may:*

- (a) terminate the contract at a date and on terms to be determined by the court; or*
- (b) adapt the contract in order to distribute between the parties in a just and equitable manner the losses and gains resulting from the change of circumstances.*

*In either case, the court may award damages for the loss suffered through a party refusing to negotiate or breaking off negotiations contrary to good faith and fair dealing’.*

**65.** The commentary on this article indicates that the recognition of change of circumstances responds to an imperative of contractual justice and the practice shows how it would be

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<sup>191</sup> **Acquis Group:** the working group on the fundamental principles proposed nothing on the subject of the scope of the principle of the binding force of contract.

dangerously inadequate to stick to a refusal of change of circumstances (*imprévision*). The parties are however able to adapt the mechanism of renegotiation. The commentary also underlines the exceptional nature of revision<sup>192</sup>.

Since the Principles of European Contract Law choose, in contrast to some national laws (see *infra*), to admit the revision of the contract in the case of unforeseeable change of circumstances, it is important that the guiding principle dedicated to the principle of binding force itself states this limit to the intangibility of the contract<sup>193</sup>. It is possible to envisage a concept of ‘*unforeseeable change of circumstances*’ since it is defined by Article 6: 111.

### **III. Applications of the principle in comparative law**

#### **A. National laws**

##### **➤ Binding force of contract**

66. The principle of binding force of contract is recognised as a fundamental principle in the majority of the national legal systems studied<sup>194</sup>. We can distinguish though between those systems where the principle is the subject of an express provision and those where it is recognised despite the silence of statute.

The legal systems which explicitly commit to this principle all do so in a similar way. Thus Article 1134 paragraph 1 of the French Civil Code states that ‘*agreements lawfully entered into take the place of the law for those who have made them*<sup>195</sup>’ while Article 1091 of the Spanish Civil Code holds that ‘*obligations arising from the contract have the force of law between contracting parties*<sup>196</sup>’ and Article 1372 paragraph 1 of the Italian Civil Code states that ‘*the contract has the force of law between the parties*<sup>197</sup>’.

67. In other legal systems, the binding force of contract appears as more of a general principle.

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<sup>192</sup> *Principles of European Contract Law, Part I and II, op. cit.* p. 324.

<sup>193</sup> **Acquis Group:** The working group has not proposed the inclusion of revision for change of circumstances in the fundamental principles applicable to contract.

<sup>194</sup> Note however that Dutch law does not evoke this principle as such.

<sup>195</sup> ‘*Les conventions légalement formées tiennent lieu de loi à ce qui les ont faites*’.

<sup>196</sup> Civil Code Article 1091: ‘*las obligaciones que nacen de los contratos tienen fuerza de ley entre las partes contratantes*’.

<sup>197</sup> ‘*Il contratto ha forza di legge tra le parti*’.

In German law, ‘*the BGB, which does not contain any general provision on the effects of contract analogous to Article 1134 [...] of the Civil Code [...] nonetheless implicitly establishes the binding force of contract – its irrevocability*’<sup>198</sup>. Legal scholarship employs the expression ‘*contractual regulation*’<sup>199</sup>.

In Swiss law, the rule according to which the contract is the law of the parties ‘*dominates the principle of contractual fidelity (pacta sunt servanda) even though it is not expressly stated in the Code of Obligations*’<sup>200</sup>.

**68.** Whichever the legal system studied, it appears that the contract’s conditions of validity are defined by the law and imply, in particular, that the contracting parties cannot derogate from a mandatory law. More fundamentally, the link established between the binding force of contract and the law signifies that the contract draws its force, not from the will of the parties, but from the law.

However, this basis of the principle of binding force of contract has not always been so widely admitted and has given rise to numerous scholarly debates. This is particularly so in French law.

The original basis, in French law, of the principle of the binding force of contract religious: fidelity to the given promise results fundamentally from moral preoccupations. Thereafter, the justification was found in the theory of autonomy of the wills from which it results that the will is all powerful and can only be bound by creating its own law. However, the later decline of this theory, at least in its absolute sense, saw the theory of the will condemned as the exclusive basis of the binding force of contract. Indeed, the majority are in agreement today in rejecting an overly radical conception of the autonomy of the will ‘*as it results in the abandonment of an essential part of social relations to the absolute discretion of legal subjects*’<sup>201</sup>. It is therefore a relative conception that must be retained: the autonomy of the will is nothing more than ‘*the power, left to individuals, to organise their transactions as they want, within the limits fixed by objective law*’<sup>202</sup>. From this perspective, the principle of the binding force of contract rests on a

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<sup>198</sup> ‘*Le BGB, qui ne contient aucune dispositions générale sur les effets du contrats analogue [à l’] art. 1134 [...] C. civ. n’en consacre pas moins implicitement [...] la force obligatoire du contrat – son irrévocabilité*’, M. Pédamon, *op. cit.* n° 150.

<sup>199</sup> M. Pédamon, *op. cit.* n°161 citing Larenz.

<sup>200</sup> ‘*Domine le principe de fidélité contractuelle (pacta sunt servanda) quand bien même il n’est pas expressément énoncé dans le Code des obligations*’, P. Engel, *Traité...*, *op. cit.* p.97 et passim, not. p.454; idem P. Tercier, *Le droit des obligations: Schulthess Juristische Medien SA, Zurich, 1999, n°178 (citing Article 1134 of the Civil Code and the Unidroit Principles...)*, n°413 and 728.

<sup>201</sup> J. Flour et J.-L. Aubert et E. Savaux, *Droit civil, les obligations, vol. I: l’acte juridique*, Paris, 10<sup>e</sup> éd. A. Colin, 2002, n° 110.

<sup>202</sup> ‘*La faculté laissée au sujets d’organiser leurs échanges comme ils l’entendent, dans les limites fixées par le droit objectif*’, J. Flour et J.-L. Aubert et E. Savaux, *op. loc. cit.*

positivist foundation, according to which binding force comes, not from the promise, but from the value that the law, or more precisely Article 1134 of the Civil Code, attributes to that promise. It remains however to ask why the law recognises such a value to the contract. Many explanations are proposed. In addition to the classic moral commanding respect of the promise given, binding force can be justified by the idea of the party relying legitimately on the promise that he has accepted<sup>203</sup>. It can also be justified by the idea of justice and social utility, implying, in particular, legal certainty from which follows compliance with the individual expectations of the parties<sup>204</sup>. It can also be justified by the idea of a compromise between the individual wills of the parties and the *volonté générale*, that is to say between the interest of the parties and the general interest; ultimately, between the roles respectively conferred on the will of the parties and the law.

### ➤ Consequences of the obligatory effect of the contract

69. The majority of national legal systems hold that the binding force of contract requires the parties to perform not only their express obligations but also those implied obligations which result from the contract. Not all the systems however make reference to this notion of implied obligations.

This formula is directly inspired by English law which refers to ‘*implied terms*’. The commentary on Article 6: 102 PECL confirms the influence of the *Common Law*<sup>205</sup>. However, the Common Law does not include good faith and fair dealing in the factors allowing identification of the *implied terms*. It also has recourse to such additions to the contract only if it is necessary to give economic efficiency to the contract, or if the implied obligation is so obvious that it goes without saying.

Rather than referring to implied terms, many legal systems refer to the consequences that equity, common practice or statute (*l'équité, l'usage ou la loi*) give to the obligation according to its nature. This is the case in French law<sup>206</sup>. It is the same in Italian law which states however that one may only refer to common practice and equity when the law is silent<sup>207</sup>. In Spanish law, Article 1258 of the Civil Code is slightly different since it states that the contract requires ‘*not only the performance of that which was expressly agreed, but also all the consequences which,*

<sup>203</sup> G. Rouhette, *Contribution à l'étude critique de la notion de contrat*, Paris 1965.

<sup>204</sup> J. Ghestin, *Les obligations. Le contrat: formation*, 2<sup>e</sup> éd. LGDJ, 1988.

<sup>205</sup> *Principles of European Contract Law, Part I and II, op. cit.* p. 305. For Scotland, *ibid.*

<sup>206</sup> Article 1135 of the Civil Code.

<sup>207</sup> Article 1374 of the Civil Code.



according to its nature, conform to good faith, custom and statute'<sup>208</sup>. Dutch law contains similar provisions. Article 6: 248 (1) BW states that the contract does not produce only those legal effects agreed by the parties, but also those that, according to the nature of the contract, result from statute, common practice or the requirements of reasonableness and equity (in the absence of statute or common practice)<sup>209</sup>. Article 6: 248 (1) BW therefore has an interpretive function and a role in completing the contract<sup>210</sup>. From a terminological point of view, the provision refers to reasonableness and equity rather than good faith in order to prevent any confusion with the subjective notion of good faith; here it is a question of objective good faith, based on the duty of the parties to observe the standards of reasonableness and fair dealing. We can, in this sense, understand the terms good faith, reasonableness and equity as synonymous<sup>211</sup>.

In German law, the system is different. Where there are gaps, the case law develops a 'normative' (in cases of obscurity), 'constructive', or 'completive' interpretation of the contract (*ergänzende Vertragsauslegung*)<sup>212</sup>. The judge discovers and takes into consideration that which, in the light of the aim of the contract, the parties would have said if they had anticipated and regulated the matter in question in conformity with the requirements of good faith and business practice<sup>213</sup>. Here, 'we take into consideration the two parties' points of view, so as to determine a fair balance of interests (*gerechter Interessenausgleich*) which they would have reached by acting reasonably and in good faith'<sup>214</sup>.

**70.** In addition, the majority of national legal systems impose an obligation on the parties to behave fairly, from which they cannot withdraw.

On this point, Italian law goes a particularly long way. According to Italian legal scholarship, the principle of binding force of contract directly requires the parties to conduct themselves in good faith. It is considered that the binding force of contract requires the parties

<sup>208</sup> Civil Code Article 1258: los contratos obligan desde su perfección 'no solo al cumplimiento de lo expresamente pactado, sino también a todas las consecuencias que, según su naturaleza, sean conformes a la buena fe, al uso y a la ley'. Article 57 of the Commercial Code contains similar provisions with regard to commercial obligations.

<sup>209</sup> 'A contract has not only the juridical effects agreed by the parties, but also those which, according to the nature of the contract, result from law, usage or the requirements of reasonableness and equity' (translation in D. Busch, E. H. Hondius et alii, *op. cit.* p.33).

<sup>210</sup> D. Busch, E. H. Hondius et alii *op. cit.* p.242, 264.

<sup>211</sup> D. Busch, E. H. Hondius et alii, *op. cit.* p.49; A. S. Hartkamp *op. cit.* p.138. - *Adde* Article 6: 2(1) BW 'A creditor and debtor must, as between themselves, act in accordance with the requirements of reasonableness and equity' (translation D. Busch, E. H. Hondius et alii, *op. cit.* p.48) (*ibid.* p.49). – For the whole provision, see *infra* under Article 0- 301.

<sup>212</sup> M. Pédamon, *op. cit.* n° 163 onwards.

<sup>213</sup> See BGH, 18 December 1954, BGHZ 16. 71, 76, cited by M. Pédamon, *op. cit.* n°166.

<sup>214</sup> 'On prend en considération le point de vue des deux parties, de manière à dégager le règlement équilibré de leurs intérêts (*gerechter Interessenausgleich*) auquel elles seraient parvenues en agissant raisonnablement et de bonne foi', M. Pédamon, *op. cit.* n° 165.

‘adopt behaviour corresponding to the undertaking entered into’<sup>215</sup>. In particular, some authors distinguish between the efficacy of the contract and the effects of the contract. If the latter consists of the rights and obligations arising from the contract, the efficacy of the contract, which exists from the moment of entering into the contract, indicates the attitude of the parties so that these effects can occur. This distinction can therefore explain the fact that each party to the contract under a condition is bound to not compromise the rights of the other party to the contract *pendente conditione*<sup>216</sup> (Article 1358 of the Civil Code).

In French law, Article 1134 paragraph 3 states that contracts ‘*must be performed in good faith*’. The obligation of contractual fairness flows from this requirement, from which the case law draws numerous obligations, such as the obligation to inform or the obligation to cooperate<sup>217</sup>.

German law also contains an obligatory duty of fairness<sup>218</sup>. The principle of good faith in § 242 BGB<sup>219</sup> performs, in order to determine the content of the contractual obligation, a gap-filling function (*Ergänzungsfunktion*). This ‘*consists in what the case law, drawing on § 242, has drawn progressively [and] independently [...] of any common will; a network of ancillary obligations (Nebenpflichten) whose terminology is however unclear and varied according to different authors*’<sup>220</sup>. Two categories exist:

- The *Nebenleistungspflichten*: obligations with a narrow link to the principal duty, ‘*which are concerned with guaranteeing a performance that will satisfy the interests of the creditor*’<sup>221</sup>.
- The *Schutzpflichten* or *Verhaltenspflichten* (obligations of behaviour): obligations of reciprocal protection, ‘*aimed at preserving the patrimonial situation (die Güterlage) [of each party] from any harm*’<sup>222</sup>. They are envisaged by the new § 241 II BGB<sup>223</sup>.

Lastly, in Swiss law, the duty of fairness can be understood as an additional ancillary duty.

<sup>215</sup> ‘*A tenir une conduite correspondant à l’engagement conclu*’, M.-C. Diener, *op. cit.* § 7. 1. 1.

<sup>216</sup> M.-C. Diener, *op. cit.* § 7. 1. 2.

<sup>217</sup> See *infra* section III.

<sup>218</sup> M. Pédamon, *op. cit.* n° 167 onwards.

<sup>219</sup> Performance in good faith: ‘*An obligor has a duty to perform according to the requirements of good faith, taking customary practice into consideration*’.

<sup>220</sup> ‘*Consiste en ce que la jurisprudence, s’appuyant sur le § 242, a dégagé progressivement [et] indépendamment [...] de toute volonté commune, un réseau d’obligations accessoires (Nebenpflichten) [...] dont la terminologie est d’ailleurs mal fixée et varie selon les auteurs*’.

<sup>221</sup> ‘*Ont pour objet de garantir une exécution propre à satisfaire les intérêts du créancier*’. Example: the seller is required to insure the goods being sold during their transport to the place of delivery, to deliver the accessory documents which are necessary in order to use the goods, and to inform the buyer of the risks of that use.

<sup>222</sup> ‘*Tendent à préserver de tout dommage la situation patrimoniale (die Güterlage)*’.

<sup>223</sup> Especially § 241 II BGB : ‘*An obligation may also, depending on its contents, oblige each party to take account of the rights, legal interests and other interests of the other party*’.

*‘Accessory duties must be distinguished from the duty to perform properly understood [...] By ‘accessory duties’ it is meant the rules of behaviour which follow implicitly from the contract and which compliment the principal duties [...] They require the debtor to conduct himself in accordance with the rules of good faith (Article 2 CCS) and to respect the absolute rights of the other party to the contract’<sup>224</sup>. In the same way, in the absence of a supplementary non-mandatory rule, it is the judge’s task to ‘imagine a hypothetical will of the parties [...] following from the rules of good faith (Article 2 CCS)’<sup>225</sup>.*

71. Although the scope of the duty of fairness will be examined principally in chapter III<sup>226</sup>, it is already possible to note that the example previously seen as to the duty of the parties not to interfere in the fulfilment (or non-fulfilment) of the condition can be found in the majority of national laws. Such an interference in the fulfilment of the condition is widely sanctioned: in French law: Article 1178 of the Civil Code; German law: §162 BGB; Italian law: Articles 1358 and 1359 paragraph 1; Spanish law: Article 1119 paragraph 1 of the Civil Code. English law often considers the interference of the party as a breach of an implied term but does not go so far as to consider that the condition has been satisfied or has failed to be satisfied<sup>227</sup>. It seems that Irish law takes a very similar position: the courts only interfere where there is an express or implied obligation to do or not to do something<sup>228</sup>.

### ➤ Unforeseeable change of circumstances

72. The question of the intangibility of the contract in the face of unforeseeable change of circumstances certainly divides different national legal systems. While the majority of Member States recognise a revision of the contract, the others either limit revision to exceptional cases or even reject it outright.

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<sup>224</sup> *‘De l’obligation d’exécuter proprement dite, il faut distinguer les devoirs accessoires [...] On entend par là les règles de comportement qui découlent implicitement du contrat et complètent les obligations principales [...] Ils obligent le débiteur à avoir un comportement compatible avec les règles de la bonne foi (article 2 CCS) et respectueux des droits absolus du cocontractant’, P. Tercier, op. cit. n°698.*

<sup>225</sup> *‘Imaginer une volonté hypothétique des parties [...] à partir des règles de la bonne foi (article 2 CCS)’, ibid. n° 724. - Adde P. Engel, *Traité...*, op. cit. p.237 onwards on the completion of the contract (distinct from its interpretation) and citing the Federal Tribunal: ‘the judge should fill the gap according to the sense and purpose of the contract, in determining how, in good faith, the parties would have acted, in view of all the circumstances (ATF 90/1964 II p.235, 244-245 = JT 1965 I p.138, 145)’.*

<sup>226</sup> See *infra*.

<sup>227</sup> *Principles of European Contract Law, Part III, op. cit. p. 236.*

<sup>228</sup> *Principles of European Contract Law, Part III, op. cit. p. 236.*

73. Many legal systems recognise the revision of the contract where there is an unforeseeable change of circumstances in a general sense, either based on special provisions, or based on more general provisions such as good faith.

In Germany, the modification of the contract in the case of a change of circumstances results from the corrective function (*Korrekturfunktion*) of the principle of good faith in § 242 BGB on the content of the contractual relationship. Originally this was a Praetorian creation. Since the 1920s, the case law has taken advantage of the general provisions of the BGB, especially § 242 in order to ‘*liberate itself from the rule of intangibility of contract and to progressively construct a system of contractual revision for change of circumstance by drawing on the famous Oertmann theory of ‘Wegfall der Geschäftsgrundlage’ (disappearance of the foundation of the contract)*’<sup>229</sup>, established by the *Reichsgericht* (Tribunal of the Empire)<sup>230</sup>. The contract can be terminated or modified if its continuation would produce results that would be intolerable and incompatible with law and justice<sup>231</sup>. The statute modernising the law of obligations of 26 November 2001 (*Gesetz zur Modernisierung des Schuldrechts*<sup>232</sup>) explicitly adopted (and altered) this Praetorian theory in the new § 313 BGB<sup>233</sup> (*Störung der Geschäftsgrundlage*)<sup>234</sup>. However, in § 313 BGB,

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<sup>229</sup> ‘*S’affranchir de la règle de l’intangibilité des conventions et de bâtir progressivement un système de révision des contrats pour cause d’imprévision en s’inspirant de la fameuse théorie d’Oertmann dite du ‘Wegfall der Geschäftsgrundlage’ (disparition du fondement de l’acte juridique)*’, M. Pédamon, *op. cit.* n°15, see also n°24.

<sup>230</sup> RG, 3 February 1922, RGZ, 103. 328, 332.

<sup>231</sup> See BGH 25 May 1977, NJW 1977. 2262, 2263 and 13 November 1975, NJW 1976. 565, 566.

<sup>232</sup> BGBI. 2001 p.3138-3185.

<sup>233</sup> Interference with the basis of the transaction: ‘(1) *If circumstances which became the basis of a contract have significantly changed since the contract was entered into and if the parties would not have entered into the contract or would have entered into it with different contents if they had foreseen this change, adaptation of the contract may be demanded to the extent that, taking account of all the circumstances of the specific case, in particular the contractual or statutory distribution of risk, one of the parties cannot reasonably be expected to uphold the contract without alteration.*

(2) *It is equivalent to a change of circumstances if material conceptions that have become the basis of the contract are found to be incorrect.*

(3) *If adaptation of the contract is not possible or one party cannot reasonably be expected to accept it, the disadvantaged party may withdraw from the contract. In the case of continuing obligations, the right to terminate takes the place of the right to withdraw.*’

Note that ‘*circumstances which became the basis of a contract*’ signifies those circumstances ‘*that should be implied by the common will of the parties without having been formally integrated in the contract itself. Amongst these circumstances it is possible to cite the maintenance of monetary stability, the equivalence of the benefit and counter-benefit, the constancy of the stipulated price, the possibility of getting identical goods ... but also the persistence of the legislation in force, obtaining a building permit ... the list is not limited*’, (M. Pédamon, *op. cit.* n°172).

<sup>234</sup> See also W.-T. Schneider ‘*La codification d’institutions prétorienne*’, La réforme du droit allemand des obligations (Colloque du 31 mai 2002 et nouveaux aspects), dir. C. Witz et F. Ranieri, Soc. Législ. Comp. 2004, p.44 onwards. ‘*The adaptation of the contractual relationship of obligation to change of circumstance (Anpassung an die veränderten Umstände) rests on a specific provision, even if it continues to root itself in § 242*’, (M. Pédamon, *op. cit.* n°170).

the adaptation of the contract for change of circumstances applies as much to the disappearance of the contractual basis as to the original absence of the contractual basis<sup>235</sup>.

In Austria, § 936, 1052 and 1170 (a) ABGB constitute the basis of the rule according to which a change of circumstances can, under certain conditions, affect the validity of the contract<sup>236</sup>.

In Denmark, Finland and Sweden, the courts accept that a change of circumstances can form the basis of a modification of the contract<sup>237</sup>.

Italian law recognises that the binding force of contract can be called into question in many cases, analysed by legal scholarship as situations based on a functional defect in the cause: even though the cause was present at the formation of the contract, it can not be carried out in accordance with the original will of the parties because of the occurrence of supervening events<sup>238</sup>. Article 1467 of the Italian Civil Code envisages the judicial termination of the contract when the performance of it has become excessively costly due to the occurrence of the extraordinary and unforeseeable event. The article is only aimed at contracts where performance is successive or continuous and contracts where the performance is deferred, and it excludes aleatory contracts. Legal scholarship adopts an extensive conception of the domain of this article and applies it to all contracts where performance is not immediate<sup>239</sup>. In respect of where only one party is obliged, Article 1468 excludes termination but allows the debtor to ask the judge for his obligation to be reduced or for the modalities of his performance to be modified<sup>240</sup>.

In the Netherlands, Article 6: 258 BW<sup>241</sup> applies the principle of good faith in order to allow termination or modification in a case of change of circumstances<sup>242</sup>. In contrast to German law, the unforeseeable circumstances must be future i.e. posterior to the conclusion of the contract.

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<sup>235</sup> See M. Pédamon, *op. cit.* n°171 onwards; P. Schlechtriem 'The German Act to Modernize the Law of Obligations in the Context of Common Principles and Structures of the Law of Obligations in Europe' Oxford University Comparative Law Forum, 2002, Oxford U Comparative L Forum 2.

<sup>236</sup> *Principles of European Contract Law, Part I and II, op. cit.* p. 328.

<sup>237</sup> *Principles of European Contract Law, Part I and II, op. cit.* p. 328.

<sup>238</sup> M.-C. Diener, *op. cit.* § 16. 1. 2. – G. Mirabelli, *Dei contratti in generale*, in *Comm. cod. civ.*, Torino, 1980, p. 654-655. – F. Gazzoni, *Manuale di diritto privato*, 2000, p. 1005.

<sup>239</sup> M.-C. Diener, *op. cit.* § 16. 11. 2.

<sup>240</sup> Compare with Article 1256 of the Civil Code which envisages the release of the debtor if the performance of the obligation becomes impossible for a reason which is not attributable to him. If the impossibility is only temporary the debtor will remain bound in principle but he will not answer for any delay in performance. The debtor may be released if, by reason of the duration of the impossibility, he can no longer be considered as bound in respect of the obligation, or if performance is no longer of interest to the creditor.

<sup>241</sup> '1. The judge may, at the request of one of the parties, modify the effects of the contract or terminate the whole or part of it owing to unforeseeable circumstances of such nature that, according to the criteria of reasonableness and equity, the other party can not expect the integral maintenance of the contract. The modification or termination may be accorded with retrospective effect.

2. Modification or termination is not pronounced in so far as the circumstances invoked by the applicant, from the nature of the contract or from generally recognised opinion, lie with him.

74. Other national legal systems only rarely accept modifications of the contract for unforeseeable change in circumstance.

In Spain, the case law has always been reticent in respect of *rebus sic stantibus* clauses, requiring, for their implementation, ‘extraordinary’ and ‘radically unforeseeable’ changes in the circumstances which existed at the moment of entering into the contract, leading to a ‘exorbitant’ disproportion between the rights and obligations of each party. If a less radical way of preserving the contract cannot be found<sup>243</sup>, the case law allows the courts to terminate the contract where the circumstances, independently of the wills of the parties, prevent the realisation of the objective which was fixed by the parties when contracting<sup>244</sup>.

In Switzerland, there exists ‘no general provision on the effects of a change of circumstances on the contract. The contractual regime remains fundamentally dominated by the principle of contractual fidelity: *pacta sunt servanda*<sup>245</sup>. On the other hand, there are certain express provisions for some special contracts (for example Article 476 I CO<sup>246</sup> on deposits; Article 373 II CO<sup>247</sup> in respect of work contracts; Article 527 CO<sup>248</sup> in respect of life-annuities and contracts of support for life). The case law does however admit, under strict conditions, the setting aside of the intangibility of the contract. ‘In the absence of a statutory provision, the Federal Tribunal has given, in this respect, some fairly clear guidance in a case of 10 October 1933: ‘the upheaval brought to the relationship between the benefit and counter-benefit, occurring as a result of change in circumstances, should be a reason for termination or modification of the contract

3. For the application of this article, anyone who has received a right or obligation from the contract is treated as a party to the contract.’

The ‘mild application’ of this provision illustrates ‘that the case law has been prudent in the attribution of the new discretionary powers. This power has been interpreted as a remedy of last resort by Dutch case law’, E. Hondius ‘Les bases doctrinales du nouveau code néerlandais’, Traditions savantes et codifications Colloque Poitiers, 8-10 septembre 2005, Aristec, dir. C. Ophèle et P. Remy, Université de Poitiers, diff. Lgdj 2007, p.264.

<sup>242</sup> See D. Busch, E. H. Hondius et alii, *op. cit.* p.287 onwards.

<sup>243</sup> MM. Diez-Picazo et Gullon (*op. cit.* p. 251) refer to the revision of the contract or different performance.

<sup>244</sup> Sentencias de 30 de junio de 1948, 9 de diciembre de 1983 and 20 de abril de 1994.

<sup>245</sup> ‘Aucune disposition générale relative aux effets du changement des circonstances sur le contrat. Le régime des conventions reste fondamentalement dominé par le principe de la fidélité contractuelle: *pacta sunt servanda*’, P. Engel, *Traité...op. cit.* p.787, who *ibid.* p.179 sees in it a general principle of law.

<sup>246</sup> ‘The bailee may return the deposited chattel before the expiration of the fixed period only if unforeseen circumstances prevent him from keeping the chattel either safely or without prejudice to himself’, Swiss-American Chamber of Commerce, Swiss Code of Obligations (English Translation of the Official Text), Zurich, 2005.

<sup>247</sup> ‘I. If the compensation has been precisely stipulated in advance, the contractor is obligated to complete the work for this sum and may not claim an increase even if he had more labor or larger expenditures than had been foreseen. II. If, however, extraordinary circumstances which could not have been foreseen or which were excluded from the assumptions made by both parties, impede the completion or render it exceedingly difficult, the judge may, in his discretion, authorize an increase in the price or dissolution of the contract ...’, Swiss-American Chamber of Commerce, *op. cit.*

<sup>248</sup> ‘I. The grantee as well as the grantor may unilaterally cancel the contract if its continuation has become intolerable because of violation of the duties owed or if other valid reasons make its continuation excessively onerous or impossible’, Swiss-American Chamber of Commerce, *op. cit.*

when the upheaval is large, manifest and excessive'<sup>249</sup>. Nevertheless, the *clausula rebus sic stantibus*, 'has these last decades been received with much caution. There is little unity of opinion on the conditions, ways, means and consequences of *imprévision*. Except for express provisions for certain special contracts, *imprévision* is sometimes dealt with by interpreting the contract [...] more generally by the principle of good faith and fair dealing [Article 2 CCS<sup>250</sup>], finally by the creative capacity of the judge when faced by a gap in the law [Article 1 CCS<sup>251</sup>]'<sup>252</sup>.

75. Finally, some legal systems reject outright any modification of the contract due to unforeseeable change of circumstances.

In Belgium and France, in principle no modification of the contract is allowed, except, in French law, in the area of administrative contracts<sup>253</sup>.

In England and Wales, the debtor has no recourse based on a change of circumstances<sup>254</sup> unless it results in impossibility<sup>255</sup>. The only possible exception (*frustration of the venture*) may follow from one isolated decision<sup>256</sup> where a change in circumstance rendered the contract pointless.

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<sup>249</sup> 'À défaut d'une disposition légale, le Tribunal fédéral a donné à cet égard, dans un arrêt du 10 octobre 1933, une orientation assez claire: 'le trouble apporté au rapport entre la prestation et la contre-prestation, survenu par suite d'un changement des circonstances, doit être un motif de résolution ou de modification du contrat lorsque ce trouble est grand, manifeste et excessif', ATF 59/1933 II p.372, 378 cited by P. Engel, *op. cit.* p.787.

<sup>250</sup> On the recourse to Article 2 CCS, 'application of the principles of objective good faith and misuse of a right', see P. Engel, *Traité... op. cit.* p.791 onwards. Citing A. von Tuhr: 'It is recognised that the principle 'pacta sunt servanda' is itself limited by the superior principle of good faith. However, it is contrary to good faith to maintain the obligations imposed on the debtor by the contract if the circumstances have changed to the extent that in exchange for his performance the debtor will not receive any counter-performance or only a derisory counter-performance. The debtor is therefore allowed to terminate the contract if the other party does not accept an equitable solution' [...] This opinion is shared by the majority of Swiss legal scholarship and case law which bases the theory of *imprévision* on the principles of good faith and abuse of law'.

<sup>251</sup> 'I. The Law must be applied in all cases which come within the letter or the spirit of any of its provisions.  
II. Where no provision is applicable, the judge shall decide according to the existing Customary Law and, in default thereof, according to the rules which he would lay down if he had himself to act as legislator.  
III. Herein he must be guided by approved legal doctrine and case-law', S. Wyler, B. Wyler, *The Swiss Civil Code*, St Gallen, 2000.

<sup>252</sup> '... Ces dernières décennies, a été accueillie avec beaucoup de circonspection. Il n'y a guère d'unité de vues à propos des conditions, des voies et moyens et des conséquences de l'*imprévision*. Hormis les dispositions expresses sur certains contrats spéciaux, on opère parfois par l'interprétation du contrat [...] plus généralement par le principe de la bonne foi [article 2 CCS], enfin par le pouvoir créateur du juge en face d'une lacune de la loi [article 1 CCS]', P. Engel, *Traité... op. cit.* p.787 onwards. – On revision for change of circumstances and the basis and the legal completion of a contract containing gaps, the change of circumstances being unforeseeable, P. Tercier, *op. cit.* n°727 onwards.

<sup>253</sup> CE 30 mars 1916, arrêt Gaz de Bordeaux, D. 1916. 3. 25.

<sup>254</sup> For a report and explanation of this state of facts, see H. Beale, A. Hartkamp, H. Kotz, D. Tallon, *Cases, Materials and Text on Contract Law, Ius commune casebooks on the Common Law of Europe*, *op. cit.* p. 630.

<sup>255</sup> *Davis Contractors Ltd v. Fareham UDC* [1956] AC 696 (H. L.)

<sup>256</sup> *Krell v. Henry* [1903] 2 KB 740 (C.A.): See in this respect *Principles of European Contract Law, Part I and II*, *op. cit.* p. 328. – We can also cite a case where the judge released the parties from the contract subject to the provision that they negotiate a new one in order to adapt their initial contractual will to the unforeseen change of

76. Nonetheless, within the systems which reject any setting aside of the binding force of contract, this approach is contested by certain writers and groups of scholars, and there have been some notable evolutions. We will take French law as an example.

In French law, the idea of a prohibition on revision for change of circumstances (*imprévision*) was established in the famous case *Canal de Craponne*, affirming that ‘*it is not the role of the tribunals, however just their decision may appear to be, to take into consideration the time and the circumstances in order to modify the parties’ agreement*’<sup>257</sup>.

This approach is traditionally based on the principle of binding force of contract which would command the intangibility of the contract. However, some argue in favour of the theory of *imprévision*, precisely because of the binding force of contract. Saint Thomas of Aquinas considered that the impossibility of performing one’s promise as a result of an unforeseeable change of circumstances could not be seen as a lie or an infidelity. The Doyen Carbonnier wrote: ‘*on the contrary, business matters could gain certainty if the parties were certain of being able to obtain an equitable revision of the contract in the case of a really unforeseeable upheaval*’<sup>258</sup>. Moreover, if we admit that the cause of the contract is the particular purpose and utility that the contract has for each of the parties, we can deduce from it that the contract only keeps its binding force whilst its content conforms to this purpose. From this perspective, the binding force of contract could justify the fact that, in the event of *imprévision*, the parties are obliged to renegotiate<sup>259</sup>.

The reasoning in terms of binding force of contract therefore leads to an impasse since for some it leads to a recognition of the theory of *imprévision* and for others its refusal. ‘*Some argue that the intangibility of the contract serves certainty and reliance, others argue the exact opposite*’<sup>260</sup>. In addition, the debate has moved on from arguments of legal technique to arguments of legal policy: on the one hand the fear of judicial interventionism or a general

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circumstances (see *Staffordshire Area Health Authority v. Staffordshire Staffs Waterworks Co* [1978]). – For a detailed analysis of the case, see H. Beale, A. Hartkamp, H. Kotz, D. Tallon, *op. cit.* pp. 621 to 623.

<sup>257</sup> ‘*Il n’appartient pas aux tribunaux, quelque équitable que puisse leur paraître leur décision, de prendre en considération le temps et les circonstances pour modifier les conventions des parties*’, Cass. Civ. 6 mars 1876 : DP 1876, 1, 193, note Giboulot ; H. Capitant, F. Terré et Y. Lequette, *Les grands arrêts de la jurisprudence civile*, t. 2, Dalloz 2000, n° 163.

<sup>258</sup> ‘*Les affaires au contraire pourraient bien gagner en sécurité si les parties étaient certaines de pouvoir obtenir une révision équitable du contrat, en cas de bouleversement réellement imprévisible*’, J. Carbonnier, *Droit civil. Les obligations*. PUF coll. Quadrige, n° 1065.

<sup>259</sup> G. Wicker, *Force obligatoire et contenu du contrat*, in *Les concepts contractuels français à l’heure des Principes du droit européen des contrats*, ss dir. de P. Remy-Corlay and D. Fenouillet, Dalloz 2003, éd. Thèmes, commentary p. 152 onwards.

<sup>260</sup> ‘*Les uns soutiennent que l’intangibilité du contrat sert la sécurité et la confiance, les autres exactement le contraire*’, L. Aynès, *L’imprévision en droit privé*, RJ com. 2005, p. 397.



imbalance of the economy ‘*by a chain reaction impossible to limit or even to predict*’<sup>261</sup> to which the admission of the theory of *imprévision* would lead, and on the other hand the idea of commutative justice which renders morally illegitimate a profoundly imbalanced contract by reason of an unforeseen event.

Moreover, the legislator has tempered the rejection of the theory of *imprévision* in certain respects, for example Article L. 131-5 of the Intellectual Property Code allows the author of a creative work, having ceded their exploitation rights and suffering a prejudice of more than 7/12ths due to insufficient foresight, to provoke the revision of the contract.

In the same way, the judiciary do sometimes take *imprévision* into consideration. Thus, they reduce the remuneration of certain service providers, in particular the *mandataire* (agent)<sup>262</sup>. Most notably, they have recently placed an obligation on some contracting parties to renegotiate in the case of a change of circumstances which totally upsets the contractual context<sup>263</sup>. Admittedly, these were specific solutions, following the example of legal provisions, and they do not suffice to reverse the principle of rejection of the theory of *imprévision*. In addition, by imposing only an obligation to renegotiate on the parties, the judiciary does not assume the power to revise the contract. Nevertheless, some see in this most recent case law the beginning of an evolution towards the recognition of the theory of *imprévision* in substantive French law.

## B. International law and Acquis communautaire

77. The **Vienna Convention** does not formally state the principle of the binding force of a contract of sale. It can nevertheless be inferred from the prohibition on unilateral termination of the contract (see Article 29: the contract ‘*may be modified or terminated by the mere agreement of the parties*’). It can also be inferred from the fact that the extent of the parties obligations can be found in the contract and the Convention<sup>264</sup>.

The parties are bound to perform the implied obligations arising from the contract. According to Article 9 (2) ‘*The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed*

<sup>261</sup> ‘*Par un jeu de réaction en chaîne impossible à limiter et même à prévoir*’, J. Flour et J.-L. Aubert et E. Savaux, *op. cit.*, n° 410.

<sup>262</sup> Cass. civ. 29 janvier 1867: DP 1867, 1, 53; H. Capitant, F. Terré et Y. Lequette, *Les grands arrêts de la jurisprudence civile*, t. 2, Dalloz 2000, n° 266.

<sup>263</sup> Cass. com. 3 novembre 1992: JCP 1993, éd. G, II, 22614, obs. G. Virassamy; RTD civ. 1993, 124, obs. J. Mestre; 28 novembre 1998: Défrénois 1999, 371, obs. D. Mazeaud; RTD ci. 1999, 98, obs. J. Mestre.

<sup>264</sup> See Article 30 for the seller ‘*The seller must ... as required by the contract and this Convention*’. *Adde* Article 53 for the buyer.

by, parties to contracts of the type involved in the particular trade concerned'. We find a specific application of this principle in Article 35: in order that the seller complies with his obligation that the goods must conform, he must not only comply with the express specifications of the contract (Article 35 (1)) but also with minimum standards of quality (Article 35 (2)).

The Convention does not appear to recognise revision of the contract for unforeseeable change of circumstances<sup>265</sup>.

**78.** In respect of **Community law**, contractual certainty can be defined as a specific expression, applied to contract, of the general principle of legal certainty which is recognised as one of the general principles of Community law, which are themselves established by Article 6 of the Treaty on the European Union and recognised as applicable in the Community legal order by the ECJ '*because they are applied in all legal systems*'<sup>266</sup>.

The principle of binding force of contract is widely recognised in the Community legal order, if only to confirm the respect that the Member States must give to their Community undertakings. In contractual affairs, the principle is '*consubstantial with the very notion of contract itself, which the ECJ impliedly recognised when it decided that, in referring to an 'agreement', Article 228 § 1 paragraph 2 of the EEC Treaty meant to use the term in a general sense to indicate any undertaking entered into by the subjects of international law and having binding force*'<sup>267</sup>. Many illustrations of the principle appear in secondary legislation, particularly within the ambit of the European law on groups of companies. Thus for example, Article 7 of Directive 68/151/EEC<sup>268</sup> concerning the protection of the interests of members and others, describes the method of dealing with company transactions entered into at the time of the formation of the company, and therefore before it had a legal personality: '*the persons who acted shall, without limit, be jointly and severally liable therefor*'<sup>269</sup>. This provision is simply applying the consequences of the binding force of contract.

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<sup>265</sup> Article 79 deals with possible causes of exoneration (force majeure). A change of circumstances does not constitute a fact that exonerates the debtor. – The question is however discussed: see *Principles of European Contract Law, Part I and II, op. cit.* p. 328.

<sup>266</sup> '*Parce qu'ils sont en vigueur dans tous les systèmes de droit*', *Mémento Pratique Francis Lefebvre - Union européenne*, 2006-2007, Francis Lefebvre, 2005, especially n° 153.

<sup>267</sup> '*Consubstantiel à la notion même de contrat, ce que reconnaît implicitement la CJCE lorsqu'elle juge qu'en se référant à un 'accord', l'article 228 §1 al. 2 du traité CE entend utiliser ce terme dans un sens général, pour désigner tout engagement pris par des sujets de droit international et ayant une force obligatoire*' H. Adida-Canac, *Contribution à l'étude du droit communautaire des obligations, op. cit.*, especially, t. 2, n° 791, on the subject of an opinion of the ECJ of 11 November 1975, opinion 1/75, *Rec.* p. 1355.

<sup>268</sup> First Council Directive 68/151/EEC of 9 March 1968 *on co-ordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community*, OJ n° L 065 14/03/1968 p. 0008 – 0012.

<sup>269</sup> Article 7 of the above Directive.

The requirement that the parties comply with the duties arising from contractual fairness is also found. This principle is found in institutional Community law in the form of the principle of cooperation laid down by Article 10 of the EC Treaty<sup>270</sup>. In secondary law, we find express references to the implementation of this principle, often coupled or assimilated with the notion of good faith. According to Directive 86/653/EEC on the coordination of the laws of the Member States relating to self-employed commercial agents, each party to the contract of agency must ‘act dutifully and in good faith’<sup>271</sup>, whether they are the agent<sup>272</sup> or the principal<sup>273</sup>. In internal market law, the ECJ has also awarded a special place to fairness in contractual matters, since it has made ‘the fairness of commercial transactions’<sup>274</sup> an ‘overriding reason relating to the public interest’<sup>275</sup> allowing the justification of obstacles to free movement. In addition, the legislator has taken this creation of the case law and has applied it to secondary legislation<sup>276</sup>. The principle of fairness therefore appears widely as a general principle of the Community law of contract throughout the whole of the contractual process<sup>277</sup>.

In very specific circumstances, an unforeseeable change of circumstances which compromises the proper performance of the contract for the parties can form the basis of an exception to the principle of binding force, whether we are talking about the manifestation of *imprévision* or the incidence of force majeure. Indeed, according to the ECJ, such an exception should be admitted even if the basis is not the same in the different Member States with their diverse legal traditions<sup>278</sup>. It is the concept of force majeure, encompassing diverse standards<sup>279</sup> such as unforeseeability, impossibility and exteriority, which seems to form the basis of the exception to the operation of binding force and it is thus this notion that is used by the Court as a

<sup>270</sup> On the definition of this principle see *infra* Section III ‘contractual fairness’.

<sup>271</sup> Article 3 and restated in Article 4 of Directive 86/653/EEC of the Council of 18 December 1986 *on the coordination of the laws of the Member States relating to self-employed commercial agents* OJ n° L 382 31/12/1986 p. 17 – 21.

<sup>272</sup> Article 3 § 1 of the above Directive.

<sup>273</sup> Article 4 § 1 of the above Directive.

<sup>274</sup> For example, point 28, ECJ, 13 December 2005, *SEVIC Systems AG*, C-411/03, *Rec.* 2005 p. I-10805.

<sup>275</sup> See in particular, *Mémento Pratique Francis Lefebvre - Union européenne*, 2006-2007, *op. cit.*, n° 1581.

<sup>276</sup> For example, Article 4 point 8 proposing a definition of the ‘overriding reasons relating to the public interest’ and giving examples, including that of ‘fairness of trade transactions’, Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, OJ L 376 27/12/2006, p. 36–68.

<sup>277</sup> In this respect see H. Adida-Canac, *Contribution à l’étude du droit communautaire des obligations*, *op. cit.*, t.2, especially n° 830 *in fine*. See *infra* Section III ‘Contractual fairness’.

<sup>278</sup> ECJ, 13 October 1993, *An Bord Bainne Co-operative Ltd et Compagnie Interagra SA v. Intervention Board for Agricultural Produce*, C-124/92, *Rec.* 1993 page I-05061, see point 11 ‘the concept of force majeure is not limited to absolute impossibility but must be understood in the sense of abnormal and unforeseeable circumstances, outside the control of the trader concerned, the consequences of which, in spite of the exercise of all due care, could not have been avoided except at the cost of excessive sacrifice’.

<sup>279</sup> H. Adida-Canac, *Contribution à l’étude du droit communautaire des obligations*, *op. cit.*, especially t. 2, n° 901 onwards.

legal basis, *'its meaning must be determined by reference to the legal context in which it is to operate'*<sup>280</sup>.

### C. Codifications by legal scholars

#### ➤ Binding force of contract

79. As with the majority of the national laws<sup>281</sup>, the different projects studied all commit, using a similar formula, to the principle of the binding force of contract.

Within the **Unidroit Principles**, the principle of binding force of contract is posed by Article 1.3 which states that *'a contract validly entered into is binding upon the parties. It can only be modified or terminated in accordance with its terms or by agreement or as otherwise provided in these Principles'*.

However, this principle can also be inferred from the rule stated in Article 6.2.1. *'Contract to be observed'* which states that *'where the performance of a contract becomes more onerous for one of the parties, that party is nevertheless bound to perform its obligations subject to the following provisions on hardship'*.

Within the **Proposals for Reform of the Law of Obligations and the Law of Prescription**, the principle of binding force of contract is dealt with under the title of *'The Effects of Contracts'* in Article 1134 paragraph 1 which states, in accordance with the classic position, that *'contracts which are lawfully concluded take the place of legislation for those who have made them'*<sup>282</sup>. The principle can also be indirectly found in Article 1165, on *'The Effects of Contract as regards Third Parties'*, which states that *'contracts bind only the contracting parties [...]*<sup>283</sup>.

Finally, Article 42 of the **European Code of Contract Preliminary Draft**, concerning *'Effects on contracting parties and in favour of third parties'* holds that *'A contract has the force of law between the contracting parties [...]*'.

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<sup>280</sup> Point 10, ECJ, 13 October 1993, *An Bord Bainne Co-operative Ltd et Compagnie Interagra SA v. Intervention Board for Agricultural Produce*, above.

<sup>281</sup> See *supra*.

<sup>282</sup> J. Cartwright and S. Whittaker, *op. cit.*

<sup>283</sup> *Ibid.*

➤ **Consequences of the obligatory effect of the contract**

80. The different projects all hold that the binding force of contract has an equal effect on implied terms and obligations as it does on explicit obligations. In addition, a reference to good faith or equity can always be found.

In the **Unidroit Principles**, the distinction between express and implied obligations is found in Article 5.1.1 which states that *‘The contractual obligations of the parties may be express or implied’*. Article 5.1.2 further clarifies that implied obligations are those which follow from *‘the nature and purpose of the contract’*<sup>284</sup>, *‘practices established between the parties and usages’*<sup>285</sup>, *‘good faith and fair dealing’*<sup>286</sup> and *‘reasonableness’*<sup>287</sup>.

In the **Proposals for Reform of the Law of Obligations and the Law of Prescription** the principle of the binding force of contract applies outside of the simple express content of the contract by virtue of the two paragraphs of Article 1135. Paragraph 2 states that *‘notably, contracts should be supplemented by customary terms, even if they are not expressed’*<sup>288</sup>. Paragraph 1 adds *‘contracts create obligations not merely in relation to what they expressly provide, but also to all the consequences which equity, custom or legislation give to them according to their nature’*<sup>289</sup>.

Within the **European Code of Contract Preliminary Draft**, the principle of binding force of contract applies outside the express obligations of the contract as a result of Article 32 concerning *‘implied terms’* of the contract. This article states in § 1 (c): *‘in addition to the express terms the contract includes terms which must be considered impliedly intended by the parties on the basis of previous business negotiations, the circumstances, and general and local usage’*<sup>290</sup>. The provision is also aimed at the declarations of the parties during the pre-contractual period<sup>291</sup> and the custom for contracts entered into in the commercial sector<sup>292</sup>.

In addition, this draft project impliedly envisages the duties induced by contractual fairness in Article 32 § 1 (b): *‘in addition to the express terms the contract includes terms which stem from the obligation of good faith’* and in Article 44: *‘the effects of a contract derive not only from the agreement made between the parties but also from the provisions in this Code, national and Community provisions, usage, good faith and equity’*.

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<sup>284</sup> Article 5.1.2 (a)

<sup>285</sup> Article 5.1.2 (b)

<sup>286</sup> Article 5.1.2 (c)

<sup>287</sup> Article 5.1.2 (d)

<sup>288</sup> J. Cartwright and S. Whittaker, *op. cit.*

<sup>289</sup> *Ibid.*

<sup>290</sup> *Adde* Article 32 (1) (d) which adds that the contents of the contract also includes those clauses which *‘must be considered necessary in order that the contract can have the effects intended by the parties’*.

<sup>291</sup> Article 32 (2)

<sup>292</sup> Article 32 (3)

➤ **Unforeseeable change of circumstances**

**81.** While the **Unidroit Principles** and the **European Code of Contract Preliminary Draft** both admit the judicial revision of the contract in the case of unforeseeable change of circumstances, the **Proposals for Reform of the Law of Obligations and the Law of Prescription** remain faithful to the classic conception of French law and do not admit it.

In the **Unidroit Principles**, the question of unforeseeable change of circumstances is governed by Article 6.1.2, 6.2.2 and 6.2.3. It is laid down that in cases of hardship (which is defined by Article 6.2.2<sup>293</sup>), the party who is the victim can demand to renegotiate the contract with the other party, and the judge can terminate the contract or adapt it to the circumstances with a view to restoring its equilibrium (Article 6.2.3<sup>294</sup>).

In the **European Code of Contract Preliminary Draft**, the question of change of circumstances is governed by Article 157. The text is long and obscure<sup>295</sup>. In substance it admits however a contractual renegotiation of the contract ‘*if extraordinary and unforeseeable events have previously happened which have made performance excessively onerous*’ (see Article

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<sup>293</sup> According to Article 6.2.2 (Definition): ‘*There is hardship where the occurrence of events fundamentally alters the equilibrium of the contract either because the cost of a party’s performance has increased or because the value of the performance a party receives has diminished, and*  
(a) *the events occur or become known to the disadvantaged party after the conclusion of the contract;*  
(b) *the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract;*  
(c) *the events are beyond the control of the disadvantaged party; and*  
(d) *the risk of the events was not assumed by the disadvantaged party.*’

<sup>294</sup> According to Article 6.2.3 (Effects): ‘(1) *In case of hardship the disadvantaged party is entitled to request renegotiations. The request shall be made without undue delay and shall indicate the grounds on which it is based.*  
(2) *The request for renegotiation does not in itself entitle the disadvantaged party to withhold performance.*  
(3) *Upon failure to reach agreement within a reasonable time either party may resort to the court.*  
(4) *If the court finds hardship it may, if reasonable,*  
(a) *terminate the contract at a date and on terms to be fixed, or*  
(b) *adapt the contract with a view to restoring its equilibrium.*’

<sup>295</sup> ‘1. *If extraordinary and unforeseeable events have happened, as are indicated in Art 97 para 1, the party who intends to avail himself of the right to renegotiation there provided must send to the other party, with all necessary information, a declaration requesting negotiation to be considered also specifying, if the request is not to be void, the different terms and conditions that he proposes in order to keep the contract alive. To this declaration the provisions of Art 21 and Art 36 para 2 shall apply.*

2. *No action can be brought before six (three) months<sup>295</sup> have elapsed, calculated from receipt of the declaration, in order to enable the parties to settle the matter out of court. The right to apply to the court for the urgent reliefs contained in Art 172 is unaffected.*

3. (...)

4. *If the parties are unable to agree within the time specified at para 2, the person entitled must, within a further sixty days if his right is not to be lost, present his request for renegotiation to the court following the rules of procedure applicable in the place where the contract is to be performed.*

5. *After evaluating the circumstances and taking into consideration the interests and the requests of the parties, the court, if necessary with expert assistance, can alter or dissolve the contract as a whole or as to the unperformed part and, if needed and it is appropriate, order restitution and award compensation for loss.’*

97(1)). In the absence of such a renegotiation, the text allows the judicial revision of a contract that has become profoundly unbalanced.

On the other hand, the **Proposals for Reform of the Law of Obligations and the Law of Prescription**, do not admit judicial revision of the contract for unforeseeable change of circumstances. To counter such situations the proposals prefer to encourage parties to make their own provisions and to stipulate renegotiation clauses in their contract. These clauses would deal with the case where it comes about that as a result of the circumstances the initial contractual equilibrium is disturbed to the point that the contract loses all point for the other party. Thus, Article 1135-1 states that *‘in contracts whose performance takes place successively or in instalments, the parties may undertake to negotiate a modification of their contract where as a result of supervening circumstances the original balance of what the parties must do for each other is so disturbed that the contract loses its point for one of them’*<sup>296</sup>. In the absence of such a clause, no revision is provided for but one of the parties may demand of the judge that he order a renegotiation<sup>297</sup>. In the case of failure of renegotiation, judicial revision is excluded, but a unilateral power of termination is awarded to the parties<sup>298</sup>.

#### **IV. Proposed text**

##### **Article 0-201: Principle of binding force**

A contract which is lawfully concluded has binding force between the parties.

In addition to the performance of the contractual obligations, each party is bound to comply with the duties which can be implied from the principle of contractual fairness.

In the course of performance, the binding force of the contract can be called into question if an unforeseeable change of circumstances seriously compromises the usefulness of the contract for one of the parties.

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<sup>296</sup> J. Cartwright and S. Whittaker, *op. cit.*

<sup>297</sup> Article 1135-2 states that *‘in the absence of such an express term, a party for whom the contract loses its point may apply to the President of the tribunal de grande instance to order a new negotiation’*.

<sup>298</sup> Article 1135-3 states that *‘where applicable, these negotiations should be governed by the rules provided by Chapter I of the present Title. In the absence of bad faith, the failure of the negotiations gives rise to a right in either party to terminate the contract for the future at no cost or loss’*.

## **Article 0-202: Right to performance**

### **I. General presentation of the principle**

82. Within this chapter, the second article should clarify the scope of binding force of contract in respect of the obligations of the debtor and the rights of the creditor. Two questions must be answered.

- what can the creditor claim?
- what can the debtor be held to?

It is a question of settling the issue of performance of the contract. The principle of binding force of contract itself supposes that performance conforms to the content of the contract. It follows that the modalities of performance (time, place of performance ...) should conform to the contract terms. Equally, it follows that the mode of performance should also respect the contractual provisions. If the contract envisages the payment of a sum of money, it is this sum that the debtor should pay. But if the contract, and it is here that we see the majority of the difficulties, envisages the provision of a service, it is important to specify whether the debtor must necessarily perform in kind or whether an equivalent performance is equally admissible. Thus, a guiding principle dedicated to the right to performance should clearly state if the Principles of European Contract Law make performance in kind the rule, or in fact whether equivalent performance is allowed. The provisions contained within the Principles of European Contract Law lead to the adoption of a principle of performance in kind, following the example of the countries influenced by Roman law and in contrast to the Common Law countries<sup>299</sup>. Such a choice does not in the least imply that performance in kind is always imposed on the debtor. Indeed the exceptions are laid down by Article 9: 102 (2) of the Principles of European Contract Law. But these exceptions should not be found within a guiding principle, which should simply state the general rule<sup>300</sup>.

### **II. Application of the principle in PECL**

83. The right to performance of the contract is expressly recognised by Section 1 of Chapter 9 of the Principles of European Contract Law. The commentary indicates that this section states

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<sup>299</sup> See *infra*.

<sup>300</sup> **Acquis Group:** The working group on fundamental principles has not proposed anything on the right to performance.



the right to compel performance of the contract<sup>301</sup> without however referring to a principle of performance in accordance with the contract.

The principle of performance in accordance with the contractual provisions is recognised and applied by several provisions of PECL. For example:

- performance should take place at the location ‘fixed by or determinable from the contract’, see Article 7:101 (1) *a contrario*<sup>302</sup>.
- performance should take place on the date ‘fixed by or determinable from the contract’. This is stated by Article 7: 102 ‘Time of Performance’: ‘A party has to effect its performance: (1) if a time is fixed by or determinable from the contract, at that time’.
- a party may in principle refuse an earlier performance, subject to the exception: ‘where acceptance of the tender would not unreasonably prejudice its interests’, see Article 7: 103 ‘Early performance’, especially (1)<sup>303</sup>.
- the creditor should accept a performance in accordance with the obligation proposed by the other party: see Articles 7:110 and 7:111<sup>304</sup>.

**84.** The principle of performance of the obligation as laid down by the contract is equally applicable to obligations to pay a sum of money as to obligations other than to pay sums of money.

In respect of obligations to pay a sum of money, Article 9: 101 (1) holds that ‘the creditor is entitled to recover money which is due’. The commentary clearly indicates that the possibility of

<sup>301</sup> *Principles of European Contract Law, Part I and II, op. cit.* p. xxxviii.

<sup>302</sup> See Article 7: 101 (1): ‘If the place of performance of a contractual obligation is not fixed by or determinable from the contract it shall be [...]’.

<sup>303</sup> See Article 7: 103 (1): ‘A party may decline a tender of performance made before it is due except where acceptance of the tender would not unreasonably prejudice its interests’.

<sup>304</sup> See Article 7: 110 ‘Property Not Accepted’: ‘(1) A party who is left in possession of tangible property other than money because of the other party’s failure to accept or retake the property must take reasonable steps to protect and preserve the property.

(2) The party left in possession may discharge its duty to deliver or return: (a) by depositing the property on reasonable terms with a third person to be held to the order of the other party, and notifying the other party of this; or

(b) by selling the property on reasonable terms after notice to the other party, and paying the net proceeds to that party.

(3) Where, however, the property is liable to rapid deterioration or its preservation is unreasonably expensive, the party must take reasonable steps to dispose of it. It may discharge its duty to deliver or return by paying the net proceeds to the other party.

(4) The party left in possession is entitled to be reimbursed or to retain out of the proceeds of sale any expenses reasonably incurred.’

Article 7:111 ‘Money Not Accepted’: ‘Where a party fails to accept money properly tendered by the other party, that party may after notice to the first party discharge its obligation to pay by depositing the money to the order of the first party in accordance with the law of the place where payment is due’.

requiring the payment of the promised sum of money is an application of the principle '*pacta sunt servanda*'<sup>305</sup>.

In respect of obligations other than to pay sums of money, the principle of performance in kind is posed by Article 9: 102 (1) which states that '*the aggrieved party is entitled to specific performance of an obligation other than one to pay money, including the remedying of a defective performance*'.

Paragraph 2 of the article specifies however the exceptions to the principle of performance in kind. Thus, performance in kind is refused when '*performance would be unlawful or impossible*' (a), or '*performance would cause the obligor unreasonable effort or expense*' (b), or '*the performance consists in the provision of services or work of a personal character or depends upon a personal relationship*' (c), or '*the aggrieved party may reasonably obtain performance from another source*' (d)<sup>306</sup>. According to the commentary, the choice operated in favour of the principle of performance in kind for obligations which do not concern a sum of money is a way of assuring the principle of binding force of contract<sup>307</sup>.

### **III. Applications of the principle in comparative law**

#### **A. National laws**

**85.** It is convenient to distinguish, within the different national laws of the Member States of the European Union, between the countries influenced by Anglo-Saxon law and the countries influenced by Roman law.

**86.** Within the Anglo-Saxon inspired countries, although the binding force of contract is well recognised, it is not understood as necessarily imposing performance in kind. An equivalent means of performance is considered equally respectful of the obligatory character of the contract.

For example, in English law there are two types of solution available to the creditor who is faced by the non-performance of the contract and the resulting: *common law remedies* (which are applicable as a matter of law) and *equitable remedies* (measures which may be pronounced by the judge but without the injured party being able to require it<sup>308</sup>). The enforced performance in kind

<sup>305</sup> *Principles of European Contract Law, Part I and II, op. cit.* p. 393.

<sup>306</sup> Compare Article 15: 104 (4) on restitution: '*If restitution cannot be made in kind for any reason, a reasonable sum must be paid for what has been received*'.

<sup>307</sup> *Principles of European Contract Law, Part I and II, op. cit.* p. 395.

<sup>308</sup> These measures are described as '*(...) provided by the discretion of the court (...)*'. They are '*discretionary remedies*'.

of the contract (*specific performance*) is one of the second types of remedy. When the contract is concerned with an obligation to do something, the granting of specific performance is in practice very rare. To obtain specific performance, it must be proved that, taking into account the nature of the obligation and the harm suffered by the party demanding specific performance, damages will not constitute adequate recompense (*damages must be inadequate*). This is the case when the demander cannot easily obtain the same service / benefit as envisaged by the contract, whether it is a question of delivery of specific / unique goods<sup>309</sup> or an obligation to do something (*replacement goods or performance*). However, in spite of the discretionary power of the judge in this matter, it is considered that specific performance of the contract cannot be ordered where it would lead to consequences of exceptional hardship for the defendant. This was the approach chosen in the case of *Patel v. Ali* (1984)<sup>310</sup>. In the name of equity, the judge can also refuse specific performance when the contract was entered into as a result of the use of dishonest practices, even if the lack of contractual fairness was not sufficient to avoid the contract as a vice affecting one of its constituent elements. This was the case in *Walters v. Morgan* (1861)<sup>311</sup>. Lastly, in English law, an order for specific performance is thought to be impossible when it threatens the individual liberty of the contracting party (see in particular *Ryan v Mutual Tontine Association*, 1893<sup>312</sup>; compare *contra Posner v. Scott-Lewis*, 1986<sup>313</sup>).

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<sup>309</sup> See in this respect a case concerning the sale of a Chinese vase, Vice-Chancellor's Court *Falcke v. Gray* (1859): '(...) where there is a contract to sell goods which are unique, specific performance may be ordered (...)'. On this case see, H. Beale, A. Hartkamp, H. Kotz, D. Tallon, *op. cit.* pp. 678 to 680.

<sup>310</sup> In this case, the applicant had solicited the ordering of specific performance of a contract for the sale of a house. The request took four years to be examined by the court and, during this time, the husband of the seller was declared bankrupt and the seller herself became incapable. As a result, it was imperative that she was able to remain near her friends and family, and to require her to move would have led to exceptionally severe consequences. Consequently, the court refused to order specific performance of the obligation to deliver the property and only required the payment of damages.

<sup>311</sup> In this case, the defendant, who had just acquired some land, had agreed to award the applicant a mining concession over the land. When the holder of the concession solicited specific performance of the obligation incumbent on the defendant to allow him to exploit the land, the court rejected his claim on the basis that, in entering into the contract for the concession, the party had intended to take advantage of the ignorance of the defendant as to the real value of the concession.

<sup>312</sup> In this case, the contract for the lease of an apartment contained a clause which stipulated that a concierge would always be present in the building. It transpired that the concierge, who had another job, was often absent from the building in which the apartment was situated. The court refused to award specific performance of this clause in the contract on the grounds that it could only be realised by putting in place constant surveillance of the employee in question, which was a measure which exceeded the requests that the court was able to satisfy.

<sup>313</sup> The reticence of the court is more or less marked depending on the facts of the case. In a factually similar case to the above, specific performance was ordered: the obligation to monitor and to supervise was placed on the defendant in so far as it concerned a building of a higher standing and the constant presence of a concierge was something that the residents were entitled to expect.

87. On the other hand, within the Romanist countries, the principle of performance in kind is widely recognised. This is particularly so in the legal systems which have remained close to Roman law<sup>314</sup>.

Thus, in principle, French law awards the creditor the right to obtain from the debtor the enforced performance in kind of the unperformed obligation, whilst at the same time retaining the possibility of tempering the right e.g. with grace periods that the judge may award to the debtor, in accordance with Article 1244-1 of the Civil code.

It is generally recognised that the right to compel performance in kind rests on the binding force of contract since it is a question of allowing the creditor to obtain that which was agreed in the contract<sup>315</sup>. The approach adopted is therefore based on Article 1134 of the Civil Code, to which it is convenient to add other provisions, such as Article 1184 paragraph 2 which states that *'the party towards whom the undertaking has not been fulfilled has the choice either to compel the other to fulfil the agreement when it is possible, or to request its avoidance with damages'* and Article 1 of the law of 9 July 1991 dealing with the reform of civil procedures for performance according to which *'any creditor may, in the conditions laid down by statute, require his defaulting debtor to perform his obligations towards the creditor'*<sup>316</sup>.

The very existence of a principle of performance in kind gives rise to discussions in French legal writing because of the interpretation sometimes given to Article 1142 of the Civil Code. In announcing that *'any obligation to do or not to do resolves itself into damages, in case of non-performance on the part of the debtor'*, this text seems in fact to exclude, for obligations to do and not to do, any enforced performance in kind. In reality the principle posed by this provision must be nuanced, or even inverted. The basis of Article 1142 of the Civil Code leads to the limiting of the scope of the article so that it only applies to those obligations where enforcing performance in kind would lead to a threat on the personal liberty of the debtor. Traditionally the example used is of the painter who cannot be forced to paint a picture. Article 1142 of the Civil Code has therefore become a provision of exception, the principle of enforced performance in kind being the principle. Nevertheless, where preparatory contracts are concerned, and contrary to the opinion of the majority of legal scholarship, the case law has maintained a literal interpretation of the text. Thus, it considers that the beneficiary of a unilateral promise of sale, who exercises the option during the time frame envisaged by the contract but after the retraction of the promise by the promisor, cannot obtain forced performance of the promised sale but damages alone. In order to justify this approach, the judges base their decision on the exact letter

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<sup>314</sup> In addition to the laws studied *infra*, see for Belgium, Cass. 30 janvier 1965, Pas. I.58; 5 janvier 1968, Pas. I.567; for Portugal: Article 817 Civil Code: cited in *Principles of European Contract Law, Part I and II, op. cit.* p. 399.

<sup>315</sup> N. Molfessis, *Force obligatoire et exécution: un droit à l'exécution en nature?*, RDC 2005/1, p. 40.

<sup>316</sup> *'Tout créancier peut, dans les conditions prévues par la loi, contraindre son débiteur défaillant à exécuter ses obligations à son égard'*.

of Article 1142 of the Civil Code; they consider that it is a question of the non-performance of an obligation to do something, that of the promisor maintaining their offer<sup>317</sup>. An identical approach is adopted for the violation of a pre-emption agreement<sup>318</sup>. However, an evolution can be identified. In a case of 26 May 2006<sup>319</sup> the court admitted the possibility of annulling a contract of sale entered into in violation of a pre-emption agreement whilst at the same time requiring proof that the third party acquirer had knowledge of the existence of the pre-emption agreement and of the intention of its beneficiary to take advantage of it. It remains to be seen whether this evolution is a sign of the abandonment of a literal interpretation of Article 1142 of the Civil Code in respect of preliminary contracts.

Other articles of the French Civil Code complete the above system and allow the creditor to obtain performance of the obligation as envisaged by the contract. Thus, Article 1144 of the Civil Code reinforces this right to performance, as, by stating '*a creditor may also, in case of non-performance, be authorized to have the obligation performed himself, at the debtor's expense*', it recognises performance in kind by a third party. In the same way, Article 1143 of the Civil Code, concerning obligations not to do something, states '*a creditor is entitled to request that what has been done through breach of the undertaking be destroyed*'. We must however underline that the question of determining whether these articles relate to performance in kind or reparation in kind is debated by legal scholars. In French law, only those remedies that are classed as performance in kind are binding on the judge. On the other hand, he remains free to choose the mode of reparation – in kind or by equivalent – which seems to him to be the most adequate.

In Italian law, the obligation to perform the contract in accordance with its terms arises from Article 1218 of the Civil Code which obliges the debtor who has not performed exactly what was due to repair the damage that has resulted unless he can establish that the non-performance or the delay was not attributable to him. Article 1453 of the Civil Code also offers the creditor the choice, in the case of non-performance, of demanding the performance or the rescission of the contract. The right to compel performance in kind is in addition legally recognised as belonging to the creditor of an obligation to deliver a thing (Article 2930), an obligation to do something (Article 2931), and an obligation to not do something (Article 2933). Article 2932 contains an original provision as it concerns the enforced performance of an obligation to enter into a contract<sup>320</sup>, where that contract is the subject of a preliminary contract (a contract fixing the

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<sup>317</sup> Cass. civ. 3<sup>ème</sup>, 15 December 1993: Bull. civ. III, n° 174.

<sup>318</sup> Cass. civ. 3<sup>ème</sup>, 30 April 1997: Bull. civ. III, n° 96.

<sup>319</sup> Cass. ch. mixte, 26 May 2006: Bull. mixt., n° 4.

<sup>320</sup> M.-C. Diener, *op. cit.* § 3. 22.

essential elements of a contract to come). A creditor in this situation has the option of asking the judge for a judgment which would have the same effects as the yet to be concluded contract<sup>321</sup>.

Spanish law recognises that the creditor has a right to require that their debtor performs that which was agreed in the contract. Articles 1096 and 1098 of the Spanish Civil Code envisage enforced performance in kind. However, the Spanish Civil Code does not clearly state whether the creditor can opt for forced performance in kind or performance by equivalent<sup>322</sup>. Legal scholarship tends however to consider that the creditor must demand performance of the obligation and that it is only when this is impossible that reparation by equivalent will suffice. In other terms, the latter appears to be a subsidiary remedy<sup>323</sup>. However, the courts can refuse performance in kind if it is not reasonable to order it having regard to the circumstances<sup>324</sup>. It also results from Article 1098 of the Civil Code that when the obligation in question is an obligation to do or not to do, it is impossible to obtain forced performance in kind.

**88.** The right to performance in kind can equally be found in the Germanic family of legal systems<sup>325</sup>.

In Dutch law, the principle of performance in kind is expressly established by Article 3:296 (1) BW<sup>326</sup>. This provision ‘gives the creditor the right to enforce any obligation or duty in court, whether or not the debtor is in default in performing the obligation. The idea behind this general right of action is that the right to (specific) performance follows from the contract itself, and is therefore not a consequence of non-performance. [...] Furthermore, the court is in principle obliged to award such a claim’<sup>327</sup>. In addition, the judge is in principle bound to accept the creditor’s demand – unless the restrictions envisaged by the provisions and resulting from the law are applicable, or the nature of the obligation or a decision of justice requires its refusal<sup>328</sup>.

<sup>321</sup> M.-C. Diener, *op. cit.* §. 3. 16. This rule does not apply to the preliminary contracts of real contracts because the judgement can only compensate a defect in consent and not the failure to hand-over the thing, which is necessary to the formation of a real contract: there is a legal impossibility arising from the text (*op. cit.* §3. 20.3: opinion of the majority of legal scholarship).

<sup>322</sup> See in this respect, MM. Díez-Picazo et Gullón, *op. cit.* p. 209.

<sup>323</sup> See in this respect, Sentencias de 24 de Abril de 1973, 24 de abril y 27 de febrero de 1995.

<sup>324</sup> See in this respect, *Principles of European Contract Law, Part I and II, op. cit.* p. 400 and the references cited there.

<sup>325</sup> In addition to the legal systems studied *infra*, see for Austria: § 918-919 ABGB; for Denmark: § 21 Sale of Goods Act; for Finland: § 23 Sale of Goods Act; for Sweden: § 23 Sale of Goods Act: cited by *Principles of European Contract Law, Part I and II, op. cit.* p. 399.

<sup>326</sup> ‘Unless the law, the nature of the obligation or a juridical act produce a different effect, the person who is obliged to give, to do or not to do something vis-à-vis another is ordered to do so by the judge upon the demand of the person to whom the obligation is owed’. Translated in D. Busch, E. H. Hondius et alii, *op. cit.* p.348.

<sup>327</sup> D. Busch, E. H. Hondius et alii, *op. cit.* p.348 onwards on ‘Art. 3:296 (which is placed in Book 3, Patrimonial Law in General, Title 11, Right of Action)’.

<sup>328</sup> *Ibid.* p.349 and 354 onwards.

Forced performance is as equally applicable to the principal obligation as to the accessory obligations of the debtor<sup>329</sup>.

However, the creditor does not have an absolute right to performance in kind. It is important to take into account the prohibition on abuse of a right in Article 3:13 BW. The exercise of a right, such as performance in kind, is abusive if the creditor cannot exercise it reasonably, in view of the balance of interests which could be disturbed as a result of its exercise. From these rules we can draw the conclusion that the creditor cannot solicit performance in kind if this remedy would constitute an unreasonable charge for the debtor and if performance in kind would be no more beneficial to the creditor than any other mode of performance. In a recent case<sup>330</sup>, the Hoge Raad was thus able to decide that, where it is possible, the creditor can opt for performance in kind rather than damages. Nonetheless, the case adds that the creditor is bound by the requirements of reasonableness and equity, which implies that when exercising this option he should take into account the legitimate and justifiable interests of the debtor. This case can be analysed as an application of the requirement of proportionality.

In German law, the primacy of performance in kind is not expressly posed, but it is generally admitted<sup>331</sup>. We can deduce this rule from § 241 I BGB<sup>332</sup> and *a contrario* from § 275 BGB<sup>333</sup> on the exclusion of ‘*the duty of performance*’<sup>334</sup>. In this case, the debtor is freed from his primary obligation (the *primäre Leistungspflichten*) and if necessary a secondary obligation (the *sekundäre Leistungspflichten*) will be substituted<sup>335</sup>.

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<sup>329</sup> *Ibid.* p. 354.

<sup>330</sup> Hoge Raad, 5 January 2001, Multi Vastgoed v. Nethou (NJ 2001).

<sup>331</sup> R. Zimmermann, *The New German Law of Obligations...*, *op. cit.* p.43 onwards.

<sup>332</sup> ‘By virtue of an obligation an obligee is entitled to claim performance from the obligor. The performance may also consist in forbearance’.

<sup>333</sup> ‘(1) A claim for performance is excluded to the extent that performance is impossible for the obligor or for any other person.

(2) The obligor may refuse performance to the extent that performance requires expense and effort which, taking into account the subject matter of the obligation and the requirements of good faith, is grossly disproportionate to the interest in performance of the obligee. When it is determined what efforts may reasonably be required of the obligor, it must also be taken into account whether he is responsible for the obstacle to performance.

(3) In addition, the obligor may refuse performance if he is to render the performance in person and, when the obstacle to the performance of the obligor is weighed against the interest of the obligee in performance, performance cannot be reasonably required of the obligor.

(4) The rights of the obligee are governed by sections 280, 283 to 285, 311a and 326.’

<sup>334</sup> M. Pédamon, *op. cit.* p.230. - Adde P. Schlechtriem ‘*The German Act to Modernize the Law of Obligations in the Context of Common Principles and Structures of the Law of Obligations in Europe*’ Oxford University Comparative Law Forum, 2002, (<http://ouclf.iuscomp.org/articles/slechtriem2.shtml>); R. Zimmermann, *The New German Law of Obligations*, *op. cit.* p.49 onwards.

<sup>335</sup> For the situations where the duty to perform is excluded, see M. Pédamon, *op. cit.* n°204 onwards.

89. Lastly, in Swiss law, the subject of varying influences, the principle according to which the debtor must perform his obligation as it is laid down by the contract results implicitly<sup>336</sup> from Article 97 I CO<sup>337</sup>. This provision is the implicit foundation beneath the establishment of the principle of performance in kind<sup>338</sup>. *‘As long as performance is possible, the creditor has the right to act to require performance in kind, such as it was promised’*<sup>339</sup>.

## B. International law and Acquis communautaire

90. In the **Vienna Convention**, the right to performance in accordance with the contract terms of a contract for sale is not formulated in a general sense. The principle is nevertheless at the origin of the rule according to which *‘the seller must deliver the goods, hand over any documents relating to them and transfer the property in the goods, as required by the contract and this Convention’* (Article 30). More specifically, this obligation implies a requirement to deliver the goods on the agreed date (Article 33 (a)) and also to deliver the goods *‘which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract’* (Article 35 (1))<sup>340</sup>. Equally, it is once again the principle of performance in conformity which justifies the fact that the purchaser is bound to pay the price on the date fixed by the contract (Article 59).

Performance in kind of the obligations incumbent on the seller is posed by Article 46 (1) of the Convention: *‘the buyer may require performance by the seller of his obligations unless the buyer has resorted to a remedy which is inconsistent with this requirement’*. However, Article 28 states that *‘if, in accordance with the provisions of this Convention, one party is entitled to require performance of any obligation by the other party, a court is not bound to enter a judgement for specific performance unless the court would do so under its own law in respect of similar contracts of sale not governed by this Convention’*.

<sup>336</sup> See P. Engel, *Traité...*, *op. cit.* p.619. - Adde P. Tercier, *op. cit.* n°81, 211 onwards, 770.

<sup>337</sup> *‘If the performance of an obligation cannot at all or not duly be effected, the obligor shall compensate for the damage arising therefrom, unless he proves that no fault at all is attributable to him’*, Swiss-American Chamber of Commerce, *op. cit.*

<sup>338</sup> P. Tercier, *op. cit.* n°213 onwards.

<sup>339</sup> *‘Tant que l’exécution est possible, le créancier a le droit d’agir en exécution pour obtenir la prestation en nature, telle qu’elle a été promise’*, P. Engel, *Traité...* *op. cit.* p.697.

<sup>340</sup> See also Article 34: *‘If the seller is bound to hand over documents relating to the goods, he must hand them over at the time and place and in the form required by the contract. If the seller has handed over documents before that time, he may, up to that time, cure any lack of conformity in the documents, if the exercise of this right does not cause the buyer unreasonable inconvenience or unreasonable expense. However, the buyer retains any right to claim damages as provided for in this Convention’*.



91. In respect of **Community Law**, the principle of performance in accordance with the contractual provisions can be compared to the principle of conformity with the contract, which ‘*may be considered as common to the different national legal traditions*’<sup>341</sup>. It is directly linked to the general principle of legitimate expectations: the latter principle, of German origin, was established in the Community legal order by the ECJ<sup>342</sup>. The principle of conformity appears in particular in the sphere of Directive 1999/44 *on certain aspects of the sale of consumer goods and associated guarantees*<sup>343</sup>, according to which ‘*the goods must, above all, conform with the contractual specifications*’<sup>344</sup>. As laid down by Article 2 of this text, this is an obligation on the part of the seller who benefits from a simple presumption of the goods’ conformity to the contract<sup>345</sup>.

Following on from this principle is the fact that performance in kind is a right, as is envisaged by Article 3 of the Directive which states that ‘*in the case of a lack of conformity, the consumer shall be entitled to have the goods brought into conformity free of charge by repair or replacement (...) or to have an appropriate reduction made in the price or the contract rescinded with regard to those goods*’<sup>346</sup>. This contractual obligation of conformity aims, within the sphere of the internal market, to reinforce the consumer’s expectations and therefore attaches ‘*less [to] the behaviour of the debtor than to the satisfaction of the creditor*’<sup>347</sup>.

### C. Codifications by legal scholars

92. Although each project treats the question of a right to performance differently, it appears that the primacy of performance in kind is retained as the principle in each.

The principle appears relatively clearly in the **Unidroit Principles**. First, a ‘*right to performance*’ of the contract is recognised by Section 2 of Chapter 7 concerning non-performance. Secondly, while Article 7.2.1 treats the performance of monetary obligations in the classic sense, Article 7.2.2 states that ‘*where a party who owes an obligation other than one to pay money does not perform, the other party may require performance*’, before however going on to enumerate the different exceptions to the principle of performance in kind.

<sup>341</sup> Whereas 7 of the Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees OJ L 171, 07/07/1999 p 12 – 16.

<sup>342</sup> See *infra* Section III ‘Contractual fairness’.

<sup>343</sup> Above Directive.

<sup>344</sup> Whereas 7, above.

<sup>345</sup> Article 2, above Directive.

<sup>346</sup> Article 3 § 2, above Directive.

<sup>347</sup> ‘*Moins [au] comportement du débiteur qu’[à] la satisfaction du créancier*’, H. Aubry, *L’influence du droit communautaire sur le droit français des contrats*, *op. cit.*, n° 86.

In the **European Code of Contract Preliminary Draft**, the right to performance in accordance with the contractual provisions is established in both a positive and a negative sense. Firstly Article 75, concerning the modalities of performance, envisages that *‘each of the parties is bound to perform exactly and completely all the obligations laid on him by the contract’*. The terms *‘exactly and completely’* clearly underline the fact that the obligation must be performed in conformity with the terms laid down by the contract. Moreover, the provision adds that *‘in rendering due performance the debtor must conform to what has been agreed by the parties [...]’*. Second, Article 78 establishes, not a right to performance for one of the parties, but a prohibition on the other party unilaterally changing the modalities of performance of the obligation. Thus Article 78 (1) states *‘the debtor cannot free himself from the obligation by a performance different from that which is due, even if of equal or greater value, unless the creditor consents’*. In addition, the project clearly shows the priority awarded to performance in kind. In principle, in the case of non-performance, it is envisaged that the creditor has the right to obtain *‘performance in specific form’* of the obligation, that is to say specific performance (performance in kind) of the obligation<sup>348</sup>.

On the other hand, there is no article in the **Proposals for Reform of the Law of Obligations and the Law of Prescription** which states the creditor’s right to performance. However, the principle follows implicitly from Article 1134 paragraph 1 according to which *‘contracts which are lawfully concluded take the place of legislation for those who have made them’*<sup>349</sup>. Although the proposals do not contain a provision stating the primacy of performance in kind, the principle seems nonetheless to have been retained for each category of obligation.

Thus, for the obligation to give, the principle is that of performance in kind (Article 1152, paragraph 3). For the obligation to do, Article 1154, paragraph 1 states: *‘if possible the obligation to do is to be performed in kind’*<sup>350</sup>. However, the provision continues in paragraph 4, *‘in the absence of performance in kind, an obligation to do gives rise to damages’*<sup>351</sup>. The rule is different for the obligation not to do, taking into account the impossibility of returning to a non-performance which has already been realised. Thus, *‘a failure to observe an obligation not to do gives rise to damages by operation of law [...] without prejudice to the creditor’s right to claim performance in kind for the future’*<sup>352</sup> (Article 1154-1). Finally, for obligations to give for use, the principle is that of performance in kind (Article 1155 *in fine*).

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<sup>348</sup> Article 111.

<sup>349</sup> J. Cartwright and S. Whittaker, *op. cit.*

<sup>350</sup> *Ibid.*

<sup>351</sup> *Ibid.*

<sup>352</sup> *Ibid.*

#### **IV. Proposed text**

##### **Article 0-202: Right to performance**

Each party can demand from the other party the performance of the other party's obligation as provided in the contract

## ***Article 0-203: Rights and duties of third parties***

### **I. General presentation of the principle**

93. While contractual certainty presumes that the parties will honour the contract, it is nevertheless insufficient if third parties are able to ignore the legal situation arising from the contract. In fact, the binding force of contract must impose itself on third parties. Third parties cannot be allowed to compromise the contract and act such that its performance is endangered. Once again, it is a question of understanding and applying the consequences of integrating the contractual situation in the general legal order.<sup>353</sup> Although we have seen that the parties must honour the rights of third parties, it is equally important that third parties honour the situation created by the contract. The contractual situation is in effect invocable by and against third parties, which gives rise to rights and duties on their behalf.

We will start with an examination of the duties created. As with any fact which can be invoked against them, third parties are bound not to do anything that harms the contractual situation. Specifically, they are bound not to compromise the performance of the contract. Thus, for example, they must not help the debtor to shirk or evade his contractual obligations. This is an expression of the general duty not to harm others: although they are not parties to the contract, third parties are no less bound to honour the rights created by the contractual situation.

In respect of the rights created by the contractual situation, third parties may take advantage of the situation created by the contract as with any fact which can be invoked by them. The contractual situation is in effect a juridical fact which can be invoked as proof in just the same way that it can be a fact generating liability. It can be a fact generating liability in the situation where a third party attempts to hold one of the parties liable because the poor performance of the contract has harmed his right. In this case, the third party is not invoking the binding force of the contract, which only binds the parties, but the effect of the legal situation.

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<sup>353</sup> See *supra* the general presentation of Article 0-102 and the incidence of the opposability of third party rights on freedom of contract.

## **II. Application of the principle in PECL**

94. In so far as the Principles of European Contract do not specifically deal with the effect of the contract on third parties<sup>354</sup>, the proposed guiding principle<sup>355</sup> cannot find support in any existing provisions. However, it should once again be recalled that a general system of contract law regulation cannot just disregard the legal situation of third parties. It therefore appeared necessary to create a guiding principle which clarifies the rights and duties of third parties in respect of the contractual situation. Of course, since they are, by necessary implication, not parties to the contract, the rights of these third parties must not go so far as to allow them to claim performance of the contract.

## **III. Applications of the principle in comparative law**

### **A. National laws**

95. The treatment of the rights and duties of third parties is different within the different national legal systems studied. Within the Common law systems, as with those influenced by German law, it is generally admitted that the contract only produces effects between the parties, and the situation of third parties is rarely studied. Therefore, there is no distinction between binding force (*contenu obligationnel*) and the effect of the contractual situation (*opposabilité*). The approach is different once again in those systems that are today essentially still based on Roman law. There we generally distinguish between binding force and the invocability of the contract (*opposabilité*), even where the latter concept is not described in those terms.

96. In the Common law systems, and in particular in English law, the question of the rights and duties of third parties is hardly ever considered. In English law, the only reference of note is to the relative effect of the contract, which results from the rule named the *Privity Rule* or the *Doctrine of Privity of Contract*<sup>356</sup>. As a result, the question of third party rights is only approached from the angle of exceptions to the rule of privity of contract<sup>357</sup>.

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<sup>354</sup> See *supra* on Article 0-102.

<sup>355</sup> **Acquis Group**: The working group has proposed nothing on the subject of the rights and duties of third parties.

<sup>356</sup> For an examination of this rule see, G. H. Treitel, *An outline of the Law of Contract*, Oxford University Press, 6th edition 2004, pp. 97 to 101. – S. A. Smith, *Atiyah's Introduction to the Law of Contract*, Clarendon Law Series, Oxford University Press, 6<sup>th</sup> edition, 2005, pp. 335 and 336.

<sup>357</sup> For these exceptions, see *supra* on Article 0-102.

97. In the same way, within the German-influenced systems, it is ordinarily acknowledged that the contract does not produce effects as regards third parties, which means there is no question of whether rights and duties can arise in their regard.

Thus, in Germany, *‘the relative effect of contract extends far since third parties, in theory, do not have regard to contracts entered into between others: the harm that they can cause to contractual rights is not in itself unlawful, it does not fall under the ambit of § 823 I BGB<sup>358</sup>; however it can be justiciable under § 826, or even § 1 of the 1909 law on unfair competition if the contested behaviour is seen as contrary to morality<sup>359</sup>’*. However, this residual system protecting the contract from the acts of third parties is not thought to be sufficient by some legal scholars<sup>360</sup>. With regard to third party rights, outside the specific case of contracts for the benefit of third parties<sup>361</sup>, German law recognises the *‘contract for the protection of third parties (Vertrag mit Schutzwirkung für Dritte)<sup>362</sup>’*. This Praetorian creation is now codified in § 311 II BGB<sup>363</sup>. It concerns a *‘contract by virtue of which the debtor does not promise to provide a service to a third person, but to be bound by an obligation to guarantee and to protect the interests of certain third parties in the same conditions as those of the other party to the contract, that is to say the creditor<sup>364</sup>’*. It is illustrated, for example, by the obligation of security and protection incumbent on a lessor, a taxi-driver, the lessor of a concert hall. *‘The purpose of the institution is to provide the third party victim of physical or material harm with the right to invoke, on a personal level, the contractual liability of the debtor rather than his delictual responsibility<sup>365</sup>’*.

<sup>358</sup> (1) A person who, intentionally or negligently, unlawfully injures the life, body, health, freedom, property or another right of another person is liable to make compensation to the other party for the damage arising from this. (2) The same duty is held by a person who commits a breach of a statute that is intended to protect another person. If, according to the contents of the statute, it may also be breached without fault, then liability to compensation only exists in the case of fault.’

<sup>359</sup> *‘La relativité contractuelle va [...] très loin puisque les tiers n’ont pas à tenir compte en principe des contrats qui ont été conclus par d’autres: l’atteinte qu’ils peuvent porter au droit contractuel d’autrui n’est pas en soi illicite, elle ne tombe pas sous le coup du § 823 I BGB; elle peut être justiciable cependant du § 826, voire du § 1 de la loi de 1909 sur la concurrence déloyale si le comportement litigieux apparaît comme contraire aux bonnes mœurs’*, M. Pédamon, *op. cit.* n°151 n. 6.

<sup>360</sup> See, MünchKomm/Kramer n°22 onwards, cited by M. Pédamon, *op. cit.* n° 151 n. 6.

<sup>361</sup> See *supra* under Article 0-102.

<sup>362</sup> *‘Contrat à effet de protection pour les tiers (Vertrag mit Schutzwirkung für Dritte)’*, M. Pédamon, *op. cit.* n° 159.

<sup>363</sup> *‘An obligation with duties under section 241 (2) may also come into existence in relation to persons who are not themselves intended to be parties to the contract’*.

<sup>364</sup> *‘... Contrat en vertu duquel le débiteur ne promet pas de fournir une prestation à une tierce personne mais est tenu de l’obligation de garantir et de protéger les intérêts de certains tiers dans les mêmes conditions que ceux du cocontractant c’est-à-dire du créancier.’*

<sup>365</sup> *‘Le but de l’institution est d’accorder au tiers victime d’un dommage corporel ou matériel le droit d’invoquer à titre personnel la responsabilité contractuelle du débiteur plutôt que sa responsabilité délictuelle’*, M. Pédamon, *op. cit.* n° 159. The basis of this concept is disputed: for some it was a question of a ‘completive interpretation’ of the contract conforming with the fiction of the will, while for others it was the principle of good faith of § 242 BGB, the origin of numerous accessory obligations. Nowadays the basis is statutory - § 311 III cited above. – Compare R.

Dutch law is relatively similar to German law on this question. The general principle is that the contract only produces effects between the contracting parties and those who are assimilated to them<sup>366</sup>. The third party taking advantage of and benefiting from the contract is not a possibility that is envisaged. The question of third parties' duties is not considered as the principle that the contract cannot impose obligations on those who are not party to it entails that it is never an issue.

Lastly, the situation in Swiss law is a little different. Although the rights and duties of third parties are not fully recognised, the effect of the contract on third parties is not however totally ignored, certain authors even arguing that its recognition should be even wider. In respect of third party rights and the harm caused by a contractual failure to perform, if no express general provision exists, '*statute [nevertheless] settles some special cases of reparation of the harm caused to a third party by conferring on them a direct action against the author*'<sup>367</sup>. However, the question is whether these special cases are exceptions to the principle or applications of the principle, applicable by analogy<sup>368</sup>. With regard to the duties of third parties, it is traditionally admitted that '*third parties are under no duty to comply with relative law as they are with absolute duties [...]*'<sup>369</sup>. This approach is however sometimes criticised as contrary to good faith<sup>370</sup>. '*It is possible to ask [...] whether the principle of objective good faith (Article 2 CCS*'<sup>371</sup>)

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Zimmermann *The New German Law of Obligations*, *op. cit.* p.3 n.14: '*The duty to have regard to the other party's rights and interests which may result from the content of an obligation (§ 241 II BGB); and the existence, in some cases, of such duties on the part of third parties [...] § 311 III BGB implies the existence of such duties also vis-à-vis third parties; whether the provision can thus be regarded as a statutory legal basis for the contract with protective effect vis-à-vis third parties is disputed*'.

<sup>366</sup> A. S. Hartkamp, *op. cit.* p.160 onwards.

<sup>367</sup> '*La loi résout [néanmoins] quelques cas spéciaux de réparation du dommage causé à un tiers et confère à celui-ci une action directe contre l'auteur*', P. Engel, *Traité... op. cit.* p.20

<sup>368</sup> Adde P. Gauch, W. R. Schluemp and P. Tercier, '*La partie générale du droit des obligations (sans la responsabilité civile)*': Schulthess, Zurich, 1982, t.2 n°1578 onwards: '*The principle of relative effect of contract prohibits third parties from inferring rights from the violation of a relationship to which they are not party. It results from this that they can only claim damages in so far as the author of the harm incurs extra-contractual liability in their respect (Article 41 of the Code of Obligations and the related provisions). [...] The principle of relative effect is not opposed to the admission of third party action when the contract directly confers rights on the third party as it is (also) aimed at their protection (Verträge mit Schutzwirkung zugunsten Dritter). Such a clause may follow expressly or impliedly from the agreement. It is also a question of knowing if, independently of these situations, it is possible in certain cases for a third party to act against the debtor in contractual liability. Legal scholarship and case law appear to recognise this, in particular in the event of indirect representation or when risks are transferred to third parties (Article 185 Code of Obligations).*'

<sup>369</sup> '*Les tiers n'ont pas le devoir de respecter le droit relatif, comme ils l'ont pour le devoir absolu [...]*', P. Engel, *Traité...*, *op. cit.* p. 19.

<sup>370</sup> P. Engel, *ibid.* – Adde p. 454: According to the author, third parties who incite the debtor to breach his contractual obligation '*would be accessory to an unlawful act from the moment they participated in the violation of the principle of contractual fidelity. In a certain way [the parties] have created a rule, which must be respected by third parties in the same way as statute; from intentional participation to participation by negligence, the threshold is often insensitive; as a result, the specific duties are added to the universal duties; no one is expected to disregard the law, no one is expected to disregard the claims of others. It is undeniable that in certain situations this assimilation does not shake a notion of justice; in others it can excessively increase the predominance of one party,*

does not subject the third party who has knowledge of a creditor's right [...] to the respect of that right, or at the very least to the duty not to disturb it. Violating the superior principle of good faith should be considered as an unlawful act in the sense of Article 41 I CO<sup>372</sup>. Nevertheless, 'the Federal case law follows in the footsteps of the dominant legal scholarship: [...] the Federal Tribunal express themselves thus: [...] the claim deriving from a relationship of obligation, for example that which derives from a contract, offers the typical example of a relative right as it rests on a specific relationship between determined persons and can only be invoked against the debtor and not a third party who is a stranger to the contract. For many decades the Federal Tribunal therefore refused to qualify the violation by a third party of rights arising from a contract as an unlawful act according to Article 41 I CO [...] On the other hand, inciting the violation of contractual obligations and the exploitation of this violation can be contrary to morality in the sense of Article 41 II CO<sup>373</sup> and thus will render the third party liable in damages. However, this supposes specific circumstances which justify an extension of liability, for example when the contract is breached with the intention to harm and the third party knows this'<sup>374</sup>.

98. The question is treated very differently in the countries that have been influenced by Roman law. It is generally admitted that the contractual situation generates rights and duties on the part of third parties.

In this respect, the most complete legal system is without doubt the French legal system.

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not only towards their partner but also towards third parties; it can favour commercial enquiry, economic espionage, the inflation of duties [...] paradoxically, the risk is large in replacing the relativity of contracts with the relativity of law. In any case, this is a choice for the legislator. In this way the law against unfair competition of 19 December 1986, Article 4, deems unfair the fact of inciting a client to break a contract with a view to entering into another one with him'.

<sup>371</sup> Cited *infra*.

<sup>372</sup> 'Whoever unlawfully causes damage to another, whether wilfully or negligently, shall be liable in damages', Swiss-American Chamber of Commerce, *op. cit.*

<sup>373</sup> 'Equally liable for damages is any person who wilfully causes damage to another in violation of bonos mores', Swiss-American Chamber of Commerce, *op. cit.*

<sup>374</sup> 'Il est permis de se demander [...] si le principe de bonne foi objective (article 2 CCS) n'assujettit pas le tiers qui connaît l'existence d'un droit de créance [...] au respect de ce droit, à tout le moins au devoir de ne pas le perturber. [Or] violer le principe supérieur de la bonne foi doit être considéré comme un acte illicite au sens de l'article 41 I CO'. [Néanmoins] 'la jurisprudence fédérale emboîte le pas à la doctrine dominante: [...] Le Tribunal fédéral s'exprime ainsi: [...] La prétention dérivant d'un rapport d'obligation, par exemple celle qui découle d'un contrat, offre l'exemple typique d'un droit relatif, parce qu'elle repose sur une relation particulière entre des personnes déterminées et ne peut être invoquée qu'à l'encontre du débiteur, et non d'un tiers qui n'y participe pas. Depuis des décennies, le TF a donc refusé de qualifier d'acte illicite au sens de l'article 41 I CO la violation par des tiers des droits découlant d'un contrat [...] En revanche, l'incitation à violer des obligations contractuelles et l'exploitation de cette violation peuvent être contraires aux mœurs au sens de l'article 41 II CO et contraindre le tiers à réparation. Cela suppose toutefois des circonstances particulières qui justifient pareille extension de la responsabilité, par exemple lorsque le contrat est violé avec l'intention de nuire et que le tiers le sait', P. Engel, *Traité...*, *op. cit.* p. 19.



French law recognises that the contract gives rise to a legal situation, a social fact which everyone must take account of even if they are outside the contract and therefore not a contracting party. This is the principle of ‘opposability’ of the contract. The opposability of the contract is nothing more than a consequence of the insertion of the contract and its provisions in the general legal order, in a relationship of interdependence<sup>375</sup>. Although no provision of the Civil Code lays down the principle of invocability, it is nonetheless unanimously admitted and is found in substantive law in two forms: the opposability of the contract to third parties, and the opposability of the contract by third parties.

The possibility of invoking the contract against third parties, which has been expressly recognised by the Cour de cassation as a general principle of law<sup>376</sup>, means that third parties must respect the situation that the contracting parties wanted to establish. In this way, the opposability of the contractual situation against third parties appears as the ‘*necessary compliment to the binding force of contract*’<sup>377</sup>: the contract would run the risk of being deprived of all efficacy if third parties were able to ignore or abuse at their whim the situation created by the contract<sup>378</sup>. The opposability of the contract to third parties is clearly shown when the contract creates or transfers a right in rem (which is characterised by the fact that it must be respected by all): subject to the publicity rules for land transactions, the purchaser will be able to invoke the right in rem he acquires from the purchase of the building against everyone. The opposability of the contract to third parties imposes an obligation on them to not compromise the rights arising from the contract. A third party may not enter into a contract when the effect of the contract would be to prevent the other party from performing his prior undertakings. ‘*Every person who, with knowledge, helps another to breach their contractual obligations, commits a delictual fault in respect of the victim of the infraction*’<sup>379</sup>. More generally, a third party, in the absence of any fault on the part of the original party, can be liable if they endanger the performance of that party’s contract<sup>380</sup>. However, the third party can only be reproached for such an attack if the contract was indeed invocable against him. Also, it is recognised that opposability requires the

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<sup>375</sup> See, G. Wicker, *La sanction délictuelle du manquement contractuel ou l’intégration de l’ordre contractuel à l’ordre juridique général*, RDC 2007/2, p. 593. – *Adde* the references cited *supra* under Article 0-102.

<sup>376</sup> Cass. civ. 1<sup>ère</sup>, 17 octobre 2000: Bull. civ. I, n° 246.

<sup>377</sup> ‘*Complément nécessaire de la force obligatoire du contrat*’, J. Ghestin, C. Jamin and M. Billiau, *Les effets du contrat*: LGDJ, 3e éd. 2001, n° 724.

<sup>378</sup> F. Terré, P. Simler and Y. Lequette, *op. cit.* n° 490.

<sup>379</sup> ‘*Toute personne qui, avec connaissance, aide autrui à enfreindre les obligations contractuelles pesant sur elle, commet une faute délictuelle à l’égard de la victime de l’infraction*’, Cass. com., 13 mars 1979: Bull. civ. IV, n° 100.

<sup>380</sup> Cass. com. 8 juin 1993: Bull. civ. IV n° 228. – V. encore Cass. civ. 1<sup>ère</sup>, 26 janv. 1999: Bull. civ. I n° 32; D. 1999, som. com. p. 263, obs. P. Delebecque; RTD civ. 1999, p. 405, obs. P. Jourdain.

third party to have real or imputed knowledge (e.g. in the case of obligatory publicity) of the contract<sup>381</sup>.

The opposability of the contract by third parties means that, against the parties, the former can take advantage of *'the situation resulting from performance of the contract as well as the contractual situation itself'*<sup>382</sup>. Thus, *'although they cannot be considered either creditor or debtor, third parties to a contract can invoke to their benefit, as a juridical fact, the situation created by the contract'*<sup>383</sup>. To this end, third parties can invoke the poor performance of a contract which has caused them harm. The question is then whether simple unawareness or poor performance of the contractual obligation on the part of the debtor is classed as a sufficient fault in the sense of Article 1382 of the Code Civil to engage his civil liability towards third parties (necessarily delictual because of the doctrine of relative effect of contracts), or if it is necessary to establish an independent delictual fault, considered totally separately from the contract. In other words, it is a question of the relativity of contractual fault. In the first instance, the case law was favourable to such relativity, considering that the third party could only obtain satisfaction if they established a failure on the part of the debtor to comply with a generally applicable duty. For example, this was the case where the manufacturer of a dangerous product saw his liability engaged towards a third party user of the product on the basis of a failure to comply with the general duty not to harm others. For some people, this solution was imposed because *'allowing a third party to invoke the contractual fault of the debtor is in effect allowing him to claim, to his advantage, the benefit of a contract to which he is not a party. In other words, it is, under cover of opposability of contract, a direct attack on the principle of relative effect of contracts'*<sup>384</sup>. In addition, the contrary solution would be unjust as *'the third party would be able to benefit from the contract in all cases without having assumed any of the limits that the contracting party is normally subject to. The third party would not therefore have to limit his demand to foreseeable damage and any limitation clauses would not be invocable against him'*<sup>385</sup>. For others, the

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<sup>381</sup> Equally, it the opposability of the contract which justifies the fact that a third party can be sanctioned for entering into a fraudulent act with a debtor where he compromises the creditor's right from an earlier contract. Compare the applications of the action paulienne and its associated disputes in French law, cited *supra* under Article 0-102.

<sup>382</sup> *'... Tant de la situation résultant de l'exécution du contrat que de la situation contractuelle elle-même'*, G. Wicker, cited above, n° 9.

<sup>383</sup> *'S'ils ne peuvent être constitués ni débiteurs ni créanciers, les tiers à un contrat peuvent invoquer à leur profit, comme un fait juridique, la situation créée par le contrat'*, Cass. com., 22 octobre 1991: Bull. civ. IV, n° 302.

<sup>384</sup> *'... Permettre à un tiers d'invoquer la faute contractuelle du débiteur, c'est en effet lui permettre de réclamer à son profit le bénéfice d'un contrat auquel il n'est pourtant pas partie. Autrement dit, c'est, sous couvert d'opposabilité du contrat porter directement atteinte au principe de l'effet relatif des contrats'*, F. Terré, Ph. Simler et Y. Lequette, *op. cit.*, n° 495.

<sup>385</sup> *'Le tiers pourrait bénéficier dans tous les cas du contrat sans avoir à assumer aucune des limites opposables au veul contractant. Le tiers n'aurait ainsi pas à limiter sa demande aux dommages prévisibles et il ne pourrait pas se voir opposer les éventuelles clauses limitatives de responsabilité'*, M. Fabre-Magnan, *Les obligations*, PUF coll. Thémis, 2004, n° 173.

solution was questionable because the third parties who take advantage of the non-performance of the contract ‘do not claim in any way to introduce themselves into the contractual relationship of obligation: they limit themselves to asserting the fact of non-performance, in the same way that any third party can invoke the factual situation created by the contract, whether it has been performed or not’, the more so as ‘the very fact that the third party has suffered harm as a result of the contractual failure appears to imply a violation of the duty not to harm another in the sense of Article 1382 of the Civil Code’<sup>386</sup>. A divergence of case law then appeared within the Cour de cassation. On the one hand, the Commercial Chamber only recognised the delictual liability of the defaulting debtor towards third parties on the condition that the third party establish the existence of a specific delictual fault, distinct from the contractual failure<sup>387</sup>. On the other hand, the first Civil Chamber adopted the position that a contractual failure itself constituted a delictual fault in respect of third parties<sup>388</sup>. The Assemblée plénière settled the matter by deciding in favour of the second solution, in affirming that ‘a third party to a contract may invoke, on the basis of delictual liability, a contractual failure to the extent that this failure has caused him harm’<sup>389</sup>.

The opposability of the contract by third parties is not limited to situations where the third party is attempting to engage the liability of the parties to the contract. It also allows third parties to escape from an obligation that they would otherwise themselves be held to. Thus for example, the debtor’s guarantors can invoke against a creditor who is pursuing them the contract by which the creditor transferred his rights to another<sup>390</sup>. It also allows third parties to invoke the contract in the name of proof as ‘the relative effect of contracts does not prevent the juges du fond from searching agreements, which do not pertain directly to one of the parties in the case, for information which may illuminate their decision’<sup>391</sup>. By invoking the contract in the name of proof, the third parties ‘do not [propose] to invoke a direct and beneficial link with the right, but

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<sup>386</sup> ‘Ne prétend en aucune façon s’introduire dans le rapport d’obligation contractuel: il se borne à faire valoir le fait de l’inexécution, comme tout tiers peut invoquer la situation de fait constituée par le contrat, qu’il soit ou non exécuté, [d’autant que] le fait même que le tiers ait subi un dommage en conséquence du manquement contractuel paraît bien impliquer une violation du devoir de ne pas nuire à autrui au sens de l’article 1382 (C. civ.)’, J. Flour et J.-L. Aubert et E. Savaux, *Droit civil, les obligations, vol. III: le rapport d’obligation*, Paris, 4<sup>e</sup> éd. A. Colin, 2006, n° 183.

<sup>387</sup> Cass. com., 5 avril 2005: Bull. civ. IV, n° 81.

<sup>388</sup> Cass. civ. 1<sup>ère</sup>, 18 mai 2004: Bull. civ. I, n° 141.

<sup>389</sup> ‘Le tiers à un contrat peut invoquer, sur le fondement de la responsabilité délictuelle, un manquement contractuel dès lors que ce manquement lui a causé un dommage’, Cass. Ass. Plén., 6 octobre 2006: Bull. ass. plén., n° 9. On this case, see the contribution in RDC 2007/2, p. 537 onwards.

<sup>390</sup> Cass. com., 22 octobre 1991: Bull. civ. IV, n° 302.

<sup>391</sup> ‘L’effet relatif des contrats n’interdit pas aux juges du fond de rechercher dans les actes étrangers à l’une des parties en cause des renseignements de nature à éclairer leur décision’, Cass. civ. 1<sup>ère</sup>, 18 juillet 1996: Bull. civ. I, n° 221.

*only to draw from the contract to which they are not a party simple information likely to generate presumptions favourable to their cause*<sup>392</sup>.

99. Other countries, equally based on Roman law, also take into account the effect on the contract on the part of third parties.

In Spanish law, third parties must respect the legal situation which the contract gives rise to: this requires them, if they are aware, to not create any ties with a party to the contract which could lead to the performance of the contract becoming difficult or even impossible<sup>393</sup>.

In Italian law, although the effect of the contract is envisaged from the angle of binding force, and therefore only affects third parties in the specific cases laid down by statute<sup>394</sup>, it is nonetheless recognised that third parties should not endanger the performance of the contract. For example, when a third party acquires goods in disregard of a beneficiary's right under a preliminary contract, the majority of legal scholarship and case law holds the third party liable for having threatened the beneficiary's right by their complicity in the debtor's non-performance of the contract<sup>395</sup>. This is simply an application of the rule according to which the third party cannot endanger the performance of the contract. Although such a general principle is not explicitly established in Italian law, recent developments in the case law, supported by a wide section of legal scholarship<sup>396</sup>, show movement in this direction. It has also been recognised<sup>397</sup>, that the holder of a right or claim can hold liable a third party who was an accessory to the debtor's non-performance, subject nevertheless to establishing bad faith or fault on their part.

## B. International law and Acquis communautaire

100. The question of the rights and duties of third parties is not dealt with by the **Vienna Convention**. This is clear from the definition of the domain of the Convention in Article 4 which states that the Convention '*governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract*'. Consequently, it does not govern the effects of a contract of sale in respect of third parties.

<sup>392</sup> '... Ne se [propose] pas de dégager de l'acte auquel il n'avait pas été partie, un lien de droit à son profit mais seulement d'y puiser de simples renseignements susceptibles d'engendrer des présomptions favorables à sa cause', Cass. req., 27 juillet 1896: DP 97, 1, 327.

<sup>393</sup> Sentencias de 23 de marzo de 1921, 16 de febrero de 1973, 26 de mayo de 1995 y 27 de marzo de 1984.

<sup>394</sup> Article 1372 para 3 of the Civil Code.

<sup>395</sup> M.-C. Diener, *op. cit.* § 3.12.11. – F. Gazzoni, *La trascrizione immobiliare*, in Comm. cov. Civ. diretto da P. Schelsinger, Milano, 1998, p. 550-551. – G. Casella, *La doppia alienazione immobiliare: un dibattito sempre aperto*, in Riv. Dir. civ. 1993, II, p. 517 onwards, especially p. 533. – C. M. Bianca, *La responsabilità*, Milano, 1994, p. 606.

<sup>396</sup> See in this respect, M.-C. Diener, *op. cit.* note 113.

<sup>397</sup> Cass. sez. Un. 12 novembre 1988, n. 6132, in Foro it. 1989, I, col. 742.

There do not seem to be any illustration of the duties arising from the opposability of the contract to third parties in **Community Law**.

### C. Codifications by legal scholars

**101.** Within the different projects studied, the question of the rights and duties of third parties is, according to the project, ignored entirely, developed, or considered occasionally.

The **Unidroit Principles** do not contain any provision on the rights and duties of third parties relative to the contractual situation.

Within the **European Code of Contract Preliminary Draft**, the rights and duties of third parties are occasionally taken into account. Although there is no provision that establishes that the contract can be invoked by and against third parties in a general sense, the principle is indirectly recognised. Indeed, Article 154 details numerous cases where the contract cannot be invoked. For example, ‘*contracts concluded either in violation of a prohibition aimed at protecting specific persons or in contravention of requirements of form or publicity made for the benefit of third parties*’ cannot be invoked against third parties. This approach is taken because third parties can only be obliged to respect a contract if it can be set against them. Yet this is not the case where the possibility of invoking the contract is subordinated to the fulfilment of publicity measures. In addition, the consequences of the contract being invocable by and against third parties are followed in Article 161. Because of this invocability, third parties are able to rely on the contract and act on this reliance in consequence. However, if the validity of the contract is questioned, the invalidation of the contract, whatever its form, could affect the third parties’ situation. The above article protects third parties in this situation by providing that each party is liable for the harm that, as a result of their conduct, a third party suffered as a result of having relied in good faith on the appearance of the contract<sup>398</sup>. For this reason the contractual liability of the parties can be brought into play (Article 162 onwards). It is because third parties can take advantage of the contractual situation that the parties are, if necessary, bound to indemnify them in cases of invalidation.

However, it is without a doubt within the **Proposals for Reform of the Law of Obligations and the Law of Prescription** that the question of the rights and duties of third parties is most thoroughly developed. Although the French Civil Code does not currently contain any provision

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<sup>398</sup> 1. *In all cases of non-existence, nullity, avoidance, ineffectiveness, inability to raise defences, rescission, dissolution and withdrawal, each party is liable for damage caused through his conduct to third parties who have in good faith relied on the appearance of the contract thus made if it has afterwards had a different effect or had no effect.*

2. *Compensation to third parties for loss is governed by the provisions of Art 162 ff to the extent that they can be applicable.*

expressly establishing the concept of opposability, the project proposes to introduce it within the section concerning ‘*the Effects of Contracts as regards Third Parties*’. Article 1165-2 states thus that ‘*contracts may be invoked by and against third parties; the latter must respect them and can take advantage of them, though they do not have a right to require their performance*’<sup>399</sup>. This provision thus imposes a duty on third parties, to respect the contract, and establishes a right, that of taking advantage of the contract. This right cannot be confused with the rights of the parties as third parties are unable to claim performance of the contract.

#### **IV. Proposed text**

##### **Article 0-203: Rights and duties of third parties**

A contract creates a situation which third parties must respect and upon which they may rely without being able to require performance.

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<sup>399</sup> J. Cartwright and S. Whittaker, *op. cit.*

## **Article 0-204: Principle favouring the maintenance of the contract**

### **I. General presentation of the principle**

**102.** It has been seen that contractual certainty supposes that the contract has binding force between the parties<sup>400</sup>. However, it remains to be clarified whether one of the parties can count on the maintenance of the law formed by the contract when something makes the contract susceptible to destruction. Here it must be decided whether we should dedicate a principle to favouring the maintenance of the contract<sup>401</sup>. This principle would apply in order to prefer the approach that conserves the effectiveness of the contract to one that would lead to its destruction. This choice can be seen in three types of case:

- when the contract is subject to interpretation
- when the validity of the contract is threatened
- when the performance of the contract is threatened.

**103.** In these different situations, contractual certainty does not require that the most favourable approach to the validity of the contract be systematically retained. For example, the party for whom, because of the delay of the other party, performance of the promised service has lost all point is not subject to the enforced maintenance of the contract. In the same way again, it could be harmful, in particular financially, to maintain the contractual relationship when the creditor could easily obtain the service that he has failed to obtain from his debtor from another party. On the other hand, there is certainly a case for preferring the maintenance of the contract when the performance of the contract would allow for the satisfaction of one of the parties' essential needs or when it is determining of their professional activity. In conclusion, the principle preferring the maintenance of the contract should apply every time the destruction of the contract would harm the legitimate interests of one of the contracting parties.

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<sup>400</sup> See *supra* Article 0-201.

<sup>401</sup> **Acquis Group:** The working group has proposed nothing on the subject of a principle favouring the maintenance of the contract.

## **II. Application of the principle in PECL**

**104.** Without it being the subject of a particular article within the Principles of European Contract Law, numerous applications of the principle favouring the maintenance of the contract can be seen throughout the text. These applications are found in the three areas mentioned above.

### ➤ **Interpretation of the contract**

**105.** The establishment of the principle favouring the maintenance of the contract in the matter of interpretation is realised by Article 5: 106, concerning '*Terms to be given (full) effect*'. According to the provision, '*an interpretation which renders the terms of the contract lawful, or effective, is to be preferred to one which would not*'.

### ➤ **Validity of the contract**

**106.** The principle favouring the maintenance of the contract can be illustrated by the situation where a modification of the contract will allow the nullity of the contract to be averted. This is the case in matters of mistake<sup>402</sup> or the taking of an excessive benefit or an unfair advantage<sup>403</sup>. It can be noted that the commentary on the above mentioned articles does not expressly refer to the principle favouring the maintenance of the contract in order to justify the possibility of adapting the contract, but to the opportunity for one of the parties to maintain the contract whilst at the same time obtaining its modification<sup>404</sup>. This is in reality admitting that it is convenient to 'save' the contract when one of the parties has an interest in it.

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<sup>402</sup> Article 4:105 PECL: '*Adaptation of Contract*': '(1) If a party is entitled to avoid the contract for mistake but the other party indicates that it is willing to perform, or actually does perform, the contract as it was understood by the party entitled to avoid it, the contract is to be treated as if it had been concluded as the that party understood it. The other party must indicate its willingness to perform, or render such performance, promptly after being informed of the manner in which the party entitled to avoid it understood the contract and before that party acts in reliance on any notice of avoidance.

(2) After such indication or performance the right to avoid is lost and any earlier notice of avoidance is ineffective.

(3) Where both parties have made the same mistake, the court may at the request of either party bring the contract into accordance with what might reasonably have been agreed had the mistake not occurred.'

<sup>403</sup> Article 4: 109 (2) and (3) PECL: '(2) Upon the request of the party entitled to avoidance, a court may if it is appropriate adapt the contract in order to bring it into accordance with what might have been agreed had the requirements of good faith and fair dealing been followed.

(3) A court may similarly adapt the contract upon the request of a party receiving notice of avoidance for excessive benefit or unfair advantage, provided that this party informs the party who gave the notice promptly after receiving it and before that party has acted in reliance on it'.

<sup>404</sup> See in this respect, *Principles of European Contract Law, Part I and II*, op. cit. p. 263, commentary on Article 4: 109 PECL.



107. When the validity of the contract is threatened, the principle of favouring the maintenance of the contract can again be seen in the situations where partial destruction of the contract is preferred to total destruction: although unable to maintain the entire contract, it is possible to maintain a part of it. This is the case when only the clauses affected by mistake, fraud, duress or excessive benefit are sanctioned. It is only if it is unreasonable to maintain the whole contract that it should be avoided in its entirety<sup>405</sup>. As above, the commentary justifies the approach by invoking the opportunity and benefit of maintaining the contract for the party who is not at the root of the problem<sup>406</sup>. The commentary adds that, when only a secondary element of the contract is affected, *‘it may not be necessary or desirable to permit the party affected to avoid the whole contract if it is feasible to allow it to avoid just the term involved and this would not result in the contract being unbalanced in its favour’*<sup>407</sup>. It follows that if the point of the contract for the parties and the balance between them is preserved, then there is reason to prefer partial nullity to total nullity, and therefore to call into play the principle favouring the maintenance of the contract.

The same mechanism of partial nullity is applied in cases of illegality of the contract. According to Article 15: 103, *‘(1) If only part of a contract is rendered ineffective under Articles 15:101 or 15:102, the remaining part continues in effect unless, giving due consideration to all the circumstances of the case, it is unreasonable to uphold it’*. The Principles thus offer the option, when a contract is only partially affected by illegality, to preserve the remainder, at least in so far as the solution does not appear unreasonable. The commentary states that such a partial preservation of the contract can only occur on consideration of:

- whether the contract can exist independently of the invalidated part;
- whether the parties would have entered into a contract dealing only with the non-invalidated parts; and,
- what the effect of partial invalidity would be on the balance between the parties’ reciprocal obligations<sup>408</sup>.

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<sup>405</sup> Article 4: 116 *‘Partial avoidance’*: *‘If a ground of avoidance affects only particular terms of a contract, the effect of an avoidance is limited to those terms unless, giving due consideration to all the circumstances of the case, it is unreasonable to uphold the remaining contract’*.

<sup>406</sup> See *Principles of European Contract Law, Part I and II, op. cit.* p. 279.

<sup>407</sup> *Ibid.*

<sup>408</sup> *Principles of European Contract Law, Part III, op.cit.* p 221.

➤ **Performance of the contract**

**108.** The Principles of European Contract Law contain many rules making it possible to substitute a term for one which is contained in the contract, in order to evade nullity or failure of the contract. In this respect, the commentary clearly indicates that Articles 6: 104 to 6: 107 ‘create rules which can be used to ‘save’ the contract in those cases in which it seems reasonable to do so because it is probable that the parties meant there to be a binding contract’<sup>409</sup>.

It is therefore the case, for example, that if the price or any other term of the contract is fixed in an unreasonable manner<sup>410</sup>, it is replaced by a reasonable substitute term<sup>411</sup>. This is the same if the price were to have been determined by reference to an unsatisfactory term: the Principles envisage other modes of determining the price by way of substitution<sup>412</sup>.

**109.** When non-performance of the contract gives rise to the possibility of its destruction, by way of termination, the various approaches used by the Principles show once again that, whenever possible, the validity of the contract, be it total or partial, is to be preferred.

Thus, the principle favouring the maintenance of the contract commands that there is no termination of a contract when the element of non-performance is minor. It is although the right to terminate the contract exists only ‘if the other party's non-performance is fundamental’<sup>413</sup>. The commentary indicates clearly that in some cases the termination of the contract can be too severe for the debtor. This is particularly the case ‘when other remedies such as damages or price reduction are available these remedies will often safeguard the interests of the aggrieved party sufficiently so that termination should be avoided’<sup>414</sup>.

We see however that the principle favouring the maintenance of the contract has a clearly defined domain as it supposes the absence of any fundamental non-performance. The cases in which non-performance will be considered fundamental are expressly laid down by the

<sup>409</sup> *Ibid.* p. 307.

<sup>410</sup> The commentary insists on the necessity of characterising a price as ‘grossly unreasonable’: *Principles of European Contract Law, Part I and II, op. cit.* p. 310.

<sup>411</sup> See Article 6: 105 PECL: ‘Where the price or any other contractual term is to be determined by one party whose determination is grossly unreasonable, then notwithstanding any provision to the contrary, a reasonable price or other term shall be substituted’.

In the same way, Article 6: 106 (2) PECL: ‘If a price or other term fixed by a third person is grossly unreasonable, a reasonable price or term shall be substituted’.

<sup>412</sup> Article 6: 107 PECL: ‘Where the price or any other contractual term is to be determined by reference to a factor which does not exist or has ceased to exist or to be accessible, the nearest equivalent factor shall be substituted’. Another example, Article 6: 106 (1) PECL: ‘Where the price or any other contractual term is to be determined by a third person, and it cannot or will not do so, the parties are presumed to have empowered the court to appoint another person to determine it’.

<sup>413</sup> Article 9: 301 (1) PECL: ‘A party may terminate the contract if the other party's non-performance is fundamental’.

<sup>414</sup> *Principles of European Contract Law, Part I and II, op. cit.* p. 409.

Principles. It is therefore the case that non-performance is considered fundamental if, ‘*strict compliance with the obligation is of the essence of the contract*’<sup>415</sup> or, ‘*the non-performance substantially deprives the aggrieved party of what it was entitled to expect under the contract, unless the other party did not foresee and could not reasonably have foreseen that result*’<sup>416</sup>, or ‘*the non-performance is intentional and gives the aggrieved party reason to believe that it cannot rely on the other party's future performance*’<sup>417</sup>. Together these situations lead to the exclusion of the principle favouring the maintenance of the contract as the contractual equilibrium has been disturbed: the contract has lost all point for the one party or he has lost all confidence in his fellow party.

Yet even when there is a fundamental non-performance, the principle favouring the maintenance of the contract can still come into play, not with regards to the principle of the sanction, but with regards to its extent. Therefore, there is no reason to terminate the whole of the contract if it can be performed ‘*in separate parts*’<sup>418</sup>.

**110.** The commentary on Article 6: 111 provides another illustration of the influence of the principle favouring the maintenance of the contract on the approaches adopted by the Principles of European Contract Law. Where there has been a change of circumstances, if the parties have not modified or terminated the agreement within a reasonable time-frame, the judge may be approached. In this case, although the provision provides that the court has the choice between termination or modification of the contract, the commentary indicates that ‘*in accordance with the purpose of the provision, [the court's] first aim should be to preserve the contract*’<sup>419</sup>.

### **III. Applications of the principle in comparative law**

#### **A. National laws**

**111.** The study of the different national legal systems reveals that, in the same way as in the Principles of European Contract Law, the principle favouring the maintenance of the

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<sup>415</sup> Article 8: 103 (a) PECL

<sup>416</sup> Article 8: 103 (b) PECL

<sup>417</sup> Article 8: 103 (c) PECL

<sup>418</sup> See in this respect, Article 9: 302 PECL: ‘*If the contract is to be performed in separate parts and in relation to a part to which a counter-performance can be apportioned, there is a fundamental non-performance, the aggrieved party may exercise its right to terminate under this Section in relation to the part concerned. It may terminate the contract as a whole only if the non-performance is fundamental to the contract as a whole*’.

<sup>419</sup> *Principles of European Contract Law, Part I and II, op. cit.* p. 326.

contract is more of an underlying principle forming the basis of the varied approaches of substantive law than a general principle as such. It is noticeable that the different applications of this principle within the Principles of European Contract Law can also be found in these various national legal systems.

### ➤ Interpretation of the contract

**112.** In matters of interpretation, the majority of the systems studied recognise a rule which favours the effective interpretation of the contract.

Sometimes the rule results from a legal provision<sup>420</sup>. However, it should be noted that these rules are not necessarily mandatory rules. This is the case in French law for example. Article 1157 of the Civil Code which states the principle of useful interpretation is simply a tool for the judiciary, who conserve their sovereign power of interpretation<sup>421</sup>. It follows that the judge can always choose to prefer an interpretation which leads to the destruction of the contract to one that allows for its preservation. The only limit to this judicial power comes from the fact that if the contract is denatured by the interpretation this will be sanctioned. The Cour de cassation oversees the interpretive process to the extent that it ensures that the judge does not, in the name of interpretation of the contract, modify the sense or the content of the contract when there is no ambiguity.

In other legal systems the rule of useful interpretation comes from the case law. This is the case in German law<sup>422</sup>. Even though § 157 BGB states that ‘*contracts are to be interpreted as required by good faith, taking customary practice into consideration*’, and therefore does not impose an interpretation in favour of the efficacy of the contract, the case law nevertheless adopts ‘*the rule in favour of full effect*’<sup>423</sup>.

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<sup>420</sup> See *Principles of European Contract Law, Part I and II, op. cit.* p. 297: France, Belgium, Luxembourg: Article 1157 Civil Code; Spain: Article 1284 Civil Code; Italy: Article 1367 Civil Code; Portugal: Article 237 Civil Code (indirectly).

<sup>421</sup> Cass. civ. 1<sup>ère</sup>, 6 mars 1979: Bull. civ. I n° 81: Articles 1156 onwards formulate non-mandatory rules with regards to the interpretation of the contract.

<sup>422</sup> *Adde* according to the *Principles of European Contract Law, Part I and II, op. cit.* p. 297: Austria: OGH, 4 December 1985: JBl 1987, 378. - England: NV Handel Smits v. English Exporters Ltd (1955): 2 Lloyd’s Rep. 317, C. A. and Chitty, § 12-064. – The laws of Scotland and Ireland are very similar. – *Compare* for Swiss law, P. Tercier, *op. cit.* n°716: some of the rules of interpretation have been created by practice (and not by statute), amongst them the rule of interpretation that invites the judge ‘*to privilege the approach that bests allows the protection of the contract (in favorem negotii)*’.

<sup>423</sup> ‘*La règle en faveur du plein effet*’, BGH (Cour fédérale de justice) 3 March 1971, NJW 1971, 1035, cited by *Principles of European Contract Law, Part I and II, op. cit.* p. 297.

➤ **Validity of the contract**

- Admission of judicial modification of the contract

**113.** Applications of the principle favouring the maintenance of the contract can be found in the legal systems which recognise that the contract can be modified judicially in order to avoid its nullity.

In the case of a mistake shared by both parties, that is to say when both parties have made the same mistake before entering into the contract, some legal systems allow the judge to adapt the contract to reflect the actual will of the parties at the critical time<sup>424</sup>. However, this approach is not unanimously recognised. Some legal systems refuse to confer a similar power of adaptation of the contract on their courts<sup>425</sup>.

More widely, in the case of a less important mistake, whether it is shared or not, some legal systems allow the judge to modify the contract. Thus Article 6: 230 (2) BW gives the Dutch courts the general power to modify the contract at the request of one or other of the parties, rather than avoid it<sup>426</sup>. In Finland, Sweden and Norway, the court can adapt the contract on the basis of the disappearance of presupposed facts or on the basis of the general clause contained in § 36 of the law on contract, but only if demanded by the victim of the mistake<sup>427</sup>. In Austria, § 872 ABGB allows the adaptation of contracts in cases of non-essential mistake, in order to render the contract in conformity with what would have been agreed between the parties if there had been no mistake<sup>428</sup>. In Swiss law, *‘the dominant legal scholarship recognises that the contract can be partially invalidated if the mistake is as to only one of the composite elements [...]’*<sup>429</sup> *The Federal Tribunal applies Article 20 II CO by analogy [...] If it appears that the mistaken party would not have entered into the contract at all if he had known the reality, the whole contract may be invalidated; [but] if it appears that both parties would have entered into the contract on the correct basis in that situation, the contract will be modified to the extent desired’*<sup>430</sup>.

<sup>424</sup> See *Principles of European Contract Law, Part I and II, op. cit.* p. 247: This is the case in Germany, Spain and Portugal in particular.

<sup>425</sup> *Ibid.* This is the case in France, England and Wales, and Scotland.

<sup>426</sup> See *Principles of European Contract Law, Part I and II, op. cit.* p. 247.

<sup>427</sup> *Ibid.*

<sup>428</sup> *Ibid.*

<sup>429</sup> When the error is fundamental, according to Article 25 CO the party in error *‘is bound by a contract as it was understood by him, as soon as the other party consents thereto’* as *‘a party is not permitted to avail himself of an error if this is contrary to good faith’*, (Swiss-American Chamber of Commerce, *op. cit.*).

<sup>430</sup> *‘La doctrine dominante admet l’invalidation partielle du contrat si l’erreur ne porte que sur un de ses éléments [...]Le Tribunal fédéral applique par analogie l’article 20 II CO [...] S’il apparaît que l’errans n’eût pas conclu du tout s’il avait connu la réalité, il est en droit d’invalider tout le contrat; [mais] s’il apparaît que les deux*

Lastly, outside the sphere of contracts vitiated by mistake, when a party has taken an excessive benefit or unfair advantage of the other party's situation, some laws accord the judge the power to adapt the contract in order to suppress the resulting inequality, even though the traditional approach would be the avoidance of the contract<sup>431</sup>.

- Judicial replacement of the invalid clauses of the contract

**114.** As within the Principles of European Contract Law, many legal systems envisage the replacement of contractual clauses which can threaten the validity of the contract.

This is also the case where the unreasonable price, fixed by one of the parties<sup>432</sup> or a third party<sup>433</sup>, is replaced by a reasonable price. In the same way, some legal systems recognise the replacement of the third party charged with determining the price<sup>434</sup>, or the replacement of a defaulting reference factor<sup>435</sup>.

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*contractants eussent conclu sur une base corrigée en fonction de la situation exacte, le contrat sera modifié dans la mesure voulue*, P. Engel, *Traité... op. cit.* p.341 citing illustrations in the case law. – Compare in respect of *dol incident* (a minor wilful misrepresentation or fraud) (P. Engel, *Traité, op. cit.* p.359 onwards): since 1955, le Federal Tribunal has recognised that *dol incident* allows total rescission of the contract, ‘but that, if the dishonesty related to a clause that was truly accessory, the judge could examine whether, even without the misrepresentation, the injured party would not have entered into the contract under the same conditions, and the Federal Tribunal add: ‘however, the right to attack the contract must be exercised according to the rules of good faith; when the rescission of the contract would appear to go too far in a case where the misrepresentation is only incidental, the judge may refuse rescission and limit himself to reducing the performance required of the injured party to the level that would have been acceptable had he not been deceived’ (ATF 81/1955 II p.213, 219)’.

<sup>431</sup> See in this respect, *Principles of European Contract Law, Part I and II, op. cit.* note on Article 4: 109, p. 265. This is the case in: Austria: § 935 ABGB (laesio enormis); France: Article 1681 Civil Code (lésion) - Luxembourg: Article 1118 Civil Code (lésion in certain circumstances); Portugal: Article 283 (1) and (2) Civil Code; Netherlands: Article 3: 54 BW; Denmark: §31 Dansk lov; Belgium: in such a case the case law accepts reduction as a sanction for the abuse of rights. See, by way of illustration, Cass. 18 fév. 1988, RW 1988-89. 1226, Arr. Cass. n° 375.

<sup>432</sup> See *Principles of European Contract Law, Part I and II, op. cit.* notes on Article 6: 105 PECL, p. 311, for the reduction in the excessive charges by *mandataires* according to case law in French and Belgian law.

<sup>433</sup> See *Principles of European Contract Law, Part I and II, op. cit.* p. 312 onwards, notes on Article 6: 106 PECL: - Germany : § 317 (1) BGB. –England and Wales: see Sudbrooke Trading Estate Ltd v. Eggleton [1983] AC 493, HL. (The intervention of the judge is only allowed where the intervention of the third party was subsidiary and accidental); Greece: Article 371 Civil Code and AP 678/1977, NoB 26 (1978) 360-361; Ireland: See Cotter v. Minister of Agriculture (H. Ct. 15 October 1991, unpublished); Italy: Article 1349 (1) Civil Code; Portugal: Article 400 Civil Code; Scandinavian countries: § 36 of the law on contract; But some laws do not admit this: England and Wales: See Collier v. Masson (1858) 25 Beav. 200; France: Com. 6 juin 1950, Bull. II, n° 205.

<sup>434</sup> See *Principles of European Contract Law, Part I and II, op. cit.* p. 312: - Belgium: See M. L. and M. E. Storme TPR 1985. 732 n° 15 and 16. - Netherlands: the approach is based on general principles, Article 6: 2 and 6: 248 BW. Normally though, the contract is declared void if the designated third party does not fix the price: - Germany: § 319 (2) BGB. – England, Wales and Scotland: s. 9 (1) of the Sale of Goods Act 1979. - Spain: for a sale, Article 1446 (2) Civil Code (the provision is interpreted restrictively). - France and Luxembourg: Article 1592 Civil Code - Greece: Article 373 Civil Code - Italy: Article 1349 (2) Civil Code.

<sup>435</sup> See *Principles of European Contract Law, Part I and II op. cit.* p. 314 onwards, notes on Article 6: 107 PECL: Germany: this is a *Wegfall der Geschäftsgrundlage*, § 242 BGB; Denmark: the case is analysed as the non-realisation of an implied condition (‘failure of assumptions’). The missing factor is replaced by the nearest equivalent one (Supreme Court of Denmark, 15 June 1977, UfR 1977 641); Netherlands: See § 6: 258 BW.

**115.** Here it is possible, without a doubt, to make a comparison with English law, which proceeds, by way of interpretation, to compliment the obligations arising from the contract so that they are not deprived of any meaning. In the case of uncertainty over whether an informal undertaking was really desired by the parties, even in a tacit sense, the judge submits their reasoning to a ‘*business efficacy test*’. According to this test, all the undertakings necessary in order for the contract to be efficiently performed, or those which can show their clear business efficacy, are considered as having been desired by the parties. This approach notably prevailed in the case of *The Moorcock* (1889): the judges placed an obligation that had not been expressly envisaged by the contract on one of the parties, without which the contract would have had no real efficiency, to the extent that it would be deprived of all point<sup>436</sup>. The rule was then clarified in the cases of *Reigate v. Union Manufacturing* (1919) and *Trollope and Colls Ltd v North West Regional Hospital Board* (1973). Thus, even in cases where the parties are silent as to the particular point in question and where there is no written clarification on the question, an obligation will necessarily form part of the contract if the contract cannot be validly performed without it.

- Preference for partial invalidity

**116.** The principle favouring the maintenance of the contract can be found in several legal systems which hold that, when a cause of invalidity affects a part of the contract which is not essential to the whole, the contract can be maintained with the exception of the vitiated part.

This can be the case whatever the cause of the invalidity. For example, in Swiss law<sup>437</sup>, according to Article 20 II CO<sup>438</sup>, ‘*if such defect only affects particular parts of the contract, however, then only those parts shall be null and void, unless it is to be presumed that the contract*

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In the absence of a specific provision, several legal systems base their approach to missing or inadequate reference factors on the interpretation of the contract and the principle of good faith and fair dealing in order to allow the replacement of the clause. England and Wales: provided that the clause was simply a way of fixing the price or some other element; Austria: on the basis of § 194 ABGB; Belgium, see Cour de Bruxelles, 29 Octobre 1962, JT 1963 102. - *Adde* Spain, Greece and Portugal.

<sup>436</sup> On *The Moorcock* and the business efficacy test see H. Beale, A. Hartkamp, H. Kotz, D. Tallon, *op. cit.* p. 585 to 588.

<sup>437</sup> *Adde*, for the Netherlands: Article 3: 41 BW: ‘*The nullity of part of a juridical act does not affect the rest of the act, to the extent that, taking into consideration the content and necessary implication of the act, the parts are so inextricably related so as not to be severable*’ (D. Busch, E. H. Hondius et alii *op. cit.* p.231).

<sup>438</sup> ‘*I. A contract providing for an impossibility, having illegal contents, or violating bonos mores, is null and void. II. If such defect only affects particular parts of the contract, however, then only those parts shall be null and void, unless it is to be presumed that the contract would not have been concluded without the defective parts*’, Swiss-American Chamber of Commerce, *op. cit.*

would not have been concluded without the defective parts'<sup>439</sup>. However, this approach is not generally recognised: in other legal systems the avoidance of the contract applies, in principle, to the whole of the contract. This is the case in the Nordic countries (Norway, Sweden, Finland), even if in Finland the case law has recognised partial avoidance (KKO 1961 II 100 and 1962 II 80)<sup>440</sup>. It is the same in English, Scottish and Irish law, where the principle is avoidance of the contract as a whole<sup>441</sup>. In German law, § 139 BGB holds the contract to be void in its entirety, unless the contracting parties would have wanted to maintain the rest of the contract.

Partial invalidity can also be adopted when the contract is partially unlawful<sup>442</sup>.

By way of example, we can cite the numerous situations of partial invalidity (*nullité*) recognised by French law. In consumer law for example, Article L132-1 of the Consumer Code strikes out '*clauses which aim to create or result in the creation, to the detriment of the non-professional or the consumer, of a significant imbalance between the rights and obligations of the parties to the contract*'. '*The removal of the clause appears to be the best protection for the consumer who is generally not interested in the extinction of the contract*'<sup>443</sup>. In the same way, the legislator sanctions those clauses that are unlawful because of their excessive character, not by declaring the contract invalid in its entirety but by reducing the excess, which can be analysed as partial invalidity by a reduction of the excessive quantity<sup>444</sup>. Thus Article 920 of the Civil Code states '*dispositions either inter vivos or mortis causa, which exceed the disposable portion shall be abated to that portion at the time of the opening of the succession*'.

In the absence of an express provision the case law sometimes adopts partial invalidity. In general, the agreement is only declared invalid by the courts in its entirety where the unlawful clause was the impulsive and determining factor of the wills of the contracting parties. Where the

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<sup>439</sup> It is the same where there is a problem with the form. According to Article 11 CO, '*I. In order to be valid, a contract is only required to be in a particular form if the law so requires. II. In the absence of a contrary provision concerning the significance and effect of using a particular form required by law, the validity of the contract shall depend upon whether or not such form was used*', Swiss-American Chamber of Commerce, *op. cit.*

<sup>440</sup> See *Principles of European Contract Law, Part I and II, op. cit.* p. 280.

<sup>441</sup> *Ibid.* See as an illustration *TSB Bank plc v. Camfield* [1995] 1 W.L.R. 430, C.A.

<sup>442</sup> See *Principles of European Contract Law, Part III, op. cit.*, p. 222, notes on Article 15: 103 PECL: Germany: §139 BGB and §134 BGB. §134 BGB poses the rule according to which the contract is void in its entirety unless the prohibition can be accomplished by partial avoidance; England and Wales: see Chitty §17-185 onwards; Austria: the scope of partial avoidance is determined by the statutory rule that has been violated. It is not essential to know if it would be reasonable to maintain the contract for the benefit of one of the parties; Belgium: Article 1217 and 1218 Civil Code; Greece: Article 181 Civil Code; Italy: Italian law recognises a general principle favouring the maintenance of the contract by virtue of which the invalidity of certain clauses will not lead to the avoidance of the contract where the law contains rules that can be substituted by operation of law for the invalid clauses (Article 1419 para 1 of the Civil Code); but if it appears that the contracting parties would not have entered into the contract had it not contained these invalid clauses, the invalidity of these clauses will lead to the avoidance of the contract as a whole (Article 1149 para 2 of the Civil Code).

<sup>443</sup> '*L'éradication de la clause apparaît comme la meilleure protection du consommateur qui n'a généralement pas intérêt à la disparition du contrat*', Y. Picod, *Rép. Dalloz*, see *Nullité*, 2004, n° 98.

<sup>444</sup> F. Terré, Ph. Simler et Y. Lequette, *op. cit.*, n° 421.



contrary applies, only the unlawful clause is struck out<sup>445</sup>. If the unlawful clause appears to be of a character that determined the wills of the parties, the lower court judges are in principle bound to pronounce the total invalidity of the agreement<sup>446</sup>. However, the judge also takes into consideration the requirements of public policy, which can lead to the pronouncement of partial invalidity, despite the presence of the decisive character of the unlawful clause. In general it is a question of not dissuading the beneficiary of protected status from denouncing the unlawful nature of the clause. For example, in the ‘Chronopost’<sup>447</sup> case, the judges, basing themselves on the absence of cause, struck out the limitation clause on the basis that it contradicted the scope of the undertaking entered into, despite the fact that it appeared to be determining of the wills of the parties. Thus, *‘in order to avoid the resulting unlawfulness turning against the party who it was intended to protect, the judges search for the most effective solution which is provided by the survival of the contract, with the clause that has been judged unlawful amputated from it’*<sup>448</sup>. More recently, the judiciary have begun to use the concept of partial falsity of cause as a method of reducing an excessive sum, thereby avoiding the nullity of a *reconnaissance de dette* exceeding the real value of the acknowledged debt. On this occasion, the judges affirmed that *‘the partial falsity of cause does not lead to the invalidation of the obligation, but to its reduction to the extent of the subsisting fraction’*<sup>449</sup>. The scope of this case remains however disputed.

- Alternatives to invalidity

**117.** Some legal systems recognise approaches which allow contracts tainted by a cause of invalidity to be ‘saved’.

We can cite for example the practice of conversion by reduction which is defined as *‘an invalid act, but which fulfils the requirements for the validity of another act, producing a similar result which conforms to the intention of the parties is, in this way, valid, one can even say validated’*<sup>450</sup>. This is recognised in Italian law<sup>451</sup> in particular, where legal scholarship sees it as

<sup>445</sup> Cass. Civ. 3<sup>e</sup>, 13 février 1969: JCP 1969, II, 15942.

<sup>446</sup> Cass. com., 27 mars 1990: Bull. civ. IV, n° 93.

<sup>447</sup> Cass. com. 22 octobre 1996: Bull. civ. IV, n° 261.

<sup>448</sup> *‘Pour éviter que la sanction de l’illicite ne se retourne contre celui qu’on entend protéger, les magistrats recherchent la mesure la plus efficace qui passe par la survie du contrat, amputé de la clause jugée illicite’*, Y. Picod, *above*, n° 97.

<sup>449</sup> *‘La fausseté partielle de la cause n’entraîne pas l’annulation de l’obligation, mais sa réduction à la mesure de la fraction subsistante’*, Cass. civ. 1<sup>er</sup>, 11 mars 2003: Bull. civ. I., n° 67

<sup>450</sup> *‘Un acte nul, mais qui remplit les conditions requises pour la validité d’un autre acte, produisant un résultat semblable et conforme à l’intention des parties est, dans cette mesure, valable, on peut même dire validé’*, F. Terré, Ph. Simler et Y. Lequette, *op. cit.*, n° 422.

<sup>451</sup> Article 1424 of the Civil Code.

an application of the principle favouring the maintenance of the contract<sup>452</sup>. The concept exists equally in German law<sup>453</sup>, Swiss law<sup>454</sup>, Dutch law<sup>455</sup> and French law. The latter, like the others, also recognises the regularisation of the contract which allows the parties to suppress the invalid cause of the contract, for example by complying with the compulsory formalities that until then have been in default<sup>456</sup>.

It is also possible to add the case of affirmation. This is the practice whereby the holder of an action to avoid the contract renounces the exercise of his right. Although renunciation only applies in his favour, it nevertheless remains the case that where he is the only holder of the right to avoid the contract, his affirmation removes all risk of its invalidity.

### ➤ Performance of the contract

**118.** When it comes to non-performance of the contract, the principle favouring the maintenance of the contract can be evidenced by the restrictive conditions to which termination of the contract is subordinated. In many of the legal systems studied it is only recognised in cases of fundamental non-performance<sup>457</sup>, or at least a serious non-performance. This is the case in England and Wales, Ireland and Scotland, which is entirely logical as the concept of fundamental non-performance originally comes from the *Common law*<sup>458</sup>.

In Germany, the entire contract can only be terminated if the creditor has lost all interest in performance in cases of non-performance or defective performance<sup>459</sup>. The creditor cannot

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<sup>452</sup> M.-C. Diener, *op. cit.* § 14. 10.

<sup>453</sup> § 140 BGB: 'If a void legal transaction fulfils the requirements of another legal transaction, then the latter is deemed to have been entered into, if it may be assumed that its validity would be intended if there were knowledge of the invalidity'.

<sup>454</sup> Conversion by reduction is not stated by the Code of Obligations, 'but legal writing and case law recognise it as a rule of general application [...] The principle of favour negotii requires that the invalid act be replaced with a valid act if there is reason to admit that the parties would have entered into such an act if they had known of the invalidity of the act which they had in mind', (P. Engel, *Traité... op. cit.* p. 265 onwards concerning vices of form and citing illustrations from the case law).

<sup>455</sup> Article 3:42 BW. - see D. Busch, E. H. Hondius et alii, *op. cit.* p.232. The mechanism was created by the Hoge Raad in 1944, see A. S. Hartkamp, *op. cit.* p.155.

<sup>456</sup> Compare Article 3: 58 BW which also envisages an a posteriori consolidation when a condition of validity, which has been in default since the contract was entered into, is completed afterwards (A. S. Hartkamp, *op. cit.* p.155).

<sup>457</sup> See in this respect, *Principles of European Contract Law, Part I and II, op. cit.* p. 366 onwards, notes on Article 8: 103 PDEC.

<sup>458</sup> *Ibid.*

<sup>459</sup> *Principles of European Contract Law, Part I and II, op. cit.* p. 418. – Adde in the case of the breach of an obligation of protection in the sense of § 241 II BGB: termination is covered by § 324 BGB (*If the obligor, in the case of a reciprocal contract, breaches a duty under section 241 (2), the obligee may withdraw from the contract if he can no longer reasonably be expected to uphold the contract*). It is also that case 'that the maintenance of the contract and the continuation of contractual relations can no longer be required from the creditor', (M. Pédamon *op. cit.* n°233; compare. *ibid.* n°227 with regards to the provision for damages in § 282: it must be that 'the

terminate the contract where the breach of the obligation is insignificant (§ 281 paragraph 1 and 323 paragraph 5 BGB)<sup>460</sup>. In cases of delay, termination is only possible if the delay is ‘qualified’ (§ 376 and 326 (2) HGB<sup>461</sup>). Legal scholarship however takes pains to underline that ‘*in the situation where the party has not performed as stipulated in the contract, the aggrieved party may not terminate the contract, if the breach of the obligation is insignificant. It is notable that the German legislator has given up, despite the submissions made on the subject, following the same system as the Vienna Convention according to which the termination of the contract is only possible if the breach of the seller’s obligation was ‘fundamental’ according to Article 25 [...] In German law, every significant breach of the obligation suffices*’<sup>462</sup>.

In Austria, § 918 (2) and 920 ABGB require fundamental non-performance. In the contract of sale, if the goods sold are defective, the purchaser can rescind the contract with the exception of where the defect is insignificant, (§ 932 (1) ABGB<sup>463</sup>). In the case of delay, rescission is only possible if the delay is ‘qualified’ (§ 376 and 326 (2) HGB<sup>464</sup>).

In Italy, according to Article 1455 of the Civil Code, the contract cannot be terminated where the non-performance is of little importance<sup>465</sup>.

In Denmark and Finland, non-performance must be ‘substantial’<sup>466</sup>.

In France, the gravity of the non-performance is something that the judge must also consider when pronouncing termination of the contract<sup>467</sup>. According to some recent case law, the gravity of the breach can itself justify unilateral termination of the contract, although the author of the termination bears the risk<sup>468</sup>.

Only the Netherlands does not recognise the concept of fundamental non-performance<sup>469</sup>. In principle, every non-performance justifies the termination of the contract on the basis of Article

*maintenance of the contract became impossible (unzumutbar) for the creditor; this impossible character being appreciated in concreto according to the interests of both parties and the facts of the case’.*

<sup>460</sup> *Principles of European Contract Law, Part I and II, op. cit. p. 367*

<sup>461</sup> *Principles of European Contract Law, Part I and II, op. cit. p. 367*

<sup>462</sup> ‘*Dans l’hypothèse où le débiteur n’a pas exécuté la prestation prévue dans le contrat, le créancier ne peut pas résilier le contrat, si la violation de l’obligation est insignifiante. On peut remarquer que le législateur allemand a renoncé, malgré les propositions faites à ce sujet, de suivre le système de la Convention de Vienne selon lequel la résolution du contrat est seulement possible si la violation de l’obligation du vendeur a été ‘essentielle’ au sens de l’article 25 [...] En droit allemand, chaque violation significative de l’obligation suffit.*’, F. Ranieri ‘*La nouvelle partie générale du droit des obligations*’, La réforme du droit allemand des obligations (Colloque du 31 mai 2002 et nouveaux aspects), dir. C. Witz et F. Ranieri, Soc. Législ. Comp. 2004, p.33 . – Adde M. Pédamon, *op. cit.* note 197.

<sup>463</sup> *Principles of European Contract Law, Part I and II, op. cit. p. 367.*

<sup>464</sup> *Ibid.*

<sup>465</sup> *Ibid.*

<sup>466</sup> See § 21, 28, 42 and 43 of the Danish law on sale. See also, § 25, 39, 54 and 55 of the Finish law on sale. See, *Principles of European Contract Law, Part I and II, op. cit. p. 367*

<sup>467</sup> See Cass. civ. 14 avril 1891, *Grands arrêts de la jurisprudence civile, op. cit. n° 176.* – D. P. 1891, 1, 329, note Planiol.

<sup>468</sup> Cass. civ. 1<sup>er</sup>, 20 février 2001: Bull. civ. I, n° 40: ‘*la gravité du comportement d’une partie à un contrat peut justifier que l’autre partie y mette fin de manière unilatérale, à ses risques et périls*’.

<sup>469</sup> See D. Busch, E. H. Hondius et alii *op. cit. p.330 onwards.*

6: 265 BW<sup>470</sup>. Nonetheless, by virtue of this provision, a relatively unimportant non-performance will not justify termination. For example, where there is only a minimal delay in performance, the creditor cannot terminate the contract, or else he can only terminate a part of the contract if the non-performance justifies a partial termination. The Hoge Raad has not followed the suggestions of authors according to whom termination would only be justified if the creditor had no other less severe remedy at his disposal, or if the non-performance was fundamental<sup>471</sup>.

## B. International law and Acquis communautaire

**119.** Within the **Vienna Convention**, the principle favouring the maintenance of the contract can only be found in provisions concerning difficulties in performance as the Convention does not deal with either the validity or the interpretation of the contract of sale.

As in other systems, the Convention limits the operation of what it terms avoidance of the contract to situations where there has been ‘*a fundamental breach of contract*’<sup>472</sup>. We can add to this the fact that the benefit of the purchaser’s termination resulting from Article 49 must be reconciled with the seller’s right to correct the non-conforming performance provided for in Article 48<sup>473</sup>.

**120.** In **Community law**, the principle favouring the maintenance of the contract is illustrated by the notion of ‘*effet utile*’ (effectiveness), used as a method of interpretation by the ECJ with the aim of allowing Community law to ‘*deploy the entirety of its effects*’<sup>474</sup>.

In particular, the principle favouring the maintenance of the contract can be found more directly within Council Directive 93/13/EEC of 5 April 1993 *on unfair terms in consumer contracts*<sup>475</sup>. ‘*If [the contract] is capable of continuing in existence without the unfair terms*’<sup>476</sup>

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<sup>470</sup> ‘1. Every failure of one party in the performance of one of his obligations gives the other party the right to set aside the contract in whole or in part, unless the failure, given its special nature of minor importance, does not justify the setting aside of the contract and the consequences following therefrom.

2. To the extent that performance is not permanently or temporarily impossible, the right to set the contract aside does not arise until the debtor is in default’ (trad. in D. Busch, E. H. Hondius et alii *op. cit.* p.365).

<sup>471</sup> D. Busch, E. H. Hondius et alii *op. cit.* p.365 onwards.

<sup>472</sup> See Article 49 for the fundamental breach of the seller; Article 64 for the fundamental breach of the purchaser; Articles 72 and 73 for anticipatory breaches.

<sup>473</sup> The articulation of these two provisions is not however without difficulty.

<sup>474</sup> ‘... *Déployer la plénitude de ses effets*’, see ‘*effet utile*’, in T. Debard, B. Le Baut-Ferrarèse & C. Nourissat, *Dictionnaire du droit de l’Union européenne*, Paris, Ellipses, 2002, especially p. 87.

<sup>475</sup> Council Directive 93/13/EEC of 5 April 1993 *on unfair terms in consumer contracts*, OJ L 095 21/4/1993, p. 0029-0034.

<sup>476</sup> Article 6 § 1 of the above Directive.

then the sanction envisaged for these terms is not the invalidity of the contract in its entirety. The terms will be regarded as struck out from the contract and the contract can then be performed<sup>477</sup>.

### C. Codifications by legal scholars

#### ➤ Interpretation of the contract

**121.** Each of the studied projects provides a provision which privileges a useful interpretation of the contract.

Article 4.5 of the **Unidroit Principles** establishes such a rule. According to the text '*contract terms shall be interpreted so as to give effect to all the terms rather than to deprive some of them of effect*'.

The **Proposals for Reform of the Law of Obligations and the Law of Prescription** implicitly establish the principle favouring the maintenance of the contract in matters of interpretation in Article 1139-1: '*where a term of a contract may bear two meanings, it should be understood in the way which gives it some effect rather than in the way according to which it would produce no effect*'<sup>478</sup>.

Lastly, in a comparable way, the **European Code of Contract Preliminary Draft** posits a rule stating the preference for the effective interpretation of the contract. According to Article 40 (2): '*in case of doubt, the contract or the individual clauses shall be interpreted in the sense in which they can have some effect rather than in that in which they would have none*'.

#### ➤ Validity of the contract

**122.** In the same way as the Principles of European Contract Law, the **Unidroit Principles** recognise many applications of the principle favouring the maintenance of the contract. For example, the following situations can be found: the maintenance of the contract despite a mistake having been made<sup>479</sup> and the adaptation of the contract in situations of

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<sup>477</sup> For another example of the principle favouring the maintenance of the contract see Article 4 § 7 of Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours, OJ L 158 23/6/1990, p. 59-64.

<sup>478</sup> J. Cartwright and S. Whittaker, *op. cit.*

<sup>479</sup> Article 3: 13, '*Loss of right to avoid*': '(1) If a party is entitled to avoid the contract for mistake but the other party declares itself willing to perform or performs the contract as it was understood by the party entitled to avoidance, the contract is considered to have been concluded as the latter party understood it. The other party must make such a declaration or render such performance promptly after having been informed of the manner in which the party entitled to avoidance had understood the contract and before that party has reasonably acted in reliance on a notice of avoidance.

excessive benefit<sup>480</sup>. With regard to the extent of the sanction, here again partial invalidity will always be preferred whenever it is not unreasonable to maintain the contract in its entirety<sup>481</sup>. Confirmation (affirmation) is also envisaged by the project<sup>482</sup>.

The **European Code of Contract Preliminary Draft** adopts the possibility of partial invalidity by admitting the validity of the remainder of the contract *‘provided this remaining part can exist independently and reasonably realise the purpose of the parties’*<sup>483</sup>. It also recognises alternatives to the invalidity of the contract. We find conversion by reduction: *‘a void contract has the effect of a different and valid contract of which it has the requisites of substance and form whenever these enable the objective sought by the parties to be reasonably realized’*. The conversion is automatic, but the parties can expressly exclude it<sup>484</sup>. We also find the possibility of a regularisation of the contract. Article 143 § 2 deals with, in appearance, *‘validation of void contract’*. However, in reality it is concerned with regularisation: § 2 *‘Contracts void for reasons other than those indicated in the preceding paragraph can be validated. Validation is made by an act of the contracting parties who reproduce the void contract but remove the cause of its being void and undertake to make due restitution and to perform their respective obligations, as would have been the case if the contract had been valid ab initio. To this act the provisions of Art 36*

*(2) After such a declaration or performance the right to avoidance is lost and any earlier notice of avoidance is ineffective’.*

<sup>480</sup> Article 3: 10 (2), and (3): *‘(2) Upon the request of the party entitled to avoidance, a court may adapt the contract or term in order to make it accord with reasonable commercial standards of fair dealing.*

*(3) A court may also adapt the contract or term upon the request of the party receiving notice of avoidance, provided that that party informs the other party of its request promptly after receiving such notice and before the other party has reasonably acted in reliance on it. The provisions of Article 3:13(2) apply accordingly’.*

<sup>481</sup> Article 3: 16, *‘Partial avoidance’*: *‘Where a ground of avoidance affects only individual terms of the contract, the effect of avoidance is limited to those terms unless, having regard to the circumstances, it is unreasonable to uphold the remaining contract’.*

<sup>482</sup> Article 3: 12, *‘Confirmation’*: *‘If the party entitled to avoid the contract expressly or impliedly confirms the contract after the period of time for giving notice of avoidance has begun to run, avoidance of the contract is excluded’.*

<sup>483</sup> Article 144, § 1: *‘Except as provided in Art 143 para 1, if an individual clause or a part of a contract is void, the remainder of the contract remains valid, provided this remaining part can exist independently and reasonably realise the purpose of the parties’.*

<sup>484</sup> See Article 145, *‘Conversion of void contract’*: *‘Without prejudice to the provisions of Art 40 para 2 and Art 143 para 1, a void contract has the effect of a different and valid contract of which it has the requisites of substance and form whenever these enable the objective sought by the parties to be reasonably realized.*

*2. The rule in the preceding paragraph applies also to individual clauses of a contract.*

*3. Conversion cannot take place if the contract or the circumstances reveal a different intention of the parties.*

*4. For there to be conversion it is sufficient that the conditions for this are present; but the party who intends to avail himself of the situation must send to the other party a notification, giving all necessary information, before the expiry of three years from the making of the contract. To this notification the provisions of Art 21 and Art 36 para 2 shall apply. Before the time limit matures, the first party can also apply for a judicial ruling on the subject, but no action can be brought before six (three) months have elapsed, calculated from receipt of the declaration, in order to enable the parties to settle the matter out of court. The right to apply to the court for the urgent reliefs contained in Art 172 is unaffected.*

*5. The rules in this article apply also to an avoided contract. For an ineffective contract reference is to be made to the provisions of Art 153 para 5.’*

*para 2 shall apply*'. The provision applies, for example, where a formality is required under threat of invalidity. Lastly, the possibility of validation (affirmation) of a void contract is also recognised<sup>485</sup>.

The **Proposals for Reform of the Law of Obligations and the Law of Prescription** prefer partial nullity when the clause that has been marred with nullity has not '*formed a decisive element of the parties' undertaking, or of one of them*'<sup>486</sup>. With regards to alternatives to nullity, this project recognizes regularisation<sup>487</sup> of the contract as well as its affirmation<sup>488</sup>.

### ➤ Performance of the contract

**123.** As previously, the rules adopted by the Principles of European Contract Law resemble those of the **Unidroit Principles**. However, the approaches adopted by the other projects move further away from this.

Within the **Unidroit Principles**, the principle favouring the maintenance of the contract can be found in the rules which envisage substitution when the fixed price is unreasonable<sup>489</sup> or when the chosen mode of fixing the price is defective<sup>490</sup>.

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<sup>485</sup> See Article 149 § 2: '*A voidable contract can be validated, and thus remain in operation in all its effects, if the entitled contracting party or his legal representative either declares, while respecting the provision of Art 36 para 2, his intention not to proceed with avoidance or performs the contract voluntarily himself. Validation requires that the contracting party, or his legal representative if he is incapable, is able to conclude a valid contract and is fully aware of the reason for the contract being voidable.*'

<sup>486</sup> Article 1130-2, para 1: '*Where the ground of nullity affects only one term of the contract, it does not give rise to nullity of the whole juridical act unless this term formed a decisive element of the parties' undertaking, or of one of them*', J. Cartwright and S. Whittaker, *op. cit.*

<sup>487</sup> Article 1133: '*When the law so authorises, regularisation restores its full effect to a juridical act by the removal of the defect which affects it, or by the completion of any formality required*'.

<sup>488</sup> See Article 1129-4: '*An act of affirmation or ratification of an obligation for which the law allows an action for nullity is valid only where it identifies the substance of the obligation, the ground of action for nullity, and the intention to rectify the defect on which the action is based.*

*In the absence of an act of affirmation or ratification, it is sufficient that the obligation is performed voluntarily after the time when the obligation when the obligation may be validly affirmed or ratified.*

*Affirmation, ratification or voluntary performance in the forms and at the time fixed by legislation imply waiver of the grounds of claim and defences that a person might otherwise raise to the juridical act, without, however, prejudice to the rights of third parties.*

*If a number of persons have the right to the action for nullity, waiver by one does not bar the action of the others*'.

<sup>489</sup> Article 5. 1. 7. (2): '*Where the price is to be determined by one party and that determination is manifestly unreasonable, a reasonable price shall be substituted notwithstanding any contract term to the contrary*'.

<sup>490</sup> Article 5. 1. 7. (3) and (4): '*Where the price is to be fixed by a third person, and that person cannot or will not do so, the price shall be a reasonable price.*

*(4) Where the price is to be fixed by reference to factors which do not exist or have ceased to exist or to be accessible, the nearest equivalent factor shall be treated as a substitute*'.

With regard to the termination of the contract for non-performance, the Unidroit Principles only allows termination where the non-performance is fundamental<sup>491</sup>.

In the **European Code of Contract Preliminary Draft**, only some occasional applications of the principle favouring the maintenance of the contract can be cited. Thus, for example, the failure of the parties to determine the place of performance is mitigated by the rules of Article 82<sup>492</sup>. This failure cannot therefore be a cause of the calling into question of the contract or of its non-performance.

With regard to the termination of the contract, it is only allowed in cases of ‘*substantial*’<sup>493</sup> non-performance.

In the **Proposals for Reform of the Law of Obligations and the Law of Prescription**, the principle favouring the maintenance of the contract is in retreat with regards to the termination of the contract. Indeed, this is not expressly confined to situations of fundamental non-performance. Article 1158 offers the creditor of the non or imperfectly-performed obligation the choice between enforced performance, termination, or the award of damages. The project recognises non-judicial termination but subordinates it to non-performance on the part of the debtor after a reasonable delay following service of a notice to perform by the creditor. Although the domain of termination therefore seems wide open, a slight tempering of this results from Article 1158-1. This article states that ‘*the debtor may contest the creditor’s decision before the court by claiming that any failure to perform which is alleged against him does not justify termination of the contract*’<sup>494</sup>. From this we can deduce that termination should not be a disproportionate measure in comparison with the gravity of the non-performance.

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<sup>491</sup> Article 7.3.1. ‘*Right to terminate the contract*’, especially (1): ‘*A party may terminate the contract where the failure of the other party to perform an obligation under the contract amounts to a fundamental non-performance*’.

<sup>492</sup> Article 82 ‘*Place of performance*’: ‘*1. Contractual obligations shall be performed at the place expressed or implied in the contract or, failing such provision, at the place which is in accordance with usage and the circumstances given the nature of the performance required. If the place at which the performance is to be carried out is not specified in the contract and cannot be inferred from these criteria, the following rules apply.*

*2. The obligation to deliver a certain and specified thing shall be performed at the place where the thing was situated when the obligation arose. If the obligation concerns goods produced by the debtor, they shall be delivered at the business premises of the debtor at the time the obligation matures.*

*3. The obligation having as its subject matter a sum of money shall be performed, at the debtor’s risk, at the residence of the creditor or, if he is the owner of a business, at his business premises at the time the obligation matures. If the residence or business premises are different from those which the creditor had when the obligation arose, and if this makes performance more burdensome, the debtor by informing the creditor in advance has the right to make payment at his own residence.*

*4. In all other cases the obligation shall be performed at the residence of the debtor at the time the obligation matures.*’

<sup>493</sup> Article 114 ‘*Right to dissolve the contract*’, especially (1): ‘*Substantial non-performance as understood in Art 107 gives the creditor the right to dissolve the contract by serving notice on the debtor to perform within a reasonable time, which shall be not less than fifteen days, and notifying him that, if this time expires without performance, the contract shall be dissolved ipso iure.*’

<sup>494</sup> J. Cartwright and S. Whittaker, *op. cit.*



124. Lastly, we can note that, whatever the treatment of unforeseeable change of circumstances<sup>495</sup>, each of the projects adopts the approach whereby before any termination of the contract, or for those who recognise it, any judicial modification, the parties are bound to renegotiate the contract<sup>496</sup>. This measure gives the parties a chance to ‘save’ the contract.

#### **IV. Proposed text**

##### **Article 0-204: Principle favouring the maintenance of the contract**

When a contract is subject to interpretation, or when its validity or performance is threatened, the effectiveness of the contract should be preferred if its destruction would harm the legitimate interests of one of the parties.

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<sup>495</sup> On this point, see *supra* under Article 0-201.

<sup>496</sup> Article 6. 2. 3. Unidroit Principles; Articles 97 and 157 of the European Code of Contract Preliminary Draft; Article 1135- 2 and 3 of the Proposals for Reform of the Law of Obligations and the Law of Prescription.

## **CHAPTER 3. CONTRACTUAL FAIRNESS**

## ***Article 0-301: General duty of good faith and fair dealing***

### **I. General presentation of the principle**

**125.** A chapter which has contractual fairness as its subject should, as a matter of logic, open with a guiding principle that states the very principle of fairness itself, and especially its obligatory character. It is therefore important that the first article of this chapter has as its subject the duty of good faith and fair dealing<sup>497</sup>. It will be necessary to clarify the scope of the duty of good faith and fair dealing, in two respects.

First, we must clarify the scope of the duty of good faith. It is a question here of determining at which stages of the contractual process the parties are required to comply with the duty of good faith and fair dealing. However, the duty of good faith and fair dealing necessarily appears as a generally applicable duty, in the sense that parties are subject to it from the start of negotiations of the contract through to the performance of the contract, or even beyond. Indeed, if the contract is later invalidated, the parties must also provide proof that they acted in good faith during the process of invalidation as well as during the determination of the consequences (restitution, damages etc). Therefore, the parties must prove their good faith until the extinction of the effects of the contract.

Secondly, we must establish the force of the duty of good faith on the parties. Here it is the imperative character of the duty of good faith and fair dealing that it is important to state. After all, a general duty of good faith and fair dealing would be entirely ineffective if the parties were allowed to derogate from the principle, or even just to limit it.

### **II. Application of the principle in PECL**

**126.** The principle of good faith and fair dealing is already the subject of an autonomous article in the Principles of European Contract Law. Indeed, in the first chapter,

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<sup>497</sup> In so far as it is a question here of dealing with 'good contractual conduct', that is to say making good faith and fair dealing a behavioural norm, the terms good faith (*bonne foi*), fair dealing and fairness (*loyauté*) should be seen as synonymous. In any case, it can be shown, from a study of comparative law, that the distinctions sometimes proposed between good faith and fairness are more dogmatic than practical: see in this respect the study of the term 'good faith' (*bonne foi*) by the terminology group – the group suggests that the only distinction which is useful in practice is that which distinguishes good faith as a behavioural norm and good faith as a basis for the protection of a mistaken belief.

dedicated to ‘*General Provisions*’, and more specifically section II concerning ‘*General Obligations*’, Article 1: 201 deals with good faith. According to this article:

- (1) *Each party must act in accordance with good faith and fair dealing.*  
 (2) *The parties may not exclude or limit this duty’.*

The current position of this article dedicated to good faith underlines its importance since the principle of good faith and fair dealing appears as a general obligation. However, in so far as the Guiding Principles of European Contract Law are concerned, the principle of good faith and fair dealing must be seen as one of the central pillars of these principles<sup>498</sup>. Consequently, there is reason to move the current Article 1: 201 and make it the first article of the chapter dedicated to contractual fairness. Although paragraph 2 is satisfactory, in that it states the imperative character of the obligation<sup>499</sup>, paragraph 1 should be rewritten to reflect the scope of the principle of good faith and fair dealing more clearly<sup>500</sup>.

**127.** In addition to the general principle of good faith and fair dealing, the Principles of European Contract Law contain many applications of the principle which confirm that it applies throughout the contractual process.

First, it must be emphasised that freedom of contract is understood only within the confines of the principles of good faith and fair dealing. Indeed, Article 1: 102 paragraph 1 states that ‘*parties are free to enter into a contract and to determine its contents, subject to the requirements of good faith and fair dealing, and the mandatory rules established by these Principles*’. To this we can add the concept of reasonableness, found frequently throughout the Principles of European Contract Law, which is defined by reference to ‘*what persons acting in good faith and in the same situation as the parties would consider to be reasonable*’<sup>501</sup>.

**128.** Good faith and fair dealing also presides over contractual negotiations. Thus, according to Article 2: 301 (2) ‘*a party who has negotiated or broken off negotiations contrary to good faith and fair dealing is liable for the losses caused to the other party*’. In addition, according to Article 2: 301 (3), that fact that a party starts or pursues the negotiations with ‘*no*

<sup>498</sup> **Acquis Group:** For some members of the group, the change in status to that of a fundamental principle is likely to create considerable uncertainties in respect of the principle of good faith and fair dealing. Although many rules and principles, which we will identify, follow on from the principle of good faith, fair dealing and ‘what a reasonable man might expect’, the question of whether this obligation should be elevated into a fundamental principle or not remains hotly contested. For the moment no general principle of good faith and fair dealing has been elaborated.

<sup>499</sup> Compare Article 8: 109 PECL which allows the parties to exclude or limit remedies for non-performance, unless it would be contrary to good faith and fair dealing to do so. The commentary indicates that it is not contractually possible to get rid of this limit (*Principles of European Contract Law, Part I and II, op. cit.* p. 388) which confirms the imperative character of the duty of good faith.

<sup>500</sup> See in this respect the general presentation *supra*.

<sup>501</sup> Article 1: 302.

*real intention of reaching an agreement with the other party*' is contrary to the requirements of good faith and fair dealing.

Even after the contract is entered into, the obligation to negotiate in good faith continues to apply should the contract have to be renegotiated. Thus, according to Article 6: 111 (3) final paragraph, the court '*may award damages for the loss suffered through a party refusing to negotiate or breaking off negotiations contrary to good faith and fair dealing*'. Good faith and fair dealing governs the way in which the renegotiation will be conducted and also the very fact that such renegotiation must commence within a reasonable timeframe<sup>502</sup>.

Many articles of the Principles of European Contract Law show that good faith and fair dealing at the precontractual stage impose other obligations on the parties, and this is particularly the case where one of the parties is in a dominant position in comparison to the other party.

First, Article 2: 104 creates a reinforced obligation to inform on the part of the party who has stipulated certain clauses of the contract. Paragraph 1 states that '*contract terms which have not been individually negotiated may be invoked against a party who did not know of them only if the party invoking them took reasonable steps to bring them to the other party's attention before or when the contract was concluded*'. Paragraph 2 then usefully details, as an example, a situation in which the above requirement is not satisfied: thus '*terms are not brought appropriately to a party's attention by a mere reference to them in a contract document, even if that party signs the document*'. From this we can see that it really is a reinforced obligation to inform which is placed on the party who invokes the non-negotiated clauses.

Secondly, it is forbidden to take an excessive benefit from the contract when the other party is in a situation of weakness. Thus, according to Article 4: 109, a contract can be avoided or adapted by the judge when, at the moment of entering into the contract, one of the parties '*was dependent on or had a relationship of trust with the other party, was in economic distress or had urgent needs, was improvident, ignorant, inexperienced or lacking in bargaining skill*'<sup>503</sup>, while at the same time the other party '*knew or ought to have known of this and, given the circumstances and purpose of the contract, took advantage of the first party's situation in a way which was grossly unfair or took an excessive benefit*'<sup>504</sup>.

We can also note that the sanction for the bad faith of the party who is in an advantageous contractual position also results from the prohibition of unfair terms. Article 4: 110 deals with '*unfair terms which have not been individually negotiated*'. It is especially concerned with terms that are contrary to the requirements of good faith and fair dealing. The first paragraph states that '*a party may avoid a term which has not been individually negotiated if, contrary to the*

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<sup>502</sup> *Principles of European Contract Law, Part I and II, op. cit.* p. 326.

<sup>503</sup> Article 4: 109 (1) (a)

<sup>504</sup> Article 4: 109 (1) (b)

*requirements of good faith and fair dealing, it causes a significant imbalance in the parties' rights and obligations arising under the contract to the detriment of that party, taking into account the nature of the performance to be rendered under the contract, all the other terms of the contract and the circumstances at the time the contract was concluded'.*

**129.** In addition to contractual negotiations, good faith and fair dealing can be found at every stage of the life of the contract.

When entering into the contract, the prohibition on fraud<sup>505</sup> and threats<sup>506</sup> can be analysed as manifestations of good faith.

Good faith and fair dealing also influence the obligatory content of the contract. Indeed, according to Article 6: 102 (c): *'in addition to the express terms, a contract may contain implied terms which stem from [...] (c) good faith and fair dealing'.*

Good faith can also be found at the stage of performance. It gives the debtor the right to cure a non-conforming performance before the deadline for performance has passed<sup>507</sup>. It also prevents enforced performance in kind if such performance would involve unreasonable efforts and expense for the debtor<sup>508</sup>.

Lastly, good faith and fair dealing remain present even when the contract has exhausted its effects (normally because it has been invalidated). In this way, someone who knew of the reason for the invalidity is not able to demand restitution<sup>509</sup> or the payment of damages<sup>510</sup>.

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<sup>505</sup> Article 4: 107, 'Fraud': *'(1) A party may avoid a contract when it has been led to conclude it by the other party's fraudulent representation, whether by words or conduct, or fraudulent non-disclosure of any information which in accordance with good faith and fair dealing it should have disclosed.*

*(2) A party's representation or non-disclosure is fraudulent if it was intended to deceive.*

*(3) In determining whether good faith and fair dealing required that a party disclose particular information, regard should be had to all the circumstances, including:*

*(a) whether the party had special expertise;*

*(b) the cost to it of acquiring the relevant information;*

*(c) whether the other party could reasonably acquire the information for itself; and*

*(d) the apparent importance of the information to the other party.'*

<sup>506</sup> Article 4: 108, 'Threats': *'A party may avoid a contract when it has been led to conclude it by the other party's imminent and serious threat of an act:*

*(a) which is wrongful in itself, or*

*(b) which it is wrongful to use as a means to obtain the conclusion of the contract, unless in the circumstances the first party had a reasonable alternative.'*

<sup>507</sup> Article 8: 104, 'Cure by Non-Performing Party': *'A party whose tender of performance is not accepted by the other party because it does not conform to the contract may make a new and conforming tender where the time for performance has not yet arrived or the delay would not be such as to constitute a fundamental non-performance'.*

<sup>508</sup> Article 9: 102, especially (2) (b): *'(2) Specific performance cannot, however, be obtained where: (b) performance would cause the obligor unreasonable effort or expense'.*

<sup>509</sup> Article 15: 104, especially (3): *'(3) An award of restitution may be refused to a party who knew or ought to have known of the reason for the ineffectiveness'.*

<sup>510</sup> Article 15: 105, especially (3): *'(3) An award of damages may be refused where the first party knew or ought to have known of the reason for the ineffectiveness'.*

### **III. Applications of the principle in comparative law**

#### **A. National laws**

130. The principle of good faith and fair dealing is recognised in all the countries of the European Union as determining of good contractual conduct<sup>511</sup>. However, the scope and the force of the principle of good faith and fair dealing do vary according to the different systems. While German and Swiss law recognise good faith as a fundamental principle, the *common law* does not recognise that it has any general applicability. In between these two extremes, the laws of other legal systems within the European Union all accord the principle of good faith and fair dealing an important role and recognise its imperative character<sup>512</sup>.

In Germany, the principle of good faith and fair dealing revolutionised the law of contract to the extent that it constitutes a characteristic feature of the law of the country. Germany is the country in which the principle of good faith and fair dealing has effected the most important breakthrough<sup>513</sup>. § 242 BGB states that ‘*an obligor has a duty to perform according to the requirements of good faith, taking customary practice into consideration*’. Literally, this requires the party to perform in good faith: the provision ‘*requires him to show proof of fairness (Treu) in the performance of his obligation, to respect the legitimate reliance that he has engendered (Glauben), [...] to take into account the legitimate interests of the other party*’<sup>514</sup>. Nonetheless, it is universally admitted that § 242 ‘*is also addressed to the creditor who must in return assert his right taking into account the legitimate interests of the debtor*’<sup>515</sup>. In addition, § 242 BGB has been extended beyond a simple principle of performance in good faith, and has become a general principle of good faith in German law. It has ‘*acquired a far more considerable scope. It has*

<sup>511</sup> *Principles of European Contract Law, Part I and II, op. cit.* p. 116.

<sup>512</sup> See in this respect, *Principles of European Contract Law, Part I and II, op. cit.* p. 117.

<sup>513</sup> *Principles of European Contract Law, Part I and II, op. cit.*, p. 116. – Compare for example, Austrian law: the principle of good faith and fair dealing is an ethical rule that is recognised as generally applicable (see OGH 29 April 1965, SZ 38/72) which is derived from the Imperial declaration in the introduction of the general Civil Code of 1<sup>st</sup> June 1811, which recognises as the basis of civil law (see OGH 7 Oct. 1974, SZ 47/104) the ‘general principles of justice’, expressly mentioned by the Code as including ‘good faith’, see § 863 and 914 ABGB. From this it clearly results that the performance of contractual obligations is subject to good faith (...). However, the requirement of good faith does not receive as extensive an interpretation as § 242 BGB in German law, see in this respect, *Principles of European Contract Law, Part I and II, op. cit.* p. 117 – 118.

<sup>514</sup> ‘... *Lui impose de faire preuve de loyauté (Treu) dans l’exécution de son obligation, de respecter la confiance légitime (Glauben) qui a été placée en lui, [...] de tenir compte des intérêts légitimes du créancier*’, M. Pédamon, *op. cit.* n°167.

<sup>515</sup> ‘... *S’adresse aussi au créancier qui doit en retour faire valoir sa créance en portant attention aux intérêts légitimes du débiteur*’, M. Pédamon, *ibid.*

been established as a 'general clause' and as a superior principle of legal ethics. In this way, it aims to insure the respect of justice and equity not only within the sphere of obligations but also throughout legal life [...], everywhere that legal relations between people are established'<sup>516</sup>. In fact, the principle of good faith and fair dealing, of which interpretation<sup>517</sup> and performance in good faith are only illustrations, has become a central pillar of German law. As a result this principle also applies to the precontractual period. Following from the theory of *culpa in contrahendo* developed in Germany by R. von Ihering in 1861<sup>518</sup>, the principle of good faith at a precontractual stage was established by the BGB before being refined and enriched by case law and legal scholarship in the 20<sup>th</sup> century. The statute modernising the law of obligations of 26 November 2001 codified this Praetorian institution in the new § 311 II BGB<sup>519</sup>. From then on, 'business connections (*geschäftliche Kontakte*)' were included amongst the legal sources of obligations; 'the simple fact of starting negotiations or even making preparations in view of entering into a contract creates, between those who participate in them, a specific legal link (*rechtliche Sonderverbindung*) from which derives precise duties, the breach of which leads to liability in respect of the party who was at fault'<sup>520</sup>. It is recognised that the precontractual relationship generates an obligation of fairness (*Redlichkeitspflicht*)<sup>521</sup>.

Lastly, although in German law there is no rule which states that it is impossible to limit the duty of good faith, it is hard to see how the obligations arising from the principle of good faith and fair dealing, established as a general principle of law and as a principle of legal ethics, could be set aside by the agreement of the parties. The rule is mandatory<sup>522</sup>.

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<sup>516</sup> '... Acquis une portée beaucoup plus considérable. Il a été érigé en 'clause générale' et en principe supérieur d'éthique juridique. A ce titre, il vise à assurer le respect de la justice et de l'équité non seulement dans le domaine des obligations mais aussi dans toute la vie juridique [...], partout où s'établissent des rapports de droit entre les personnes', M. Pédamon, *ibid.*

<sup>517</sup> See § 157, *supra* under Article 0-204.

<sup>518</sup> In his article 'Culpa in contrahendo oder Schadensersatz bei nichtigen oder nicht zur Perfektion gelangten Verträgen'.

<sup>519</sup> 'An obligation with duties under section 241 (2) also comes into existence by

1. the commencement of contract negotiations

2. the initiation of a contract where one party, with regard to a potential contractual relationship, gives the other party the possibility of affecting his rights, legal interests and other interests, or entrusts these to him, or

3. similar business contacts'.

<sup>520</sup> 'Le seul fait d'entamer une négociation ou même d'engager des préparatifs en vue de la conclusion d'un contrat crée entre ceux qui y participent un lien juridique particulier (*rechtliche Sonderverbindung*) d'où dérivent des devoirs précis dont la violation fautive fait peser une responsabilité sur celui des intéressés qui s'en rend coupable', M. Pédamon, *op. cit.* n° 10.

<sup>521</sup> M. Pédamon, *op. cit.* n° 44 and 45.

<sup>522</sup> *Principles of European Contract Law, Part I and II, op. cit.* p. 119.



Swiss law, in the same way as German law, recognises a general principle of good faith and fair dealing<sup>523</sup>. Thus, Article 2 of the Swiss Civil Code states that *'I. Every person is bound to exercise his rights and fulfil his obligations according to the principles of good faith'*<sup>524</sup>. The rule laid down by this article has become a general principle of law<sup>525</sup>. *'The whole of contract law follows the principle of good faith and fair dealing, stated in Article 2 I CCS [...]. Establishing fairness in transactions, this principle plays an essential role in the interpretation and completion of contracts'*<sup>526</sup>. At a precontractual stage, it is noticeable that precontractual liability<sup>527</sup> for *culpa in contrahendo* has been exported. In the absence of a written provision to this effect, the case law and legal scholarship have been responsible for establishing this approach. It is therefore recognised that *'as soon as they enter into negotiations, the parties are required to behave in accordance with the rules of good faith and fair dealing. Each party must do everything that they have the right to expect from a fair partner and avoid, as far as possible, anything that might cause harm to the other'*<sup>528</sup>. The duty of good faith and fair dealing therefore has many diverse applications. For example, *'a party may not, by adopting an attitude contrary to their true intentions, engender in the other party the illusory hope that a matter will be concluded and therefore lead them to spend money in this respect (or on the contrary to abstain from making other provisions). He who enters into negotiations with the aim, even if it is only a potential aim, of breaking them off must compensate the other party for any harm caused'*<sup>529</sup>. It is even considered

<sup>523</sup> See in particular G. Brogini, *'L'abus de droit et le principe de la bonne foi, Aspects historiques et comparatifs', Abus de droit et bonne foi: ed. P. Widmer and B. Cottier, Editions universitaires Fribourg Suisse, 1994, Coll. Enseignements du 3<sup>e</sup> cycle de droit 1992, Universités de Berne, Fribourg, Genève, Lausanne et Neuchâtel, p.3-21; P. Engel *'La portée de la clause générale de la bonne foi (art. 2 CC) dans la jurisprudence et par rapport à sa concrétisation dans certains domaines spécifiques (LCD, bail, contrat de travail)', ibid. p.125-137; C. Chapuis, 'Les règles de la bonne foi entre contrat et délit', Pacte, convention, contrat: Essays in honour of Professeur Bruno Schmidlin Helbing and Lichtenhahn, Bâle and Francfort-sur-le-Main, 1998, Coll. genevoise, p.227-248.**

<sup>524</sup> S. Wyler, B. Wyler *op. cit.*, *'I. Chacun est tenu d'exercer ses droits et d'exécuter ses obligations selon les règles de la bonne foi'*. Paragraph 2 states for its part that *'II. L'abus manifeste d'un droit n'est pas protégé par la loi'* (The law does not sanction the evident abuse of a person's rights).

<sup>525</sup> P. Engel, *Traité...* *op. cit.* p.179.

<sup>526</sup> *'L'ensemble du droit des contrats obéit au principe de la bonne foi, énoncé à l'article 2 I CCS [...]. Consacrant la loyauté en affaires, ce principe joue un rôle essentiel dans l'interprétation et le complètement du contrat', P. Tercier, op. cit. n°409 onwards.- The author adds that 'the good faith of Article 2 CCS (Treu und Glaube) should be distinguished from the 'good faith' of Article 3 CCS (guter Glaube), which is the absence of knowledge of legal irregularity'.*

<sup>527</sup> Contractual liability according to the Federal Tribunal.

<sup>528</sup> *'Dès qu'elles entrent en pourparlers, les parties sont tenues de se comporter conformément aux règles de la bonne foi. Chacune doit faire tout ce que l'on est en droit d'attendre d'un partenaire loyal et éviter dans la mesure du possible tout ce qui pourrait causer un préjudice à l'autre', see P. Gauch, W. R. Schlupe et P. Tercier, op. cit. t.1 n° 678 onwards.*

<sup>529</sup> *'Une partie ne peut pas, par une attitude contraire à ses véritables intentions, éveiller chez l'autre l'espoir illusoire qu'une affaire sera conclue et l'amener ainsi à faire des dépenses dans cette vue (ou au contraire à s'abstenir de prendre d'autres dispositions). Celui qui engage de la sorte des pourparlers dans le dessein, même éventuel, de les rompre doit réparation pour le préjudice causé à son partenaire', ATF 77/1951 II p.135, 137-138 cited by P. Engel, *Traité...*, *op. cit.* p.189.*

that in some situations there is a duty to break negotiations. As soon as one of the parties realises that the negotiations are bound to fail, they should bring an end to them<sup>530</sup>. In addition, an obligation to inform exists during the precontractual period, which covers any relevant circumstances which might influence the decision of one of the parties to enter into the contract, or to enter into it in certain terms<sup>531</sup>. The scope of the obligation to inform is determined by the position of the parties and the balance of their relationship. *'The duty to inform will be less extensive if the two parties are on an equal technical footing, and are practising the same profession and the same speciality. The duty to inform will be [more extensive] if one of the parties is equipped with knowledge or experience which plays a role in the decision to be taken'*<sup>532</sup>.

Although there is no express provision which forbids the undermining of the principle of good faith and fair dealing, as in German law, it is hard to see how the principle of good faith and fair dealing could be set aside by the agreement of the parties<sup>533</sup>.

**131.** In contrast to the legal systems mentioned above, English and Irish law do not recognise the existence of a general duty of good faith and fair dealing<sup>534</sup>. There are no generally applicable provisions of statute or case law relating to good faith and fair dealing in these countries, only cases dealing with specific applications of the principle of good faith.

In this way, the *common law* and the case law do not recognise a general duty of good faith in the entering into of contracts<sup>535</sup>. In particular, the case of *Walford v Miles* (1992), a decision of the House of Lords, denies the existence of a precontractual duty of good faith. According to the most senior English judges, the existence of such a principle would call into question the necessary opposition between the interests of the parties at the negotiating stage. Nonetheless, the refusal of a general principle of good faith and fair dealing is sometimes limited in scope. In this way, the re-surfacing of contract law theory in English law has led to the emergence of what

<sup>530</sup> See in this respect, P. Engel, *ibid.*

<sup>531</sup> See P. Gauch, W. R. Schlupe et P. Tercier, *op. cit.*, t. 1 n° 682 onwards. - P. Engel, *Traité...*, *op. cit.* p. 187 onwards.

<sup>532</sup> *'Le devoir d'information sera moins large si les partenaires sont sur un pied d'égalité technique, exercent la même profession, pratiquent la même spécialité. Le devoir d'information sera [plus large] si l'une des parties est dotée de connaissances ou d'expériences qui jouent un rôle dans la décision à prendre'*, P. Engel, *Traité...*, *op. cit.* p. 187.

<sup>533</sup> Compare P. Engel *Traité... op. cit.* p.109: the principle of objective good faith of Article 2 CCS *'evades the autonomy of the will, more exactly, it prevails over it'*.

<sup>534</sup> Compare American law where the principle of good faith and fair dealing is firmly anchored in substantive law, whether it is a question of provisions generally applicable to contractual matters or provisions which apply only to the regulation of trade (see *Uniform Commercial Code* [U.C.C], or more significantly the *Second Restatement of Contracts* [1981], which provides that *'every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement'*).

<sup>535</sup> On the absence, as such, of 'precontractual good faith' in English law, see H. Beale, A. Hartkamp, H. Kotz, D. Tallon, *op. cit.* p. 238.

is called ‘*a duty to negotiate with care*’<sup>536</sup>, which involves taking into consideration the interests of the other negotiating party. The English approach therefore relies on specific mechanisms to censor violations of the duty of good faith at a precontractual stage<sup>537</sup>. In addition, there are some contracts which require a reinforced duty of good faith at the stage of formation because of the particularity of their subject, (these are contracts *uberrimae fidei*, or contracts of *utmost good faith*). These contracts include, in particular, contracts of insurance, contracts transferring shares in a company, contracts for the sale of land, as well as some family arrangements dealing with inheritance. In these contracts it is recognised that the breach of a reinforced obligation to act in good faith allows the party who suffers the consequences to demand the avoidance of the contract, without however being able to obtain damages.

In respect of the contractual period, English law remains opposed to the establishment of a general principle of good faith and fair dealing, thought to be a problem for legal certainty<sup>538</sup>. Here again though, this does not mean that the requirements of good faith and fair dealing are not recognised in English law. In many situations, the same results imposing good faith are reached as elsewhere thanks to specific rules<sup>539</sup>. For example, the courts have sometimes refused to consider the contract terminated for non-performance when the true intention of the dissatisfied party was to rid himself of a bad deal<sup>540</sup>. We can also note a more general evolution in English law, based on the idea of ‘*fairness*’. This concept is comprised of three ideas: ‘*unjustifiable domination, the equivalence of the exchange and the need to ensure co-operation*’<sup>541</sup>. In

<sup>536</sup> See H. Collins, *op. cit.* p. 178 s.

<sup>537</sup> The different bases are diverse: ‘*misrepresentation*’, ‘*undue influence*’, ‘*collateral contracts*’ ‘*equitable estoppel*’, ‘*implied terms*’ ...

<sup>538</sup> For an exhaustive analysis of the reasons why English law refuses to establish a general obligation of good faith and fair dealing in the performance of contractual obligations see in particular S. A. Smith, *Atiyah’s Introduction to the Law of Contract*, Clarendon Law Series, Oxford University Press, 6<sup>th</sup> edition, 2005, pp. 164 to 166.

<sup>539</sup> We can cite the following devices as examples: ‘*consideration*’, ‘*incorporation of terms*’, ‘*undue influence and unconscionability*’, ‘*interpretation and implied terms*’, ‘*mistake and misrepresentation*’, ‘*duress and undue influence*’, ‘*waiver and estoppel*’, ‘*fiduciary obligations*’, ‘*unjust enrichment and restitution*’: See H. Collins, *op. cit.*, 270 onwards.

<sup>540</sup> See in particular, *Hoening v. Isaacs (1952) - Honk Kong Fair Shipping Co Ltd V. Kawasaki Kisen Kaisha Ltd (1962)*; cited by *Principles of European Contract Law, Part I and II, op. cit.* p. 117.

<sup>541</sup> H. Collins, *The Law of Contract, Fourth edition, LexisNexis, 2003*, p. 28-29.

*Adde* the evolution tending towards the protection of the weak party to the contract, and from this, the emergence of some control over the bad faith of the stronger party. English law has indeed progressively moved away from an undifferentiated application of the principles of contract law, which envisaged simply the control of various elements essential to the regularity of the procedure of formation of the contract (procedural fairness), towards a consideration of the positions of the parties (weak or strong, professional or consumer, informed or layman). Legal scholars do not hesitate to talk about distributive justice and substantive fairness. See in this sense, C. Elliott and F. Quinn, *Contract Law, Case Navigator, 6<sup>th</sup> edition, Pearson Longman/Lexis Nexis 2007*, p. 4: ‘(...) Over the last century, the law has to some extent moved away from simple procedural fairness, and an element of what is called substantive fairness, or distributive justice has developed. Substantive fairness aims to redress the balance of power between unequal parties, giving protection to the weaker (...)’.

addition, the concept of good faith has itself entered English law via the influence of Community law and the transpositions rendered necessary by it<sup>542</sup>.

**132.** The laws of the other countries of the European Union are somewhere in between the two extremes. Without good faith being an influence on the whole of the law as in Germany and Switzerland, it is nevertheless a principle which in general governs the whole of the contractual process. Good faith and fair dealing are, depending on the legal system, the subjects of one general provision, of several scattered provisions, or else they result from the work of the case law as a result of the inadequacies of the legal texts.

In Dutch law, the principle of good faith and fair dealing can be found in Article 6: 2 BW<sup>543</sup>. *'1. A creditor and debtor must, as between themselves, act in accordance with the requirements of reasonableness and equity. 2. A rule binding upon them by virtue of law, usage or a juridical act does not apply to the extent that, in the given circumstances, this would be unacceptable according to criteria of reasonableness and equity'*. From a terminological point of view, the provision refers to reasonableness and equity rather than good faith in order to avoid any confusion with the concept of subjective good faith. This is because the above provision is concerned with objective good faith, based on the duty on the parties to observe the standards of reasonableness and fair dealing. In this sense, the terms good faith, fair dealing, reasonableness and equity can be seen as synonymous<sup>544</sup>. In certain respects, the BW goes further than German law: in exceptional circumstances, Articles 6: 2 and 6: 248 (2) give the court the power to replace the effects of the contract or a legislative text by a provision that it sees as fairer and more equitable<sup>545</sup>. Following Article 6: 2 BW, good faith and fair dealing governs not only the law of contract but also the law of obligations. In addition, Article 6: 248, in conjunction with Article 6: 216 BW, extends the effect of the principle of good faith and fair dealing to all patrimonial multilateral juridical acts. As in the majority of European legal systems, good faith and fair dealing is considered to be a general clause, i.e. a norm the content of which cannot be abstractly established but which depends on the circumstances of the case and should be established *in concreto*. The generally employed method for establishing the content is the following: after

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<sup>542</sup> See also the Regulations adopted with the aim of transposing the European Directives which expressly reproduce the notion of good faith: see the Commercial Agents Regulations 1993, regulation 4: *'a principal, in dealing with his agent is obliged to act dutifully and in good faith'*. Regulation 5 provides that the parties cannot derogate from the duty of good faith.

In the same sense, The Unfair Terms in Consumer Contracts Regulations 1999, transposing Directive 93/13, defines an unfair terms in Article 5: *'(1) A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.'*

<sup>543</sup> Translation by D. Busch, E. H. Hondius et alii, *op. cit.* p.48.

<sup>544</sup> D. Busch, E. H. Hondius et alii, *op. cit.* p.49 ; A. S. Hartkamp *op. cit.* p.138.

<sup>545</sup> See in this sense, *Principles of European Contract Law, Part I and II, op. cit.* p. 118.

grouping the situations in which the rule of good faith is invoked, legal scholarship has revealed that the case law uses the principle for three functions: interpretation, completing the contract<sup>546</sup> and its limitation<sup>547</sup>. Lastly, the imperative character of the principle of good faith and fair dealing is recognised even in the absence of an express rule in this sense<sup>548</sup>.

In many other legal systems, the principle of good faith and fair dealing is the subject of scattered legal provisions. This is the case in Spanish law<sup>549</sup> and Greek law<sup>550</sup>. It is the same in Italian law. The requirement of good faith and fair dealing at a precontractual stage is provided for in Article 1137 of the Italian Civil Code. Non-compliance with the duty of good faith is therefore a source of delictual responsibility based on the unlawful character of the conduct of the person who has not acted in good faith<sup>551</sup>. Article 1375 of the Italian Civil Code requires performance in good faith, and Article 1366 poses the principles of an interpretation in good faith. Although the general applicability of the duty of good faith and fair dealing comes from these diverse rules, it is nevertheless reinforced by the provisions of Article 1175 of the Italian Civil Code. According to this provision, the two parties should conduct themselves in an honest fashion<sup>552</sup>. This article is generally applicable as it is included within the preliminary provisions of the section of the Civil Code on obligations in general<sup>553</sup>.

Lastly, in some of the legal systems studied it is the case law that has contributed to establishing the principle of good faith as generally applicable because the legal provisions concerning good faith and fair dealing are so few and far between<sup>554</sup>. This is the case in French law. Within the Civil Code, apart from the prohibition on fraud in Article 1116 of the Civil

<sup>546</sup> See Article 6:248 BW cited *supra* in the commentary on Article 0-201.

<sup>547</sup> D. Busch, E. H. Hondius et alii, *op. cit.* p.49 onwards.

<sup>548</sup> D. Busch, E. H. Hondius et alii, *op. cit.* p.51.

<sup>549</sup> Article 7 Civil Code: '*the parties must exercise their rights in good faith*'. - Article 1258: '*the contracting parties are bound, not only by that which is expressly agreed, but also by that which is required by good faith, custom and the law*'. - Adde Article 57 Commercial Code: '*the parties to a commercial contract must perform it in accordance with the requirements of good faith and fair dealing*'.

<sup>550</sup> Articles 200, 281 and 288 of the Civil Code.

<sup>551</sup> M.-C. Diener, *op. cit.* § 3. 6. 3.

<sup>552</sup> Article 1175: '*Il debitore e il creditore devono comportarsi secondo le regole della correttezza*' (The debtor and the creditor must behave following the rules of honesty.). '*Correttezza*' indicates the honesty that should preside over business relationships.

<sup>553</sup> Compare Portuguese law where the principle of good faith and fair dealing is expressed in specific provisions, such as Article 227 on *culpa in contrahendo*, Article 239 concerning gaps in the contract, Article 334 concerning the abuse of law and Article 437 which deals with change of circumstances, and also in general terms in Article 762 (2) Civil Code. See on this point, *Principles of European Contract Law, Part I and II, op. cit.* p. 118

<sup>554</sup> Compare the legal systems in which the recognition of good faith and fair dealing results only from the work of case law: see *Principles of European Contract Law, Part I and II, op. cit.* p. 116-117: Denmark, Sweden and Norway: the principle of good faith is recognised by the courts and by legal scholarship; Scotland: the House of Lords has recently recognised (*Smith v. Bank of Scotland* (1997) S.L.T. 1061) that an inherent principle of good faith also exists in Scottish law, although it is difficult to find a clear and comprehensive expression of it in modern law.

Code and the reference, in Article 1135<sup>555</sup>, to equity in respect of implied obligations, the only article which expressly deals with a duty of good faith is Article 1134. Paragraph 3 states that agreements ‘*must be performed in good faith*’. For a long time this provision was simply regarded as an aid to the interpretation of the contract. Today it is recognised as being responsible for unprecedented expansion. It has allowed legal scholarship and case law to impose on parties a duty to conduct oneself in good faith. This can be understood not only as conduct respecting the letter of the contract, but also as positive conduct which places numerous duties on the parties<sup>556</sup> such as that of fairness<sup>557</sup>, cooperation or collaboration<sup>558</sup>. In a general sense, these duties combine to require honest conduct and behaviour<sup>559</sup>, not only from the debtor, but also from the creditor, both in the performance of the contract and at other levels. In this way the case law has imposed a duty of good faith and fair dealing at the pre-contractual stage. Although the principle remains that of freedom to break negotiations, it is nonetheless recognised that the negotiations should be conducted in a fair way<sup>560</sup>. Many duties result from this, such as the obligation to fairly inform the negotiating partner<sup>561</sup>. In the same way, allowing the other party to run up large costs with a view to a future contract and then harshly breaking off negotiation without reason is not allowed<sup>562</sup>. The case law also clearly recognises that the party who has encouraged the creation of expectations on the part of the other party and then destroyed them is liable<sup>563</sup>. In addition to behaviour motivated by bad faith or an intention to harm, conduct that results from culpable carelessness is also sanctioned<sup>564</sup>.

In a more general way, the case law bases itself on objective facts, linked to the content of the contract, in order to determine the scope of the duty of good faith and fair dealing. It is in this

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<sup>555</sup> ‘*Agreements are binding not only as to what is therein expressed, but also as to all the consequences which equity, usage or statute give to the obligation according to its nature*’.

<sup>556</sup> See note D. Mazeaud, *Loyauté, solidarité, fraternité: la nouvelle devise contractuelle?*, Mélanges F. Terré, Dalloz-PUF, éditions juris-classeur, 1999, p. 603 onwards. - C. Jamin, *Plaidoyer pour le solidarisme contractuel*; Mélanges Ghestin, LGDJ 2001, p. 441.

<sup>557</sup> For example, the case law refuses to allow a termination clause to apply if the person invoking it behaved unfairly: Cass. civ. 1<sup>ère</sup>, 31 janv. 1995: D. 1995, somm. 230, obs. D. Mazeaud; Defrénois 1995, p. 749, obs. P. Delebecque. - 16 février 1999: Bull. civ. I n° 52. – On the duty of fairness, see more generally, Y. Picod, *Le devoir de loyauté dans l’exécution du contrat*: thèse LGDJ, Paris, 1989.

<sup>558</sup> For example, good faith and fair dealing prevents a party to the contract from profiting from the mistake made by the other party in omitting to charge for the essential services of the contract: see Cass. civ. 1<sup>ère</sup>, 23 janv. 1996: Bull. civ. I n° 36.

<sup>559</sup> Compare R. Demogue, *Traité des obligations en général*: tome VI, Rousseau, Paris, 1931, n° 3 onwards. This author, often considered as being at the origin of the renewal of the interpretation of Article 1134 para 3 of the Civil Code, was one of the first to consider that this article imposed an obligation on the parties to conduct themselves in conformity ‘*with the rules that imply fair and honest conduct*’.

<sup>560</sup> Cass. com. 7 avril 1998, D. 1999, p. 514, n. P. Chauvel.

<sup>561</sup> Cass. civ. 1<sup>ère</sup>, 6 janvier 1998, Bull. civ. I n° 7; Defrénois 1998, article 36815, n° 70, obs. D. Mazeaud: liability of the party who knowingly allows negotiations to continue thereby generating costs for the other party to the contract.

<sup>562</sup> Cass. com. 20 mars 1972, Bull. civ. I n° 93; JCP 1973 II 17543, n. J. Schmidt.

<sup>563</sup> Cass. com., 11 juil. 2000, Cont. Cons., 2000, n° 174.

<sup>564</sup> Cass. com., 22 fév. 1994, Bull. civ. IV, n° 79.

way, for example, that the existence and the content of the duty of collaboration, are determined by the subject of the contract entered into<sup>565</sup>. The case law also ensures compliance with the requirements of good faith and fair dealing by basing itself on general principles which tend to prohibit all bad faith in contractual relations, such as abuse of law<sup>566</sup> or fraud. The principle of good faith and fair dealing is not however without limit. Two recent cases are proof of this. In the first<sup>567</sup>, the Cour de cassation attributed a strictly enshrined domain to Article 1134 paragraph 3 of the Civil Code in deciding that the obligation of good faith required the existence of contractual ties<sup>568</sup>. In the second, the Cour de cassation held that, although Article 1134 paragraph 3 allows the judge to sanction the unfair use of a contractual prerogative, it ‘*does not allow him to undermine the very substance of the rights and obligation legitimately agreed between the parties*’<sup>569</sup> thereby applying Article 1134 paragraph 1 of the Civil Code<sup>570</sup>.

**133.** It is notable that, at a precontractual stage, different national laws impose a reinforced duty of good faith on a party where that party is in a much stronger position than the other, echoing similar treatment in the Principles of European Contract Law. We find duties to inform about the clauses of the contract, a prohibition on taking an excessive benefit from the contract, and lastly the sanctioning of unfair terms.

Many different mechanisms aim to ensure that information is given about the clauses stipulated by the party in the stronger position. These mechanisms apply, depending on the case, whatever the position of the parties or else only in respect of contracts entered into between professionals and consumers.

It is generally recognised that the party in the stronger position should draw the attention of the other party to the non-negotiated terms. For example, in Italian law, Article 1341 of the Civil Code, concerning non-negotiated contracts, provides in paragraph 2 that some terms (for example limitation clauses, clauses limiting freedom of contract in respect of third parties, and clauses limiting which exceptions are opposable ...) can only be inserted by a party who has already

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<sup>565</sup> See *infra* under Article 0-304.

<sup>566</sup> See in particular P. Stoffel-Munck, *L'abus dans le contrat. Essai d'une théorie*: thèse LGDJ 2000. – The case law sometimes links the sanctioning of abuse of law to Article 1134 para 3. For the prohibition on abuse in the unilateral termination of contracts for an indefinite period, see for example Cass. Civ. 1<sup>ère</sup>, 5 février 1985, Bull. civ. I, n° 54, p. 52; RTDC 1986, 105, obs. J. Mestre. - Cass. com., 8 avril 1986, Bull. civ. IV, n° 58. - Cass. com., 20 janvier 1998, Bull. civ. IV, n° 40; D., 1998, 413, note. Ch. Jamin; 1999, som. 114, obs. D. Mazeaud.

<sup>567</sup> Cass. civ. 3<sup>ème</sup>, 14 sept. 2005: Bull. civ. III n° 166; D. 2006. 761, note D. Mazeaud; JCP 2005 II 10173, note Loiseau.

<sup>568</sup> And this was not the case in a case of failure of the condition precedent found in the contract.

<sup>569</sup> ‘... *L'autorise pas à porter atteinte à la substance même des droits et obligations légalement convenus entre les parties*’, Cass. com. 10 juillet 2007: pourvoi n° 06-14768; D. 2007, act. jur. 1955.

<sup>570</sup> Which states that ‘*agreements lawfully entered into take the place of the law for those who have made them*’.

established the content of the contract if they are specially approved in writing by the other party. The same rule applies, by reference to Article 1342, to standard form contracts.

In addition, the majority of national laws specially regulate standard terms inserted into a contract so that they cannot harm the party who did not stipulate them.

In German law, by virtue of § 307 I BGB, '*provisions in standard business terms are ineffective if, contrary to the requirement of good faith, they unreasonably disadvantage the other party to the contract with the user. An unreasonable disadvantage may also arise from the provision not being clear and comprehensible*'. This article '*rests on the principle of good faith and fair dealing, it is a direct continuation of the case law and former legislation based on § 242 BGB*'<sup>571</sup>. It is notable that German law does not differentiate according to the position of the party. § 307 applies to all contracts which contain standard terms<sup>572</sup>.

In Dutch law, by virtue of Article 6: 233 (b) BW, a general condition of contract can be declared invalid if its author has not offered the other party reasonable opportunity to gain awareness of the standard terms. Article 6: 234 BW enumerates the way in which this reasonable opportunity can be offered. These provisions protect consumers and small businesses<sup>573</sup>.

In French law, standard terms only bind the parties if, on the one hand the contract contains a reference clause which refers to these conditions and considers them accepted, and on the other hand the accepting party has had chance to properly consult them<sup>574</sup>. In addition, a clause which appears in the standard terms but which was only brought to the attention of the other party after entering into the contract does not bind or have any other effect on them<sup>575</sup>. The simple attachment of the standard terms does not suffice to render them invocable against the contracting party if their existence has not been brought to the attention of that party by the other party to the contract.<sup>576</sup>

In Italian law, a provision of the Civil Code, Article 1341 paragraph 1, expressly provides that standard terms inserted by one party will only bind the other party if, at the moment of entering into the contract, he had, or could reasonably have had, knowledge of that clause.

Lastly, in English law, if a party has signed a contractual document, all the terms contained in that document and to which it refers are treated as part of the contract<sup>577</sup>. However, if the term does not figure in a signed document it does not form part of the contract unless the other party to

<sup>571</sup> '*Repose sur le principe de la bonne foi, il se situe dans le prolongement direct de la jurisprudence et de la législation antérieures qui se fondaient sur le § 242 BGB*', M. Pédamon, *op. cit.* p. 236-237.

<sup>572</sup> M. Pédamon, *op. cit.* n° 114.

<sup>573</sup> See *Principles of European Contract Law, Part I and II, op. cit.* p. 151.

<sup>574</sup> Cass. civ. 1<sup>ère</sup>, 20 janvier 1993, *Cont. Conc. Consom.* Avril 1993, n° 77. – 17 novembre 1998, *Cont. Conc. Consom.* 1998, n° 18, obs. L. Leveneur ; Defrénois 1999, p. 367, obs. P. Delebecque.

<sup>575</sup> Cass. com. 28 avril 1998: *RJDA* 1998, n° 938; *RTD civ.* 1999, p. 81, obs. J. Mestre.

<sup>576</sup> Cass. com. 10 février 1959, *Bull. civ. III*, n° 70. – Civ. 1<sup>ère</sup>, 4 juillet 1967, *Bull. civ. I* n° 248.

<sup>577</sup> See *L'Estrange v. F. Graucob Ltd* (1934) 2 *K.B.* 394, *C. A.*



the contract has been reasonably informed of it at the moment of entering into the contract or before<sup>578</sup>, or it has been incorporated into the contract by a past practice<sup>579</sup> or a regular commercial practice<sup>580</sup>.

Within the different national laws, we can find two applications of the prohibition on a party profiting from their superior position in order to take an excessive benefit from the contract. On the one hand, the taking of an excessive profit is in itself sanctioned. On the other hand, unfair terms are prohibited.

First, the approaches adopted by the different national legal systems in respect of the sanction for excessive benefit are varied. Some systems sanction such benefit specifically while others base the sanction on more general devices.

In Italian law, judicial rescission of the contract is possible when a party has contracted on unjust terms because they were in a state of necessity<sup>581</sup>. No economic threshold is provided and the unjust character of the terms of the contract is appreciated objectively<sup>582</sup>. Rescission for substantive inequality of bargain is also possible if the economic imbalance results from the advantage taken by one of the parties of the state of need of the other. In this case, Article 1448 of the Italian Civil Code requires an economic imbalance greater than half of the value of the goods or services.

In Dutch law, the sanction of the taking of an excessive benefit comes under the remit of abuse of circumstance provided for in Article 3: 44 (4) BW<sup>583</sup>. Abuse of circumstance is constituted by: the existence of specific circumstances, a causal link between them and the entering into of the contract, and the fact that the party, who knew of the victim's critical position, nonetheless entered into the contract although they should have abstained in view of the manifest disadvantage which would result for the victim<sup>584</sup>.

In Swiss law, the sanction of the taking of an excessive benefit operates via the sanction of grossly unbalanced contracts on the basis of Article 21 I CO. Inequality of bargain (*lésion*), in the sense of this article, requires the reunion of an objective element (the obvious disproportion)

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<sup>578</sup> See *Parker v. South Eastern Railway Co* (1877) 2 CPD 416.

<sup>579</sup> See *Hollier v. Rambler Motors AMC Ltd* (1972) 2 Q. B. 71, C. A.

<sup>580</sup> See *British Crane Hire Corp. Ltd v. Ipswich Plant Hire Ltd* (1975) Q. B. 303 C. A.

<sup>581</sup> Article 1447 of the Civil Code.

<sup>582</sup> M.-C. Diener, *op. cit.* § 15. 2. 1.

<sup>583</sup> 'A person who knows or should know that another is being induced to execute a juridical act as a result of special circumstances – such as state of necessity, dependency, wantonness, abnormal mental condition or inexperience – and who promotes the creation of that juridical act, although what he knows or ought to know should prevent him therefore, commits an abuse of circumstances' (translation D. Busch, E. H. Hondius et alii *op. cit.* p.212).

<sup>584</sup> D. Busch, E. H. Hondius et alii, *op. cit.* p.212.

and a subjective element (the decision was determined by the exploitation of the difficulty, the carelessness or the inexperience of the victim)<sup>585</sup>.

In German law, although no rule specifically sanctions the excessive profit taken from the other party's vulnerable position, this situation comes within the sphere of application of § 138 II BGB (legal transaction contrary to public policy). This provision '*treats as invalid any extortionary act by which a person exploiting the state of necessity, the weakness or the inexperience of another is promised or granted disproportionate patrimonial advantages either to himself or to a third party*'<sup>586</sup>.

In French law, the basis of the sanction of an excessive benefit taken from the exploitation of the contracting party's weakness is subject to debate. In the absence of any specific provision, part of the legal scholarship suggests that it should be seen as a specific instance of duress, namely as an example of economic duress. The idea is not to sanction the party who contracts with the party suffering a state of necessity, but to sanction the party who profits from this situation in order to take an excessive benefit<sup>587</sup>. The case law has recognised that '*economic constraint is closer to duress than to lésion*'<sup>588</sup>. In this way, a contract of employment that was very disadvantageous for the employee could be invalidated, it having been entered into when the employee was in a situation of necessity resulting from the illness of their child and a pressing need for money<sup>589</sup>. However, the case law requires that there is an abuse of the economic dependence of the contracting party. Thus, it has held that '*consent is vitiated by duress only when a situation of economic dependence is abused in order to profit from the dependent party's fear of some evil directly threatening their legitimate interests*'<sup>590</sup>.

In English law, reference is made to two distinct doctrines, each of which requires the exploitation of a particularly vulnerable party. First, the doctrine of undue influence applies when one party exerts, or is in the position to exert, considerable authority over the other party.

<sup>585</sup> See P. Engel, *Traité...*, *op. cit.* p.298 onwards.

<sup>586</sup> '*... Frappe de nullité tout acte lésionnaire (Wucher) par lequel une personne exploitant l'état de nécessité, la légèreté ou l'inexpérience d'autrui se fait promettre ou accorder soit à elle-même soit à un tiers des avantages patrimoniaux en disproportion flagrante avec sa propre prestation*', M. Pédamon, *op. cit.* n° 24. – Compare § 315 I BGB by virtue of which '*where performance is to be specified by one of the parties to the contract, then in case of doubt it is to be assumed that the specification is to be made at the reasonably exercised discretion of the party making it*'.

<sup>587</sup> See J. Flour, J.-L. Aubert et E. Savaux, *op. cit.* n° 224. – J. Ghestion, *op. cit.* n° 586.

<sup>588</sup> '*La contrainte économique se rattache à la violence et non à la lésion*', Cass. civ. 1<sup>ère</sup>, 30 mai 2000, Bull. civ. 2000, I, n° 169 ; RTD civ. 2000, p. 827, obs. J. Mestre et B. Fages; *ibid.*, p. 863, obs. P.-Y. Gautier; D. 2000, p. 879, note J.-P. Chazal; Defrénois 2000, art. 37237, p. 1124, note D. Mazeaud.

<sup>589</sup> Cass. soc., 5 juill. 1965: Bull. civ. 1965, IV, n° 545.

<sup>590</sup> '*Seule l'exploitation abusive d'une situation de dépendance économique, faite pour tirer profit de la crainte d'un mal menaçant directement les intérêts légitimes de la personne, peut vicier de violence son consentement*', Cass. civ. 1<sup>ère</sup>, 3 avr. 2002, Bull. civ. 2002, I, n° 108; RTD civ. 2002, p. 502, obs. J. Mestre et B. Fages; JCP 2002, I, 184, note G. Virassamy; D. 2002, p. 2844, obs. D. Mazeaud; *ibid.* p. 1860, note J.-P. Gridel et note J.-P. Chazal; Contrats, conc. consom. 2002, comm. 121, note L. Leveneur; Defrénois 2002, art. 37607, p. 1246, note E. Savaux

Recourse is available if it is proved, either that the party has exerted this authority over the other to the extent that the other party's independence of spirit is suppressed, or the parties are in a relationship of trust and confidence. In both of these cases, if the weaker party enters into a manifestly disadvantageous contract with the stronger party then a presumption arises that undue influence has been exerted<sup>591</sup>. Secondly, according to the doctrine of unconscionability, if a party deliberately takes advantage of the poverty and ignorance of the other party to buy goods from him at a price which is much lower than their real value, the contract can be invalidated<sup>592</sup>. This doctrine is old and infrequently used<sup>593</sup>.

The prohibition on taking an excessive benefit by profiting from a position of strength is also effected by the censoring of unfair terms. Here the different national laws have been modified under the influence of Directive 93/13/EEC *on unfair terms in consumer contracts*. Article 3.1 of this directive makes acting contrary to good faith one of the elements which allows a clause to be classified as unfair. Since transposition of the directive<sup>594</sup>, some legal systems have reproduced this criterion as part of the definition of unfairness. This is the case in German law<sup>595</sup> and also in Italian law<sup>596</sup>. It is the same in English law in respect of contracts entered into with consumers within the *Unfair terms in consumer contracts regulations 1999*<sup>597</sup>. The idea according to which a special duty of good faith and fairness is imposed on the 'strong' party when one of the parties is not able, because of their position, their situation or their competences, to negotiate the contract or its terms, is reproduced within Regulation 5: '*a contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer*'. It is also stated that the unfair character of the contract or contract term may be appreciated not only by reference to the very letter of the contract (or the very letter of other contracts to which the principal contract refers) but in function of the nature of the goods or services concerned, as well as all the circumstances which surrounded the

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<sup>591</sup> *Principles of European Contract Law, Part I and II, op. cit.* p. 264.

<sup>592</sup> See *Fry v. Lane* (1884): 40 Ch.D. 312.

<sup>593</sup> *Principles of European Contract Law, Part I and II, op. cit.* p.264.

<sup>594</sup> For an overview of the transposition of the directive in the different Member States see the *Commission Report on the application of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts*. COM (2000) 248 final.

<sup>595</sup> § 305 to 310 BGB. See in particular § 307.

<sup>596</sup> Article 1469 bis of the Civil Code.

<sup>597</sup> Even if its sphere of application seems to be wider and concerns many aspects of the professional / consumer relationship, this legislation has as its principal subject the prevention and sanction of unfair terms. On the scope and content of the *Unfair Contract Terms Act 1977*, see H. Beale, A. Hartkamp, H. Kotz, D. Tallon, *op. cit.* p. 515 to 519.

conclusion of the contract<sup>598</sup>. The clarification of the standard of good faith, which the provision refers to, has been the subject of a House of Lords decision. In the case of *Director General of Fair Trading v. First National Bank* (2001), the House of Lords had the opportunity to state that good faith, far from being an artificial or purely technical notion, should be appreciated by reference to good standards of business morality and commercial practice (fair and open dealing)<sup>599</sup>.

Following transposition of the above directive, other legal systems have distanced themselves from the criterion of good faith and only use the criterion of significant imbalance to characterise unfairness. Thus, in French law, Article L. 132-1 of the Consumer Code states that *'clauses which aim to create or result in the creation, to the detriment of the non-professional or the consumer, of a significant imbalance between the rights and obligations of the parties to the contract, are unfair'*.

## B. International law and Acquis communautaire

134. The scope awarded to the duty of good faith in the **Vienna Convention** is somewhat ambiguous. Indeed, Article 7 (1) states that *'in the interpretation of this Convention, regard is to be had [...] to the need to promote [...] the observance of good faith in international trade'*. In spite of the letter of the provision, it is not certain that the Convention makes good faith and fair dealing a simple directive of interpretation. Indeed, this provision seems to be the result of a compromise during the negotiation of the terms of the Convention, between the representatives of the *civil law* countries (in favour of establishing a duty of good faith) and the representatives of *common law* countries (forcibly opposed to such an approach)<sup>600</sup>. In particular England and Wales were opposed to any establishment of the duty of good faith in the guise of a general principle<sup>601</sup>. The provision is therefore interpreted in a diverse manner, with some going so far as to deny any establishment of a duty of good faith within the Convention. However, this analysis hardly seems tenable in view of the numerous Convention articles which simply follow

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<sup>598</sup> See *Unfair terms in consumer contracts regulations 1999*, reg. 6: *'(...) the unfairness of a contractual term shall be assessed, taking into account the nature of the goods and services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all the circumstances attending the conclusion of the contract and to the other terms of the contract or another contract on which it is dependent (...)'*.

<sup>599</sup> On the requirements of fair and open dealing, see in particular H. Treitel, *op. cit.* pp. 112 to 114.

<sup>600</sup> See the United Nations Conference on contracts for the international sale of goods, Vienna, 10 March – 11 April 1980, United Nations Official Documents, p79 and p 272; see also G. Eorsi, *'Problems of Unifying Law on the Formation of Contracts for the International Sale of Goods'*, *Am. J. Int. Law*, 1979, vol. 27, p. 311 onwards, especially, p. 313.

<sup>601</sup> See in this respect, P. Lalive, *'Sur la bonne foi dans l'exécution des contrats d'État'*, in *Mélanges offerts à Raymond Vander Elst*, éd. Némésis, 1981, p. 434.

through the consequences of the principle of good faith and fair dealing. Thus, at a pre-contractual stage, although the Convention poses the principles of free revocation of the offer before it is accepted, this is different *'if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer'*<sup>602</sup>. More generally we can cite Article 29.2 according to which *'a contract in writing which contains a provision requiring any modification or termination by agreement to be in writing may not be otherwise modified or terminated by agreement. However, a party may be precluded by his conduct from asserting such a provision to the extent that the other party has relied on that conduct'*. We can also consider Article 35.3: *'The seller is not liable under subparagraphs (a) to (d) of the preceding paragraph for any lack of conformity of the goods if at the time of the conclusion of the contract the buyer knew or could not have been unaware of such lack of conformity'*<sup>603</sup>. Article 77, concerning the obligation to mitigate loss, can also be seen as an application of a general principle of good faith and fair dealing between the parties: *'a party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach. If he fails to take such measures, the party in breach may claim a reduction in the damages in the amount by which the loss should have been mitigated'*. Finally, Article 80 of the Convention states that *'a party may not rely on a failure of the other party to perform, to the extent that such failure was caused by the first party's act or omission'*.

In view of these different provisions, there is as a result no doubt that the duty of good faith and fair dealing permeates the contractual process of sale within the Convention, and that this is the case whatever the scope attributed to the ambiguous Article 7 (1).

**135.** It has already been noted that the principle of contractual fairness is frequently found in **Community law**<sup>604</sup>. Nevertheless, the recognition of a genuine duty of good faith and fair dealing is uncertain. As the recent Green Paper *on the review of the Consumer Acquis*<sup>605</sup> showed, for the moment the Community provisions which apply to the consumer in contractual affairs *'do[es] not include a general duty to deal fairly or to act in good faith'*<sup>606</sup>. However, the European Commission proposes to introduce such a general principle into contract law: *'(...) a general provision could be built round the phrase "good faith and fair dealing". This includes the idea that they show due regard to the interests of the other party, considering the specific situation of certain consumers. (...) The main advantage of an overarching general clause for*

<sup>602</sup> Article 16.2 (b).

<sup>603</sup> Compare Article 40: *'The seller is not entitled to rely on the provisions of articles 38 and 39 if the lack of conformity relates to facts of which he knew or could not have been unaware and which he did not disclose to the buyer'*.

<sup>604</sup> See *supra* Article 0-201.

<sup>605</sup> Green Paper *on the review of the Consumer Acquis* 15 March 2007, OJ 2007/C61/01.

<sup>606</sup> Point 4.3 (Annex I) of the above Green Paper.

*consumer contracts (...) would be the creation of a tool which would provide guidance for the interpretation of more specific provisions and would allow the courts to fill gaps in the legislation by developing complementary rights and obligations*<sup>607</sup>.

There are already occasional applications of the duty of good faith and fair dealing, either at the margins of the domain of contract *stricto sensu*, or else applying in a narrower way within the contractual domain. This first example can be illustrated by the wide expression ‘*professional diligence*<sup>608</sup>’, used in the Directive on ‘*unfair business-to-consumer commercial practices in the internal market*’ and defined as a ‘*standard of special skill and care which a trader may reasonably be expected to exercise towards consumers, commensurate with honest market practice and/or the general principle of good faith in the trader's field of activity*’<sup>609</sup>. The second example can be found at a precontractual stage with the reinforced protection that is given to the weaker party to the contract, and the reinforced requirement to inform. Thus for example, Directive 2002/65/EC concerning the distance marketing of consumer financial services<sup>610</sup> establishes in Article 3, dedicated to ‘*information to the consumer prior to the conclusion of the distance contract*’<sup>611</sup>, that the consumer should be informed of the supplier. The second paragraph of this article very precisely details the manner in which precontractual information should be given to the future contracting party: ‘*in a clear and comprehensible manner (...) with due regard, in particular, to the principles of good faith in commercial transactions*’<sup>612</sup>. In addition, we also see the sanction of unfair terms by Directive 93/13/EEC 5 April 1993<sup>613</sup> in Community law. When the requirement of good faith is not met<sup>614</sup>, in so far as the term of the contract has not been individually negotiated and ‘*it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer*’<sup>615</sup> then the clause in question is ‘*regarded as unfair*’<sup>616</sup>.

Some provisions also reflect the impossibility for the parties to limit or derogate from the duty of good faith and fair dealing. This takes the form of a total prohibition on clauses excluding the operation of mandatory norms which would have the above effect. This is the case

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<sup>607</sup> Point 4.3 (Annex I) (‘*The concepts of good faith and fair dealing in the consumer acquis*’), in the Green Paper on the review of the Consumer Acquis.

<sup>608</sup> Article 2 (h) of Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market, OJ L 149, 11/06/2005 p22 – 39.

<sup>609</sup> *Ibid.*

<sup>610</sup> Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC OJ L 271, 9/10/2002, p. 16–24

<sup>611</sup> The title of Article 3 of the above Directive.

<sup>612</sup> Article 3 § 2 of the above mentioned Directive.

<sup>613</sup> Council Directive 93/13/EEC 5 April 1993 on unfair terms in consumer contracts, OJ L 095 21/04/1993, p. 29-34.

<sup>614</sup> Article 3 § 1 of the above Directive.

<sup>615</sup> *Ibid.*

<sup>616</sup> *Ibid.*

for example in Directive 94/47/EC *on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis*<sup>617</sup>, which requires Member States, by way of the transposition into national law of the above texts, to make provision ‘*in their legislation to ensure that any clause whereby a purchaser renounces the enjoyment of rights under this Directive or whereby a vendor is freed from the responsibilities arising from this Directive shall not be binding on the purchaser, under conditions laid down by national law*’<sup>618</sup>.

### C. Codifications by legal scholars

136. Whilst there is a provision to be found in the **Unidroit Principles**, as in the Principles of European Contract Law, which poses a mandatory general duty of good faith and fair dealing, the other projects have chosen to proceed by way of establishing particular applications of the duty at the different stages of the contractual process.

Thus, the **Unidroit Principles** establish good faith as generally applicable in Article 1.7 ‘(1) *Each party must act in accordance with good faith and fair dealing in international trade. (2) The parties may not exclude or limit this duty*’. The consequences of this principle are then applied at the precontractual stage. In this way, Article 2.1.15 states in paragraph 2 that ‘*(...) a party who negotiates or breaks off negotiations in bad faith is liable for the losses caused to the other party*’. Paragraph 3 clarifies, ‘*it is bad faith, in particular, for a party to enter into or continue negotiations when intending not to reach an agreement with the other party*’.

In the **Proposals for Reform of the Law of Obligations and the Law of Prescription**, in respect of the negotiation stage of the contract, it is stated that ‘*parties are free to begin, continue and break off negotiations, but these must satisfy the requirements of good faith*’<sup>619</sup>. In addition, ‘*a break-down in negotiations can give rise to liability only if it is attributable to the bad faith or fault of one of the parties*’<sup>620</sup> which *a contrario* leads to the establishment of a requirement of good faith at a precontractual stage. In addition, the project provides for a precontractual obligation to inform in Article 1110 which states in its first paragraph that ‘*if one of the parties knows or ought to have known information which he knows is of decisive importance for the*

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<sup>617</sup> Directive 94/47/EC of the European Parliament and the Council of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis, OJ L 280 29/10/1994, p. 83-87.

<sup>618</sup> Article 8 of the above Directive.

<sup>619</sup> Article 1104 para 1, J. Cartwright and S. Whittaker, *op. cit.*

<sup>620</sup> Article 1104 para 2, *ibid.*

other, he has an obligation to inform him of it'<sup>621</sup>. Nevertheless, this obligation exists 'only in favour of a person who was not in a position to inform himself, or who could legitimately have relied on the other contracting party, by reason (in particular) of the nature of the contract or the relative position of the parties'<sup>622</sup>. When it comes to formation of the contract, the prohibitions on fraud and duress as factors vitiating consent are also an expression of the requirement of good faith<sup>623</sup>. Finally, in respect of performance of the contract, it is provided that contracts 'must be performed in good faith'<sup>624</sup>.

The duty of good faith and fair dealing is present in the **European Code of Contract Preliminary Draft** without having been established as a general principle. Thus, Article 32 (1) in the section 'Implied terms' states that 'in addition to the express terms the contract includes terms which (b) stem from the obligation of good faith'. Moreover, at a precontractual stage, this duty is broken down into various aspects and comprises an obligation of good faith<sup>625</sup>, an obligation to inform<sup>626</sup> and an obligation of confidentiality<sup>627</sup>. In addition, Article 6.3 states that 'if in the course of negotiations the parties have already given consideration to the essentials of the contract the conclusion of which is predictable, either party who breaks off negotiations without justifiable grounds, having created reasonable confidence in the other that the contract will be concluded, is acting contrary to good faith'. In respect of the formation of the contract, Article 1 states in its second paragraph that a contract may result from an agreement implied 'from conduct when in conformity with (...) good faith'. In respect of performance of the contract, a duty of good faith and fair dealing is confirmed<sup>628</sup>. Article 44 for its part states that

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<sup>621</sup> *Ibid.*

<sup>622</sup> Article 1110 para 2, *ibid.*

<sup>623</sup> Article 1111 onwards.

<sup>624</sup> Article 1134 para 3, *ibid.*

<sup>625</sup> Article 6, especially § 1: '1. Each of the parties is free to undertake negotiations with a view to concluding a contract without being held in any way responsible if the contract is not drawn up, unless his conduct is contrary to good faith'.

<sup>626</sup> Article 7 'Obligation to inform': '1. During negotiations each party who knows or should know any circumstance of fact or law which would help the other party assess the validity of the contract and the benefit of concluding it is under a duty to inform the other.

2. In the event of information being withheld or being falsely or partially given, if the contract has not been concluded or is void, the party who has acted contrary to good faith is responsible to the other party in the measure stated in Art 6 para 4. If the contract has been concluded, the party in bad faith must return such sum or pay such compensation to the other party as the court shall determine on equitable grounds, but without prejudice to the other party's right to avoid the contract on the ground of mistake.'

<sup>627</sup> Article 8 'Obligation of confidentiality': '1. The parties have the obligation to treat with circumspection any confidential information obtained during negotiations.

2. Whichever party does not comply with this obligation shall compensate the other for any resulting loss, and if he has also drawn undue benefit from the confidential information he must recompense the other party to the extent of his own enrichment.'

<sup>628</sup> Article 75 § 1: 'Each of the parties is bound to perform exactly and completely all the obligations laid on him by the contract, without request from the entitled party being necessary. In rendering due performance the debtor must



*‘the effects of a contract derive not only from the agreement made between the parties but also from (...) good faith and equity’.* Good faith has also been called on in the case of refusal of performance made before the time due as such a refusal is only possible if it is not contrary to good faith<sup>629</sup>.

**137.** In addition it is notable that the different projects, with the exception of the **Proposals for Reform of the Law of Obligations and the Law of Prescription**, infer a reinforced obligation to inform about general conditions of the contract from the duty of good faith and fair dealing.

The **Unidroit Principles** designate these general conditions as ‘standard-terms’<sup>630</sup>. Article 2.1.20 states, in its first paragraph, that *‘no term contained in standard terms which is of such a character that the other party could not reasonably have expected it, is effective unless it has been expressly accepted by that party’*<sup>631</sup>.

The **European Code of Contract Preliminary Draft** holds that the *‘standard conditions of contract drawn up by one of the parties in order to regulate a multiplicity of specific contractual relations in a uniform manner are effective as against the other party if he has knowledge of the conditions or should have knowledge of them by using ordinary diligence (...)’*<sup>632</sup>. Article 30 paragraph 4 provides in addition that some of these clauses should be expressly approved in writing<sup>633</sup>.

**138.** Lastly, the different projects all sanction the party who profits from their stronger position to take an excessive benefit from the contract or in order to stipulate unfair terms.

Firstly, in respect of the sanction for excessive benefit, Article 3.10 of the **Unidroit Principles** states that *‘(1) A party may avoid the contract or an individual term of it if, at the time*

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*conform to what has been agreed by the parties, to good faith and to the diligence required in the particular case, on the basis of the agreement, the circumstances and current practice’.*

<sup>629</sup> Article 109 § 1: *‘1. Without prejudice to the provisions of Art 101 the creditor has the right to refuse performance offered or made before the time due, or in greater quantity than that due, provided his refusal is not contrary to good faith as understood in the preceding article to the extent that the article is applicable’.*

<sup>630</sup> Article 2.1.9: *‘Contracting under standard terms’: ‘(1) Where one party or both parties use standard terms in concluding a contract, the general rules on formation apply, subject to Articles 2.1.20 - 2.1.22’.*

*(2) Standard terms are provisions which are prepared in advance for general and repeated use by one party and which are actually used without negotiation with the other party’.*

<sup>631</sup> Paragraph 2 states that *‘in determining whether a term is of such a character regard shall be had to its content, language and presentation’.*

<sup>632</sup> Article 33.

<sup>633</sup> Article 30, para 4: *‘In the standard conditions of contract provided for in Art 33, those terms are ineffective, unless specifically approved in writing, which create, in favour of the party who has prepared them, limitations of liability or rights of withdrawing from the contract or of suspending its performance, or which impose on the other party forfeitures, limitations on the right to raise defences, restrictions on contractual freedom in relations with third parties or on the extension or the implied renewal of the contract, arbitration clauses or derogations from the competence of the courts’.*

*of the conclusion of the contract, the contract or term unjustifiably gave the other party an excessive advantage. Regard is to be had, among other factors, to (a) the fact that the other party has taken unfair advantage of the first party's dependence, economic distress or urgent needs, or of its improvidence, ignorance, inexperience or lack of bargaining skill (...)'.*

The **Proposals for Reform of the Law of Obligations and the Law of Prescription** establish the concept of economic duress (*violence économique*) as the basis for the sanction of excessive benefit. Thus Article 1114-3 states that '*there is also duress where one party contracts under the influence of a state of necessity or dependence, if the other party exploits this situation of weakness by obtaining from the contract a manifestly excessive advantage*'<sup>634</sup>. The second paragraph of the provision details that '*a situation of weakness is assessed by reference to all the circumstances, taking particular account of the vulnerability of the party who submits, the pre-existing relationship between the parties, and their economic inequality*'<sup>635</sup>.

The **European Code of Contract Preliminary Draft** also sanctions the taking of an excessive benefit. Article 30 § 3 states thus that '*as provided for in Art 156, any contract may be rescinded where one of the parties, by abusing the other's situation of danger, need, incapacity to understand or to form an intention, inexperience, or economic or moral subjection, has induced that other party to promise or provide to him or a third party a performance or other pecuniary benefits clearly disproportionate to the performance he has provided or promised in exchange*'.

Second, all the projects, with the exception of the Unidroit Principles, sanction the use of unfair terms.

In the **Proposals for Reform of the Law of Obligations and the Law of Prescription**, Article 1122-2 states that '*(...) a contract term which creates a significant imbalance in the contract to the detriment of one of the parties may be revised or struck out at the request of that party, in situations where the law protects him by means of a particular provision – notably because he is a consumer, or where the clause has not been negotiated*'<sup>636</sup>.

In the **European Code of Contract Preliminary Draft**, Article 30 § 5 states that '*in contracts drawn up between a professional and a consumer, apart from Community rules, those terms are ineffective which have not been individually negotiated if they create a significant imbalance, to the detriment of the consumer, between the rights and the obligations arising under the contract, even if the professional is in good faith*'.

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<sup>634</sup> J. Cartwright and S. Whittaker, *op. cit.*

<sup>635</sup> *Ibid.*

<sup>636</sup> *Ibid.*

**IV. Proposed text**

**Article 0-301: General duty of good faith and fair dealing**

Each party is bound to act in conformity with the requirements of good faith and fair dealing, from the negotiation of the contract until all of its provisions have been given effect.

The parties may neither exclude this duty, nor limit it.

## ***Article 0-302: Performance in good faith***

### **I. General presentation of the principle**

139. After the statement of a general duty of good faith and fair dealing in Article 0-301, it appears necessary to clarify the scope of this duty in respect of performance of the contract. Naturally, it is also important to state the principle of performance in good faith itself. Such a principle appears in the majority of the sources studied<sup>637</sup>. But, due as always to a concern over the accessibility and intelligibility of the proposed guiding principle<sup>638</sup>, it would appear opportune to specify clearly what exactly performance in good faith requires, rather than to limit the discussion to a statement of the one principle alone. The point of these clarifications is to clearly indicate to the parties what constitutes good contractual conduct<sup>639</sup>. Three points can be distinguished.

Performance in good faith supposes firstly that the parties invoke the contractual terms and exercise their contractual rights in good faith. In order to do this, they should only avail themselves of these rights and these terms in accordance with the aim that justified their original stipulation. Thus, a party may only invoke a term of the contract if it corresponds with his statements, or with the nature and content of the contract. This means that a party cannot take advantage of a term on the sole pretext that it figures in the body of the contract if the operation of that term would be inconsistent with the economy of the contract or with the conduct of the party who invokes it.

Good faith in respect of performance of the contract necessarily places on the parties a duty to abstain. So as to respect the binding force of contract, the parties are in fact bound to do nothing that would compromise the proper performance of the contract. If this were not the case, the binding force of contract would be deprived of all effectiveness. The parties must not therefore diminish the utility of the contract for the other party or undermine the rights that the contract gives the other party.

In addition to this duty to abstain, an obligation of positive conduct can be placed on the party who, without having hindered performance of the contract, has nonetheless, by his conduct, lessened the point of the contract for the other party. In this case, if the other party so desires, the party whose conduct has caused the loss of utility must not refuse to renegotiate the content of the contract.

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<sup>637</sup> See *infra* II and III.

<sup>638</sup> See *supra*: general introduction.

<sup>639</sup> **Acquis Group**: no provision has been proposed on this topic.

## **II. Application of the principle in the PECL**

**140.** Although good faith in the performance of the contract does not feature in an individual provision of the Principles of European Contract Law, it does nonetheless follow clearly from the general obligation posed by Article 1.201. We will recall<sup>640</sup> that the first paragraph of this article states that *‘each party must act in accordance with good faith and fair dealing’*. Placed within the chapter dedicated to general provisions and presented as a general obligation, there is no doubt that the duty of good faith and fair dealing applies throughout the contractual process, and therefore at the time of performance. In addition there are several illustrations of the principle throughout the text. Thus, the duty of good faith prevents a creditor from being able to force the debtor to perform in kind if such performance *‘would cause the obligor unreasonable effort or expense’*<sup>641</sup>. Good faith also requires that a party accepts early performance if this does not unreasonably affect his interests<sup>642</sup>, in particular when the party suffers no inconvenience as a result of the early performance<sup>643</sup>. Lastly, good faith and fair dealing requires that termination of the contract should only be possible where there is *‘fundamental’*<sup>644</sup> non-performance and not where there is a lesser non-performance<sup>645</sup>.

**141.** The Principles of European Contract Law also impose a duty of good faith and fair dealing in the implementation of the terms of the contract and the exercise of the rights arising from the contract. Thus, according to Article 8: 109, *‘remedies for non-performance may be excluded or restricted unless it would be contrary to good faith and fair dealing to invoke the exclusion or restriction’*. The commentary specifies that this is in particular a question of setting aside the terms which, at their most extreme, *‘would allow a debtor to undertake to perform and at the same time exclude all sanction for failure to perform’*<sup>646</sup>: in this case, they constitute an incitement not to perform<sup>647</sup>.

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<sup>640</sup> See *supra*. under Article 0-301.

<sup>641</sup> Article 9.102 (2) (b) PECL.

<sup>642</sup> Article 7.103 (1) PECL: *‘A party may decline a tender of performance made before it is due except where acceptance of the tender would not unreasonably prejudice its interests’*.

<sup>643</sup> *Principles of European Contract Law, Part I and II, op. cit.* p. 335.

<sup>644</sup> Article 9.301 (1) PECL: *‘A party may terminate the contract if the other party's non-performance is fundamental’*.

<sup>645</sup> *Adde supra* the developments described under Article 0-204: Principle favouring the maintenance of the contract.

<sup>646</sup> *Principles of European Contract Law, Part I and II, op. cit.* p. 385.

<sup>647</sup> *Ibid.*

142. The Principles of European Contract Law also recognise a specific illustration of the duty to abstain incumbent on the parties, which requires that they do nothing which could compromise the proper performance of the contract. The application in question is prohibition on interfering with the operation of a condition posed in Article 16:102. This provision provides that a condition is, according to the situation, regarded as accomplished or failed, if the debtor has prevented its fulfilment or provoked the realisation of it ‘*contrary to duties of good faith and fair dealing or co-operation*’.

### **III. Applications of the principle in comparative law**

#### **A. National laws**

143. In respect of the treatment of the duty of good faith at the level of performance by different national laws, we find the approaches already mentioned under the study of the general duty of good faith and fair dealing<sup>648</sup>. It is interesting to note that even those legal systems that rarely contain references to good faith and fair dealing all contain a provision dedicated to performance in good faith. It is also normally around the provision on performance in good faith that the different legal systems have developed a more extensive duty of good faith and fair dealing.

This is indeed the case in French law where Article 1134 paragraph 3 of the Civil Code states that agreements ‘*must be performed in good faith*’. This is also the same in German law<sup>649</sup> and in Swiss law<sup>650</sup>, in which good faith has today become a fundamental principle<sup>651</sup>.

Italian law, which recognises many provisions dedicated to good faith and fair dealing, establishes the principle of performance in good faith in Article 1375 of the Civil Code. We can add two other important articles: Article 1175 of the Civil Code which states that the parties must conduct themselves according to the rules of fairness, and Article 1176 of the Civil Code which states that, in the performance of his obligation, the party must show proof of reasonable diligence.

The approach that Dutch law takes is similar to that currently adopted by the Principles of European Contract Law where good faith is the subject of a very general provision and therefore

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<sup>648</sup> See *supra*. under Article 0-301.

<sup>649</sup> § 242 BGB: ‘*An obligor has a duty to perform according to the requirements of good faith, taking customary practice into consideration*’.

<sup>650</sup> Article 2 CCS: ‘*I. Every person is bound to exercise his rights and fulfil his obligations according to the principles of good faith*’, S. Wyler and B. Wyler, *op. cit.*

<sup>651</sup> See *supra*. under Article 0-301.

necessarily includes the performance stage of the contract. Thus, Article 6:2 paragraph 1 BW states that ‘*1. A creditor and debtor must, as between themselves, act in accordance with the requirements of reasonableness and equity*’<sup>652</sup>. It is the same in Spanish law where Article 7 of the Civil Code is also very general and states that ‘*rights must be exercised in accordance with the requirements of good faith*’.

In contrast to the above national laws, English law has not expressly recognised good faith in the performance of the contract at either a statutory or judicial level<sup>653</sup>. English law does not allow the concept of good faith to disturb the law which results from the contract, freely determined by the parties. Once again though, we can nonetheless observe that, by operation of specific rules, certain acts contrary to good faith are sanctioned. The most direct sanction of a party’s conduct contrary to good faith at the stage of performance would appear to be the judicial doctrine of *estoppel*<sup>654</sup>.

**144.** The above study shows that where the obligation to perform the contract in good faith is a legal requirement, national laws are content to merely pose the principle without giving any concrete guidance to the parties. However, the case law plays an important role in each of these legal systems in that it elaborates the different applications of the obligation to perform the contract in good faith.

**145.** First, many of the legal systems studied hold that the terms of the contract and any rights arising from it cannot be invoked in a manner that is inconsistent with the objective that justified their stipulation. Even English law, which does not contain a general obligation to perform in good faith, recognises numerous situations where the courts interpret the contract in such a way as to prevent one party from taking advantage of a term in circumstances in which it was probably not the parties’ intention that it apply<sup>655</sup>.

It is notable, firstly, that the right to terminate or provoke the termination of the contract cannot be exercised in bad faith, in particular by invoking a minor breach of the contract<sup>656</sup>. Even English law refuses termination to the party who intends to take advantage of a minor breach in

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<sup>652</sup> Translation by D. Busch, E. H. Hondius et alii, *op. cit.* p.48

<sup>653</sup> Compare American law: whether dealing with provisions generally applicable to contractual affairs, or provisions limited to the regulation of commercial exchanges, the principle of good faith is firmly anchored in substantive law (see *Uniform Commercial Code* [U.C.C], or more significantly the *Second Restatement of Contracts* [1981] which provides that ‘*every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement*’).

<sup>654</sup> See *infra* under Article 0-304.

<sup>655</sup> See *Principles of European Contract Law, Part I and II, op. cit.* p. 117-118.

<sup>656</sup> See *supra.* under Article 0-204.

the sole aim of escaping the contract<sup>657</sup>. Where the termination of the contract is provided for by a term of the contract, the term can only be invoked or taken advantage of in accordance with the requirements of good faith. In fact, it is only when the other party to the contract has specifically allowed the term in question to be included in the contract that its beneficiary can invoke it in a different aim to that which justified its inclusion in the contract<sup>658</sup>. Thus, in French law, a consistent line of cases prevents the creditor from taking advantage of a termination clause in bad faith<sup>659</sup>. It is however necessary to qualify the abuse of the creditor in termination<sup>660</sup>. This is the case where the creditor invokes a fault of the debtor's which has caused him no harm, which is minor, and which he has otherwise tolerated<sup>661</sup>. This is also the case where the creditor intends to take advantage of a termination clause although he has already issued summons to perform, provided for in the clause, during the absence of the debtor<sup>662</sup>. In the same way, only the beneficiary of a clause requiring consent can take advantage of the clause contrary to the aim which justified its inclusion. Thus, in a contract which was concluded *intuitu personae*, the Cour de cassation decided that the refusal of consent or approval should have been justified by imperatives related to the safeguarding of the legitimate commercial interests of its beneficiary<sup>663</sup>.

Other terms cannot be invoked contrary to good faith. To return to the previously cited provision of the Principles of European Contract Law concerning the exclusion or limitation of remedies for non-performance<sup>664</sup>, limitation clauses may only be invoked in good faith. Thus, in French law, such clauses cannot be invoked, even though their validity is not in question, if the party trying to take advantage of the clause has committed a gross or deliberate or dishonest fault (*faute lourde ou faute dolosive*)<sup>665</sup>. In such a case, it would in fact be contrary to the requirements of good faith to allow the author of the fault to benefit from a limitation of his own

<sup>657</sup> See Hoenig v. Isaacs (1952); Honk Kong Fair Shipping Co Ltd v. Kawasaki Kisen Kaisha Ltd (1962).

<sup>658</sup> See G. Wicker, *Force obligatoire et contenu du contrat*, cited above, n° 34.

<sup>659</sup> Cass. civ. 1<sup>ère</sup>, 31 janvier 1995: Bull. civ. I n° 57; D. 1995, p. 389, note. C. Jamin.

<sup>660</sup> Cass. com., 14 janv. 1997: D. aff. 1997, p. 274; Defrénois 1997, p. 745, obs. D. Mazeaud; RTD civ. 1997, p. 427, note J. Mestre

<sup>661</sup> Cass. com., 31 mars 1978, Bull. civ. 1978, IV, n° 102.

<sup>662</sup> Cass. civ. 3<sup>ème</sup>, 16 oct. 1973: Bull. civ. 1973, III, n° 529. –29 juin et 15 déc. 1976: RTD civ. 1977, p. 340, obs. G. Cornu. – *Compare* Cass. civ. 3<sup>ème</sup>, 25 janv. 1983: Bull. civ. 1983, III, n° 21; RTD civ. 1985, p. 163, obs. J. Mestre.

<sup>663</sup> Cass. com., 2 juillet 2002: D. 2003, p. 93, note. D. Mazeaud; JCP 2003, II, 10023, note. D. Mainguy. – *Compare* the approaches adopted for *intuitu societatis* clauses, that is to say clauses which attribute the power to destroy the contract to a party who contracts with a company. This applies in situations where there is a non-agreed modification to the management or the composition of share capital of the contracting company. The case law provides that these clauses can only be legitimately invoked if the envisaged modification gives rise to a risk of non-performance of the contract or a risk of the takeover of the company by a competitor: Cass. com., 14 janvier 1997: RTD civ. 1997, p. 427, obs. J. Mestre; RJ com. 1998, p. 178, note. G. Wicker. The approach thus applies the consequences of the reason why the clauses were inserted into the contract. – See G. Wicker, cited above, n° 34, p. 93.

<sup>664</sup> Article 8.109 PECL

<sup>665</sup> Consistent line of case law: for example, Cass. com. 15 juin 1959: Bull. civ. III, n° 265; D. 1960, p. 97, note R. Rodière.



liability. The same solution is adopted by the law in Spain<sup>666</sup>, Italy<sup>667</sup> and Germany<sup>668</sup>, and by the case law in the Netherlands<sup>669</sup>. In English law, this approach is not as clearly followed, but a clause limiting liability can nonetheless be set aside as ‘*unreasonable*’<sup>670</sup>, that is to say as having been invoked in circumstances that did not correspond with what the parties had anticipated<sup>671</sup>.

We can also add that terms which directly contradict the purpose of the contract may not be validly invoked. This is the case where a limitation clause would deprive an essential obligation of the contract of its effect. Thus, in French law, the Cour de cassation<sup>672</sup> decided that a limitation clause, which had been inserted in a contract of transport fixing the indemnity payable in the case of delay as the price of the transport, should be regarded as removed from the contract, on the basis that the Chronopost company, ‘*a specialist undertaking which guaranteed the reliability and speed of its service and promised to deliver the Bancheureau packages by a certain time, failed to honour this essential obligation, and therefore the clause limiting Chronopost’s liability must be treated as struck out as being in conflict with the engagement it undertook*’.

**146.** Another illustration of the duty to perform the contract in good faith can be found in the duty to abstain that certain legal systems place on the parties in the name of good contractual conduct. Therefore, the parties are bound to do nothing that would compromise the proper performance of the contract. For example, one such obligation takes the form of a guarantee, owed by the vendor to the purchaser after the transfer of property, against compromise of the purchaser’s rights by the vendor’s personal action<sup>673</sup>. In the same way, another such obligation requires that the parties do nothing to compromise the proper performance of the contract by contracting with a third party. This is the situation of fraud on the rights of creditors<sup>674</sup>. Thus, a party may not enter into a contract that would result in his insolvency<sup>675</sup> or

<sup>666</sup> Articles 1102, 1256 and 1476 of the Civil Code.

<sup>667</sup> Article 1229 of the Civil Code.

<sup>668</sup> § 276 (2) BGB.

<sup>669</sup> See Hoge Raad, 31 December 1993: NJ, 1995, 389; 5 September 1997: RvdW 1997. 161.

<sup>670</sup> See in this respect *Principles of European Contract Law, Part I and II, op. cit.* p. 388.

<sup>671</sup> See G. Treitel, *op. cit.* p. 201 to 222

<sup>672</sup> Cass. com., 22 oct. 1996, affaire Chronopost: Bull. civ. 1996, IV, n° 261; GAJC, *op. cit.* n° 156; JCP 1997, I, 4002, n° 1, obs. M. Fabre-Magnan; Cont., conc. consom. 1997, n° 24, note. L. Leveneur; D. 1997, jurispr. p. 121, note A. Sériaux et somm. p. 175, obs. Ph. Delebecque; Defrénois 1997, p. 333, obs. D. Mazeaud; JCP G 1997, II, 22881, note D. Cohen; JCP 1997, I, 4025, n° 17; Gaz. Pal. 1997, 2, p. 519, note R. Martin. – See in the same sense, Cass. com., 17 juillet 2000: JCP 2002, II, 148, n° 117, obs. G. Loiseau. – See also, Cass. com. 5 juin 2007: JCP 2007, II, 10145, note D. Houtcieff.

<sup>673</sup> See in this respect G. Wicker, article cited above, n° 22.

<sup>674</sup> For the different applications of the *action paulienne* in the national legal systems, see *supra*. under Article 0-203.

<sup>675</sup> Cass. Req., 3 déc. 1923: S. 1923, I, 352; D. H. 1923. 6. – civ. 1ère, 27 juin 1972: Bull. civ. I n° 163. – 31 mai 1978: Bull. civ. I n° 209. – 6 janv. 1987: Bull. civ. I n° 1; RTD civ 1988, p. 137 obs. J. Mestre. – com., 14 nov. 2000:

which would make his goods harder to seize<sup>676</sup> as, in doing this, he would compromise the proper performance of his obligation to the other party<sup>677</sup>.

We find another illustration of the duty to abstain in the obligations imposed on the parties when the undertaking is subject to a condition. It is judged to be contrary to good faith to interfere in the operation of the condition. This is the case in German law where § 162 BGB<sup>678</sup> sanctions the party who, by his act, prevents or brings about contrary to good faith, the satisfaction of the condition. French law<sup>679</sup> and Spanish law<sup>680</sup> also sanction any interference by the parties in the operation of the condition precedent<sup>681</sup>. In Italian law, according to Article 1359 of the Civil Code, the condition is deemed to be fulfilled when its failure is due to a cause attributable to the party who had an interest contrary to its satisfaction. For the condition to be deemed fulfilled, the party at the origin of the failure must have acted fraudulently, dishonestly or must have been at fault<sup>682</sup>. However, Italian law goes further in that it imposes a wider obligation on the parties to act in good faith before the satisfaction of the condition. Thus, Article 1358 of the Civil Code, concerning the conduct of the parties *pendente conditione*, imposes on each party the obligation to conduct oneself in good faith in order that the rights of the other party remain intact<sup>683</sup>. This rule is applied by analogy to standard supply contracts<sup>684</sup>.

Bull. civ. IV n° 1173; JCP G 2001, IV, 1049; D. 2000, p. 441, obs. See Avéna-Robadet; Defrénois 2001. 240, obs. R. Libchaber.

<sup>676</sup> See for example in French law: the replacement of goods which would be easily seizeable with goods that would be easy to hide (the agreed sale of real goods at a nonprejudicial price), Cass. civ. 1<sup>ère</sup>, 21 nov. 1967: Bull. civ. I n° 336; D. 1968, p. 317, note. Lambert-Faivre. - 18 fév. 1971: Bull. civ. I n° 56; D. 1972, p. 53, note. E. Agostini; RTD civ. 1971, p. 841, obs. Y. Lousouarn. - com., 1<sup>er</sup> mars 1994: Bull. civ. IV n° 81; Defrénois 1994, p. 1118 note. D. Mazeaud; D. 1994 somm. p. 215, obs. E. Fortis. - 9 janv. 2001: RJDA 2001, n° 635.

For the replacement of goods easily seizeable with goods that are harder to liquidate (the contribution of goods to a company): Cass. com. 19 avril 1972: Bull. civ. IV n° 112. - civ. 1<sup>ère</sup>, 27 fév. 1973: Bull. civ. I n° 70. - 21 juil. 1987, Bull. civ. I n° 231; JCP 1987 IV p. 347; RTD civ. 1988, p. 136, obs. J. Mestre. - com. 20 déc. 2000: Bull. civ. III n° 200; JCP 2001 IV 1326; Bull. Joly 2001, p. 305, note. H. Le Nabasque.

<sup>677</sup> See Laura Sautonie Laguionie, *La fraude paulienne*, thesis cited above, especially n° 130 onwards.

<sup>678</sup> BGB § 162: 'Prevention of or bringing about the satisfaction of the condition

(1) *If the satisfaction of a condition is prevented in bad faith by the party to whose disadvantage it would be, the condition is deemed to have been satisfied.*

(2) *If the satisfaction of a condition is brought about in bad faith by the party to whose advantage it would be, the condition is deemed not to have been satisfied.*

<sup>679</sup> Article 1178 of the Civil Code: 'A condition is deemed fulfilled where it is the debtor, bound under that condition, who has prevented it from being fulfilled'.

<sup>680</sup> See Article 1119 of the Civil Code.

<sup>681</sup> In French law the case law extends this legal device to situations where the debtor brings about the satisfaction of a condition of termination (Cass. civ. 3<sup>ème</sup>, 28 mai 1970, motifs, Bull. civ. III n° 364), and to those situations where it is the creditor who interferes in the operation of the condition (Cass. civ. 3<sup>ème</sup> 23 juin 2004, Bull. civ. III n° 132, D. 2005, p. 1532, n. H. Kenfack). - See F. Terré, P. Simler et Y. Lequette, *op. cit.* n° 1227).

<sup>682</sup> Cass. 13 avril 1985, n° 2464, NGCC 1985 I 610, note Belfiore.

<sup>683</sup> Compare in French law the fact that acts accomplished *pendente conditione* are not opposable if they are incompatible with the satisfaction of the condition.

<sup>684</sup> M.-C. Diener, *op. cit.* § 5. 21. 3.

In English law, the basis of the obligation on the parties not to interfere in the operation of the condition is found in *implied terms*. Whether the obligation is express or implied, the parties cannot deliberately prevent the fulfilment of the condition. If the party in whose power the fulfilment of the condition lies does not do everything possible to satisfy the condition they may be ordered to pay damages, subject to the party proving that any efforts that he could have made would not have led to the fulfilment of the condition<sup>685</sup>. Where the condition fails, a distinction should be made between two types of obligation: the principal obligation of the parties (such as to sell or buy) and the subsidiary obligation (to not withdraw, to not cause the condition to fail or to do everything possible to fulfil the condition). Two approaches are therefore envisaged. The first consists in deeming the condition fulfilled to the detriment of the party who has not conducted themselves with necessary diligence or who caused the condition to fail (non-performance of the subsidiary obligation). This approach has not received the approval of legal scholarship which considers it to be excessively severe. In fact, the fulfilment of the condition was not, by definition, certain. The second approach consists in ordering the party to pay damages for breach of the subsidiary obligation, in consideration of the chance of the fulfilment of the condition<sup>686</sup>.

We can add that the duty to abstain, which weighs on the parties in the name of good faith in performance of the contract, also supposes that they do not diminish the utility of the contract for the other party to the contract. It is in this way that an employee or a director can be bound by a non-compete clause in a contract<sup>687</sup>.

**147.** Lastly, French case law provides an interesting illustration of the duty of good faith in respect of performance of the contract, in that it places on obligation to renegotiate on the parties. This applies where a contracting party, by his action, removes all or part of the utility of the contract for the other party, in particular because of the adaptation of his professional activity to the economic context. In two cases<sup>688</sup>, the Cour de cassation, rather than sanctioning the

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<sup>685</sup> G. H. Treitel, *op cit.* p. 61.

<sup>686</sup> *Ibid.*

<sup>687</sup> See in this respect G. Wicker, article cited above, n° 22.

<sup>688</sup> Cass. com., 3 novembre 1992: arrêt 'Huard', JCP 1992, II, 22164, note. G. Virassamy; RTD civ. 1993, p. 124, obs. J. Mestre. In this case, following the removal of restrictions on the selling price of petrol which allowed him to lower his prices considerably, a supplier started to sell fuel, via his agents, to the final consumer at a lower price than the price he sold the fuel to his distributors for, which had been previously fixed by contracts entered into before the removal of restrictions on price.

Cass. com., 24 novembre 1998: Defrénois 1999, p. 371, obs. D. Mazeaud; RTD civ. 1999, p. 98, obs. J. Mestre: in this case, a commercial agent found himself in difficulties as he could not sell at competitive prices in comparison with those products sold in parallel by central sales who provided the products directly to his principals. The decision was rendered in reliance on the old Article 4 of the law of 25 June 1991, which has become Article L. 134-4 of the Commercial Code. This subjects the relationship between the commercial agent and his principal to a duty of

change of circumstances attributable to the party, required the latter to renegotiate the content of the contract. It is interesting, from an economic point of view, to generalise such an approach<sup>689</sup>: in effect it allows the party who suffers the change of circumstances to retain their partner whilst at the same time remedying the loss of profitability of the contract.

## B. International law and Acquis communautaire

**148.** In the **Vienna Convention**, the question of whether there is a duty of good faith in the performance of the contract depends more widely on the scope that is given to Article 7 of the Convention<sup>690</sup>. However, in any event the Convention recognises illustrations of good faith in the performance of the contract. For example, Article 77, concerning the obligation to mitigate damage, states that ‘*a party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach. If he fails to take such measures, the party in breach may claim a reduction in the damages in the amount by which the loss should have been mitigated*’. In addition, Article 80 of the Convention which states that ‘*a party may not rely on a failure of the other party to perform, to the extent that such failure was caused by the first party's act or omission*’.

**149.** Although it has been seen that the establishment of a general duty of good faith remains uncertain in **Community Law**, the ECJ has not hesitated to recognise a duty of performance in good faith based on the general principle of international law. Thus, in the case of *Hauptzollamt Mainz*<sup>691</sup> 1982 the ECJ stated that ‘*according to the general rules of international law there must be a bona fide performance of every agreement*’<sup>692</sup>.

## C. Codifications by legal scholars

**150.** In respect of the statement of the principle of performance in good faith itself, each of the projects studied adopts a different approach.

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fairness, and holds that ‘*principals shall make sure that the commercial agents are able to perform their mandate*’ (paragraph 3).

<sup>689</sup> Compare G. Wicker, article cited above, n° 37.

<sup>690</sup> See *supra*. under Article 0-301.

<sup>691</sup> CJCE, 26 October 1982, *Hauptzollamt Mainz v. C.A. Kupferberg & Cie KG a.A.*, Aff. 104/81, Rec. 1982 p. 03641.

<sup>692</sup> Point 18 of the above case.

The **Unidroit Principles** adopt, in the same way as the Principles of European Contract Law, an article that states a general duty of good faith and fair dealing<sup>693</sup>, on which is based the duty of good faith in respect of performance of the contract.

The **Proposals for Reform of the Law of Obligations and the Law of Prescription** identically reproduce the current provision of the Civil Code, holding simply that contracts ‘*must be performed in good faith*’<sup>694</sup>.

The **European Code of Contract Preliminary Draft** contains for its part a very complete provision. Thus, Article 75 § 1 states that: ‘*each of the parties is bound to perform exactly and completely all the obligations laid on him by the contract, without request from the entitled party being necessary. In rendering due performance the debtor must conform to what has been agreed by the parties, to good faith and to the diligence required in the particular case, on the basis of the agreement, the circumstances and current practice*’. The criteria laid down by this article are sufficiently wide to enable the obligation of performance in good faith to have a very wide reach. We can also add that this project recognises, like the Principles of European Contract Law, a provision on early performance. Such performance can only be refused if it is not contrary to good faith<sup>695</sup>.

**151.** The **Unidroit Principles** deal with the question of good faith in the operation of contractual terms under exemption clauses. Thus, Article 7.1.6 states that ‘*a clause which limits or excludes one party’s liability for non-performance or which permits one party to render performance substantially different from what the other party reasonably expected may not be invoked if it would be grossly unfair to do so, having regard to the purpose of the contract*’.

The **Proposals for Reform of the Law of Obligations and the Law of Prescription** adopt, for their part, the case law’s approach. Thus, according to Article 1382-2 paragraph 1, ‘*a party to a contract cannot exclude or limit the reparation for harm caused to his co-contractor by his deliberate, dishonest or gross fault or by failure to perform one of his essential obligations*’<sup>696</sup>. In addition, within the generally applicable provisions, Article 1125 paragraph 2 states that ‘*any term of the contract that is incompatible with the real character of its cause is struck out*’<sup>697</sup>.

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<sup>693</sup> See Article 1.7 (*Good faith and fair dealing*): ‘(1) *Each party must act in accordance with good faith and fair dealing in international trade. (2) The parties may not exclude or limit this duty*’.

<sup>694</sup> Article 1134 para 3, J. Cartwright and S. Whittaker, *op. cit.*

<sup>695</sup> Article 109 (1).

<sup>696</sup> J. Cartwright and S. Whittaker, *op. cit.*

<sup>697</sup> *Ibid.*

**152.** The requirement that parties do not interfere in the operation of a condition (itself a specific application of the obligation on the parties not to compromise the performance of the contract) can be found in two of the three projects.

In the **Proposals for Reform of the Law of Obligations and the Law of Prescription**, according to Article 1176, ‘*the parties have an obligation of loyalty with regard to the satisfaction of the condition*’<sup>698</sup>. According to Article 1177, the condition is deemed to have been satisfied or deemed to have failed if its obstruction or satisfaction was caused by the party who had an interest in bringing that about<sup>699</sup>.

The **European Code of Contract Preliminary Draft** contains a general provision which imposes a duty of good faith on the parties *pendente conditione* and clearly places a duty to abstain on the part of the parties. It is expressly mentioned in Article 51 that each party ‘*is required to act according to good faith in order to safeguard the interests of the other party*’. In addition, Article 52, in paragraph 2, states that ‘*a condition is considered fulfilled or not fulfilled when the interested contracting party prevents or brings about, respectively, its fulfilment*’.

#### **IV. Proposed text**

##### **Article 0-302: Performance in good faith**

Every contract must be performed in good faith.

The parties may avail themselves of the contractual rights and terms only in accordance with the objective that justified their inclusion in the contract.

Each party is required not to do anything that prevents the performance of the contract or that infringes the rights that the other party acquires from the contract.

Where one of the parties, without compromising the performance of the contract, has acted in such a way as to reduce the benefit that the other party could legitimately expect from the contract, the party is required, at the request of the other party, to renegotiate the contents of the contract.

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<sup>698</sup> *Ibid.*

<sup>699</sup> Article 1177: ‘*The condition is deemed to have been satisfied if the party who is interested in its failure has obstructed its satisfaction. It is deemed to have failed if its satisfaction has been caused by the party who had an interest in this occurring*’.

## **Article 0-303: Duty to cooperate**

### **I. General presentation of the principle**

**153.** Article 0-302 defines what is meant by performance of the contract in good faith. In effect it states what, at the very least, is expected from the parties when they perform contractual obligations. We can note that the duty of good faith also places an obligation to abstain on the parties: an obligation not to invoke contract terms contrary to the objective that justified their inclusion in the contract, and an obligation to not compromise the proper performance of the contract. Only the isolated situation where a change in circumstances is attributable to one of the parties can lead to the imposition of a positive duty on that party to renegotiate the contract and not simply a duty to abstain. Despite its rich content, it appears that this provision does not fully allow all the consequences of good faith in the performance of the contract to be applied. Indeed, good faith and fair dealing goes further than a simple absence of bad faith. If it consisted in this alone, then it would only justify the duties on the parties to abstain. Yet good faith can also be understood as a dynamic concept which places a requirement of positive conduct on the parties when it appears to be necessary in order that the contract can be fully effective. Good faith is no longer the opposite of bad faith but a positive, autonomous concept, generally understood to be the basis of a duty of cooperation between the parties<sup>700</sup>.

Even if we stick to a simple statement of the duty to cooperate between the parties<sup>701</sup>, it can however be noted that the scope of such a duty depends on the nature or the subject of the contract. The obligations arising from the duty to cooperate vary according to whether the nature and subject of the contract require more or less collaboration between the parties. For example, the nature of the contract of mandate or the employment contract is such that they require a large amount of cooperation between the parties, without mentioning the contract constituting a company the validity of which requires the *affectio societatis* of members. The subject of the contract can also lead to collaboration sometimes being required, for example where the service being provided is very technical as in contracts for the provision of information technology services. It is different where the interests of the parties to the contract are more opposed or even antagonistic, for example a contract of sale. But even in this case, the opposing interests of the parties do not mean that a minimum level of collaboration should not be expected from the parties. It would appear obviously contrary to good faith not to inform the other party of events

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<sup>700</sup> The concept of cooperation appeared in the different sources studied. See *infra*.

<sup>701</sup> **Acquis Group**: no provision on this point.

which could compromise the proper performance of the contract and which the party had personal knowledge of.

## **II. Application of the principle in the PECL**

154. Amongst the general obligations laid down in the first chapter of the Principles of European Contract Law, and following from the duty of good faith, can be found the duty to cooperate. Article 1: 202 states thus that ‘*each party owes to the other a duty to co-operate in order to give full effect to the contract*’. The chosen formulation of the principle is interesting in that it clearly shows the function of the duty to cooperate: to assure the full effect of the contract. It is this that explains the fact that the parties are not simply bound to abstain from harming the contract but that they must adopt a positive conduct. Following the treatment adopted for the general principle of good faith<sup>702</sup>, it seems that the statement of the principle of cooperation is better placed in the Guiding Principles than within the different provisions of Chapter One of the Principles of European Contract Law. It is suggested, in addition to an elaboration of the content of Article 1: 202, that it be placed within the Guiding Principles.

The commentary clarifies the scope of this article. The duty to cooperate ‘*includes a duty to allow the other party to perform its obligations and thereby earn the fruits of performance stipulated in the contract*’<sup>703</sup>. The commentary also indicates that cooperation requires that a ‘*a party has to inform the other party if the other party in performing the contract may not know that there is a risk of harm to persons or property*’<sup>704</sup>. We find a specific application of the duty in Article 8: 108 (3) according to which a party should notify the other party of the existence of any impediment and the consequences of this on his ability to perform<sup>705</sup>. The commentary indicates clearly that this rule follows from the duty of good faith. It allows the party who receives notice to take precautions in order to limit the inconveniences of non-performance and also to exercise the right to terminate<sup>706</sup>.

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<sup>702</sup> See *supra* under Article 0-301.

<sup>703</sup> *Principles of European Contract Law, Part I and II, op. cit.* p. 119.

<sup>704</sup> *Ibid.* p. 120.

<sup>705</sup> Article 8: 108 (3): ‘*The non-performing party must ensure that notice of the impediment and of its effect on its ability to perform is received by the other party within a reasonable time after the non-performing party knew or ought to have known of these circumstances. The other party is entitled to damages for any loss resulting from the non-receipt of such notice*’.

<sup>706</sup> *Principles of European Contract Law, Part I and II, op. cit.* p. 383.



### **III. Applications of the principle in comparative law**

#### **A. National laws**

**155.** In the majority of national laws, a duty of cooperation has been inferred from the provisions which establish a general duty of good faith.

In German law, the duty of cooperation results from the general applicability given to the § 242 BGB principle of performance in good faith. It follows, for example, that if the permission of a third party or a public authority is required, the parties should work together to obtain it<sup>707</sup>. In addition, the German law on the modernisation of the law of obligations introduced § 241 paragraph 1 into the BGB which states that ‘*an obligation may also, depending on its contents, oblige each party to take account of the rights, legal interests and other interests of the other party*’.

In Dutch law, according to legal scholarship and case law, the duty to cooperate is a result of the complete function of the principle of good faith and fair dealing found in Articles 6: 2 and 6: 248 BW<sup>708</sup>. The duty to cooperate can be expressly agreed by the parties or it can be inferred from the nature of the obligation. It is therefore a true obligation incumbent on the parties, and its violation constitutes a breach *stricto sensu*.

In Italian law, Article 1175 of the Civil Code, which requires the parties to prove fairness in their contractual relations, forms the basis for the duty to cooperate. In Spanish law, legal scholarship describes how the parties should cooperate in the proper performance of the contract<sup>709</sup>.

French law recognises numerous illustrations of the duty to cooperate, which has for a long time been recognised as a principle by a section of the legal scholarship<sup>710</sup>. The scope of the duty of cooperation varies according to the nature and object of the contract<sup>711</sup>. For example, in respect of the subject of the contract, it might be the technicality of the service which is taken into

<sup>707</sup> *Principles of European Contract Law, Part I and II, op. cit.*, p. 121.

<sup>708</sup> D. Busch, E. H. Hondius et alii, *op. cit.* p.50, 52 onwards.

<sup>709</sup> See *Principles of European Contract Law, Part I and II, op. cit.* p. 121 and the references cited there.

<sup>710</sup> See especially R. Demogue, who suggested a cooperation between the parties where it was considered that the contracts formed a sort of microcosme ‘*where each party must work with a common purpose*’ (‘*où chacun doit travailler dans un but commun*’): See *Traité des obligations en général, t. IV, 1931, n° 3*. – See also, J. Mestre, *D'une exigence de bonne foi à un esprit de collaboration: RTD civ. 1986, p. 101*. – Y. Picod, *L'obligation de coopération dans l'exécution du contrat: JCP G 1988, I, 3318*. – D. Mazeaud, *Loyauté, solidarité, fraternité: la nouvelle devise contractuelle ?*, Mélanges F. Terré, Dalloz-PUF, éditions juris-classeur, 1999, p. 603 onwards.

<sup>711</sup> See in this respect, F. Terré, P. Simler et Y. Lequette, *op. cit.* n° 441. – Adde G. Wicker, *Force obligatoire et contenu du contrat*, article cited above, n° 24, which shows that the duty to cooperate can only be required from the parties ‘*when a collaboration, either material or intellectual, turns out to be necessary having regard to the nature or the subject of the contract*’.

account: thus when considering the provision of IT systems the seller should help the purchaser to specify his needs, and will often prolong his obligation to advise by providing assistance in training the purchaser's staff<sup>712</sup>. The nature of distribution contracts also requires a close collaboration between the parties as their interests are closely overlapping. Consequently, if the supplier changes the balance of the contract such that the distributor is no longer able to compete, the supplier is not performing the contract in good faith<sup>713</sup>. The duty of cooperation therefore applies not only to the debtor, but also to the creditor<sup>714</sup>. Sometimes the case law gives a wider scope to the duty of cooperation, without however assimilating it to a duty to work together (mutual aid)<sup>715</sup>. Case law has also decided that the party who is bound to perform the contract in good faith should check that the creditor has invoiced him correctly for the services provided, and if he has not done so then he should alert him to the mistake<sup>716</sup>.

Lastly, in English law, in the absence of a general duty of good faith and fair dealing, the duty to cooperate is only occasionally placed on the parties. Nonetheless, it is interesting to note that this duty is considered as implicit when such a duty is necessary to give the contract its economic efficiency<sup>717</sup>. From this we can deduce that the nature and the objective of the contract will determine the recognition of an implied duty to cooperate.

**156.** Some legal systems consider that the duty of cooperation requires the party, who is aware of an event that might compromise the proper performance of the contract, to inform the other party of it.

This is the case in those systems that hold, in the same way as the Principles of European Contract Law, that the party from whom performance is due should notify the other party of the existence of an impediment to performance. Sometimes, as in Italy<sup>718</sup>, this is inferred from the duty of good faith although statute is silent<sup>719</sup>. Sometimes, it is a question of applying a more general obligation to inform the other party of the risks that might affect performance, as in Spain<sup>720</sup>. On the other hand, other legal systems refuse to recognise such an approach. Thus, the

<sup>712</sup> See in this respect, Y. Picod, *juris-classeur civil*, *V° Article 1134-1135*, n° 46

<sup>713</sup> Cass. com. 19 déc. 1989, Bull. civ. IV n° 327; RTD civ. 1990 p. 649, obs. J. Mestre.

<sup>714</sup> For example, the client must inform the dry cleaner of a previous attempt at stain removal (Cass. 1re civ., 11 mai 1966: Bull. civ. 1966, I, n° 281). – *Adde* Y. Picod, article cited above, n° 49 onwards and the examples cited there.

<sup>715</sup> The case law has established that a supplier is not obliged to help his distributor find new markets: Cass. com., 6 mai 2002, JCP 2002, II, 10146, note Ph. Stoffel-Munck ; D. 2002, p. 2842, obs. D. Mazeaud ; RTD civ. 2002, 810, obs. J. Mestre et B. Fages.

<sup>716</sup> Cass. civ. 1<sup>ère</sup>, 23 janv. 1996: Bull. civ. I n° 36; Defrénois 1996, p. 744, obs. P. Delebecque; RTD civ. 1996, p. 900, obs. J. Mestre; Contr. Conc. Consom. 1996, n° 76, obs. L. Leveneur

<sup>717</sup> See *Principles of European Contract Law, Part I and II, op. cit.* p. 121 citing the case of *The Moorcock* 1889.

<sup>718</sup> See *Principles of European Contract Law, Part I and II, op. cit.* p. 384.

<sup>719</sup> See however Article 1780 of the Italian Civil Code which, in respect of the deposit contract, imposes on the depository the duty to notify the other party of the loss of the goods in custody.

<sup>720</sup> See Article 1559 of the Spanish Civil Code.

duty to notify the other party of a possible impediment no longer exists in Germany<sup>721</sup>, and is excluded in English law<sup>722</sup>.

In French law, legal scholarship recognised very early that each party had ‘*an obligation to inform the other party, during the contract, of any event that he would be interested to know about for performance of the contract*’<sup>723</sup>. This obligation to inform is sometimes established by statute. Thus, in respect of insurance contracts, the requirement that the policy-holder keep the insurer informed of events that occur during performance of the contract, and in particular those that are in the nature of increasing the risk, is laid down by statute<sup>724</sup>. More generally, the case law imposes on the parties an obligation to inform the other party of any events that might affect the proper performance of the contract. It is therefore considered that a party should inform the other of the risk of an element of the contract disappearing, when this information would permit him to eliminate the risk<sup>725</sup>.

## B. International law and Acquis communautaire

**157.** Although there is no article in the **Vienna Convention** that states, as such, the principle of cooperation between the parties in the performance of the contract, it does however recognise many illustrations of the principle. Thus, Article 79 (4) imposes an obligation on the party from whom performance is due to notify the other party of any impediment to performance within a reasonable time frame, under threat of damages<sup>726</sup>. In addition, we can note that the obligation to preserve the goods which is placed on the parties by Article 85 onwards also implements the minimum level of cooperation that can be expected from the parties.

**158.** In **Community law**, the duty to cooperate results from the duty of fairness which applies throughout the contractual process. It is a question of the parties showing a certain availability towards each other in order that, through positive actions if necessary, they can favour the proper performance of the contract. In this respect we can cite Directive 90/314/EEC

<sup>721</sup> OLG Hambourg, 13 May 1901, OLGE 3, n° 4, p. 8, cited by *Principles of European Contract Law, Part I and II*, *op. cit.* p. 384.

<sup>722</sup> *Principles of European Contract Law, Part I and II*, *op. cit.* p. 384.

<sup>723</sup> ‘*L’obligation d’avertir l’autre, en cours de contrat, des évènements qu’il a intérêt à connaître pour l’exécution du contrat*’, R. Demogue, *op. cit.* n° 29.

<sup>724</sup> Article L. 113-4 3° of the Insurance Code.

<sup>725</sup> Cass. civ. 1<sup>ère</sup>, 27 juin 1995: Bull. civ. I n° 281; RTD civ. 1996, p. 393, obs. J. Mestre.

<sup>726</sup> Article 79 (4): ‘*The party who fails to perform must give notice to the other party of the impediment and its effect on his ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, he is liable for damages resulting from such non-receipt*’.

on package travel, package holidays and package tours<sup>727</sup>, in which everything is done to ensure that the organisers of the package and their partners do everything possible to prevent the risk of the package holiday envisaged in the contract failing. Thus, *‘in cases of complaint, the organizer and/or retailer or his local representative, if there is one, must make prompt efforts to find appropriate solutions’*<sup>728</sup>. In addition, *‘the organizer and/or retailer party to the contract shall be required to give prompt assistance to a consumer in difficulty (...)’*<sup>729</sup>. The French version of this provision refers to the concept of *‘diligence’*<sup>730</sup>, which itself underlies the concept of fairness.

In counterpart, the consumer is also bound to cooperate, in particular by communicating as soon as possible *‘any failure in the performance of a contract which he perceives on the spot (...) in writing or any other appropriate form at the earliest opportunity’*<sup>731</sup>. It is only in these conditions of reciprocal cooperation that the performance of the contract seems able to be successful. More often than not, it will be the defaulting party who will be required to do all that he can to inform the other party of a risk, of which he is aware, which could prevent the proper performance of the contract. Thus for example, *‘where a supplier fails to perform his side of the contract on the grounds that the goods or services ordered are unavailable, the consumer must be informed of this situation (...)’*<sup>732</sup>. This is provided for in Directive 97/7/EC on the protection of consumers in respect of distance contracts<sup>733</sup>.

### C. Codifications by legal scholars

**159.** Only the **Unidroit Principles** clearly state, in the same way as the Principles of European Contract Law, a duty of cooperation. Thus, according to Article 5.1.3, *‘each party shall cooperate with the other party when such co-operation may reasonably be expected for the performance of that party’s obligations’*. We can note that the Unidroit Principles are careful to limit the domain of this duty in that it only applies where *‘such co-operation may reasonably be expected’*. The criterion of reasonableness does however lack clarification.

The silence of the other projects does not however mean that they reject the very principle of a duty of cooperation.

<sup>727</sup> Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours O J L 158, 23/06/1990 p. 59 – 64.

<sup>728</sup> Article 6 of the above Directive.

<sup>729</sup> Article 5 para 2 of the above Directive.

<sup>730</sup> Article 5 para 2 of the above Directive (French version): *‘L’organisateur et/ou le détaillant partie au contrat sont tenus de faire diligence pour venir en aide au consommateur en difficulté’*.

<sup>731</sup> Article 5 para 4 of the above Directive.

<sup>732</sup> Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts O J L 144, 04/06/1997 p. 19 – 20.

<sup>733</sup> Above Directive.

This is evident firstly in respect of the **European Code of Contract Preliminary Draft** where Article 75 § 1 is endowed with a very wide scope. We will recall that it states that *‘each of the parties is bound to perform exactly and completely all the obligations laid on him by the contract, without request from the entitled party being necessary. In rendering due performance the debtor must conform to what has been agreed by the parties, to good faith and to the diligence required in the particular case, on the basis of the agreement, the circumstances and current practice’*. The reference to diligence in particular would appear able to justify requiring the parties to adopt positive conduct in order to facilitate the performance of the contract.

Second, in respect of the **Proposals for Reform of the Law of Obligations and the Law of Prescription**, the reproduction of the formula of the current Article 1134 paragraph 3 of the Civil Code<sup>734</sup> allows the foundation, as in substantive law, of a duty of cooperation.

**160.** The duty to inform the other party of events that may compromise the proper performance of the contract (a specific application of the duty to cooperate) is only recognised by the **Unidroit Principles**. This project deals with the notification of the existence of an impediment to performance that the party from whom performance is due must give the other party. Thus, Article 7.1.7 (3) states that *‘the party who fails to perform must give notice to the other party of the impediment and its effect on its ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, it is liable for damages resulting from such nonreceipt’*.

#### **IV. Proposed text**

##### **Article 0-303: Duty to cooperate**

The parties are bound to cooperate with each other when necessary for the performance of their contract.

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<sup>734</sup> Contracts *‘must be performed in good faith’*, J. Cartwright and S. Whittaker, *op. cit.*

## **Article 0-304: Duty of consistency**

### **I. General presentation of the principle**

**161.** The treatment of contractual fairness requires a supplementary article concerning the scope of good faith in the performance of the contract. Although the abstentions and requirements of positive conduct which are placed on the parties have for the most part already been identified, it remains necessary to impose an obligation on each of the parties to behave consistently. In this section, it is therefore necessary to consider the principle of consistency, which requires that a party does not act in contradiction with the behaviour that he had previously adopted. The principal application of this principle rests in the prohibition on contradicting oneself to the detriment of another. From the moment one of the parties has created a legitimate expectation in the other party that they have relied on, the first party cannot legitimately conduct himself in a contrary manner.

Even if we restrict ourselves, in terms of guiding principles, to the statement of the principle of consistency alone<sup>735</sup>, such a principle must nonetheless be understood as having a very rich content.

The above principle has a particular application that can be found in the majority of the sources studied<sup>736</sup>. This is the situation where a party who is responsible for the non-performance or inefficacy of the contract cannot take advantage of it in order to demand a sanction.

However, the principle of consistency has a wider scope than this, in two respects. First, when the parties are bound to fulfil certain prerequisite conditions before their right becomes exercisable, the principle of consistency means that they cannot invoke this right if they have not satisfied the required conditions. This is a case of applying the consequences of the concept of *incombance*<sup>737</sup>. Secondly, when a party tolerates some of the failings of the other party to the contract, the principle of consistency dictates that the party cannot, following this, take advantage of the contractual sanctions which would have applied to the tolerated failings.

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<sup>735</sup> **Acquis Group:** No provision on this subject.

<sup>736</sup> See *infra* II and III.

<sup>737</sup> On this concept see *infra*.

## **II. Application of the principle in PECL**

162. Although there is no article in the Principles of European Contract Law that states, as such, the principle of consistency, or the prohibition on acting contrary to previous conduct to the detriment of another, the commentary clearly shows that it is one of the duties that results from the general duty of good faith posed by Article 1: 201. It is thus held that a *‘particular application of the principle of good faith and fair dealing is to prevent a party, on whose statement or conduct the other party has reasonably acted in reliance, from adopting an inconsistent position’*<sup>738</sup>. The commentary then details the specific rules contained in the Principles of European Contract Law which are simply applications of this principle.

This is notably the case in Article 2: 202 (3) (c) which creates an exception to the principle of free revocability of an offer. Thus, *‘a revocation of an offer is ineffective if (...) it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer’*. The commentary for this article makes clear that this is an approach based on the reliance and expectations of the offeree created by the offeror<sup>739</sup>.

The principle can also be found in Articles 2: 105 (4)<sup>740</sup> and 2: 106 (2)<sup>741</sup> according to which the statements or the behaviour of one of the parties can prevent that party from relying on a merger clause or a clause requiring modification by writing if the other party has reasonably relied on it.

This is also the same in Article 3: 201 (3)<sup>742</sup>, according to which, when the apparent authority of an agent follows from the statements or conduct of the principal, the principal is bound by the agent’s acts.

In addition to the articles cited above in the commentary to Article 1: 201, other articles within the Principles of European Contract Law also demonstrate the influence of the duty of consistency. Thus for example, in the case of non-performance, the duty of consistency implies that the party cannot attempt to take advantage of two incompatible remedies. The rule is contained within Article 8: 102: *‘remedies which are not incompatible may be cumulated (...)’*. The commentary gives the example of a party who has terminated the contract: the party can no longer demand performance in kind. This is an application of the principle which states that

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<sup>738</sup> *Principles of European Contract, Part I and II, op. cit.* p. 114.

<sup>739</sup> *Ibid.* p. 165.

<sup>740</sup> Article 2: 105 (4), ‘Merger clause’: *‘A party may by its statements or conduct be precluded from asserting a merger clause to the extent that the other party has reasonably relied on them’*.

<sup>741</sup> Article 2: 106 (2), ‘Modification by writing’: *‘A party may by its statements or conduct be precluded from asserting such a clause to the extent that the other party has reasonably relied on them’*.

<sup>742</sup> Article 3: 201 (3), ‘Express, implied or apparent authority’: *‘A person is to be treated as having granted authority to an apparent agent if the person’s statements or conduct induce the third party reasonably and in good faith to believe that the apparent agent has been granted authority for the act performed by it’*.

*‘when a party has made a declaration of intention which has caused the other party to act in reliance of the declaration the party making it will not be permitted to act inconsistently with it’*<sup>743</sup>.

**163.** The Principles also contain a number of diverse provisions that illustrate the prohibition on a party taking advantage of the inefficacy of a contract or its non-performance when the reason for the inefficacy or non-performance is attributable to that party. Thus, the party to whom the non-performance is attributable may not have resort to any of the remedies provided for in Chapter 9 (termination, damages etc). The rule is clearly stated by Article 8: 101 (3): *‘a party may not resort to any of the remedies set out in Chapter 9 to the extent that its own act caused the other party’s non-performance’*. The commentary indicates that this provision is an application of the principle of good faith and fair dealing and the duty of fairness<sup>744</sup>. The rule applies to all the remedies available to the creditor. The duty of consistency also prevents the creditor demanding reparation of the harm caused by non-performance of the contract if it was the creditor himself who contributed to the non-performance. The rule is stated in Article 9: 504: *‘the non-performing party is not liable for loss suffered by the aggrieved party to the extent that the aggrieved party contributed to the non-performance or its effects’*.

We can compare these approaches to the rule according to which the party who knew or ought to have known of the reason for the contract’s ineffectiveness (for example an unlawful motive) can be refused restitution<sup>745</sup> or damages<sup>746</sup>. Even though this rule is more directly based on the adage according to which no one can profit from his own wrongdoing, this can also be assimilated to the principle of consistency. It is clear that the party who has knowingly entered into an unlawful contract may not thereafter, without contradicting himself, take advantage of the consequences of the invalidity of the contract.

**164.** In respect of the prohibition on relying on a right when the party concerned has not fulfilled the necessary requirements for its exercise, we can cite the situations where a party is deprived of their right when they have not acted within a reasonable time-frame. Thus, according to Article 9: 303 (2), dealing with the termination of the contract, *‘the aggrieved party loses its right to terminate the contract unless it gives notice within a reasonable time after it has or ought to have become aware of the non-performance’*. In the same way, according to Article 9: 102

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<sup>743</sup> *Principles of European Contract Law, Part I and II, op. cit.* p. 363.

<sup>744</sup> *Ibid.* p 360.

<sup>745</sup> Article 15: 104 (3): *‘An award of restitution may be refused to a party who knew or ought to have known of the reason for the ineffectiveness’*.

<sup>746</sup> Article 15: 105 (3): *‘An award of damages may be refused where the first party knew or ought to have known of the reason for the ineffectiveness’*.



(3)<sup>747</sup>, a party who has not acted in reasonable time is deprived of the right to demand performance in kind.

A comparison can be made with the non-performing party's obligation to mitigate their harm. The Principles of European Contract Law pose this rule in Article 9: 505 (1) which states that '*the non-performing party is not liable for loss suffered by the aggrieved party to the extent that the aggrieved party could have reduced the loss by taking reasonable steps*'. If the aggrieved party does not take '*reasonable steps*', he is deprived of the right to demand damages as compensation for the loss which could have been avoided. The commentary shows that this situation covers two sets of circumstances: '*either ... [when] the aggrieved party incurs unnecessary or unreasonable expenditure or ... [when] it fails to take reasonable steps which would result in reduction of loss or in offsetting gains*'<sup>748</sup>.

**165.** Lastly, although there is no provision in the Principles of European Contract Law which prohibits a party who has tolerated a non-performance from demanding its sanction later on, a comparison can however be made with the situations where a right must be exercised '*in a reasonable time*' under penalty of forfeiture<sup>749</sup>. When the aggrieved party has not acted to demand the sanction of a non-performance of which he has knowledge within a reasonable time then this can be seen as tolerance on his part.

### **III. Applications of the principle in comparative law**

#### **A. National laws**

**166.** The principle of prohibiting inconsistent conduct which harms another is widely recognised in two 'families' of national laws: the Anglo-Saxon legal systems and the legal systems influenced by German law. In the other national laws, in the absence of any recognition of a general principle, particular applications of the principle prohibiting contradictory conduct which harms another can nonetheless still be found.

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<sup>747</sup> '*The aggrieved party will lose the right to specific performance if it fails to seek it within a reasonable time after it has or ought to have become aware of the non-performance*'.

<sup>748</sup> *Principles of European Contract Law, Part I and II, op. cit.* p. 445.

<sup>749</sup> See *supra*.

**167.** In English law, the principle is known under the name of *estoppel*. This rule ‘rests on the prohibition on benefiting from ones own contradictions’<sup>750</sup>; it is ‘a blocking mechanism which works in a similar way to the *fin de non-recevoir*’ (a sort of lack of standing)<sup>751</sup>. But, ‘*estoppel* does not establish a general prohibition on contradicting oneself [...] In addition a legitimate expectation must have been created in the other party and the re-establishment of the truth would lead to harm in respect of that party’<sup>752</sup>. English law recognises many categories of *estoppel*<sup>753</sup>. Some find their origins in *common law*<sup>754</sup> and others in *equity*. Amongst the latter, one of the more remarkable is without doubt *promissory estoppel*, the development of which is due to the case of *Central London Property Trust Ltd v. High Trees House Ltd*<sup>755</sup>. This *estoppel* has firstly ‘served to render obligatory the promise not to act to obtain the full payment of a sum due when the creditor made it understood that he would be satisfied with the partial payment of the debt, without requiring a counterpart that would be constitutive of consideration’<sup>756</sup>. Today it is a way of permitting the attenuation of the rigour of *consideration* (i.e. a counterpart), whether or not the parties are already linked by a previous contractual or pre-contractual relationship<sup>757</sup>. In respect of the sanction, given that equity ‘justifies freedom of choice as to the amount and nature of the compensation’<sup>758</sup>, the objective is not the performance in kind of the promise but the reparation of the harm suffered<sup>759</sup>.

**168.** In German law, the prohibiting of contradictory conduct which harms another is widely established<sup>760</sup>. The interpreters of the BGB have rediscovered the Roman *exceptio doli*

<sup>750</sup> ‘... *Repose sur l’interdiction de profiter de ses propres contradictions*’, B. Fauvarque-Cosson, ‘*L’estoppel du droit anglais*’, in *L’interdiction de se contredire au détriment d’autrui*, Colloque 13 janv. 2000, dir. M. Behar-Touchais, Centre de droit des affaires et de gestion (CEDAG) de l’Université Paris V, Economica 2001, Coll. Études juridiques, p. 3.

<sup>751</sup> ‘... *qui fonctionne à la manière d’une fin de non-recevoir*’, *ibid.* p. 3.

<sup>752</sup> ‘*L’estoppel ne consacre pas une interdiction générale de se contredire [...]. Encore faut-il avoir créé, chez autrui, une attente légitime et que le rétablissement de la vérité porte préjudice à celui-ci*’, *ibid.* p. 4.

<sup>753</sup> For a study of *estoppel* in American and Australian law see, B. Fauvarque-Cosson, article cited above, p. 15 onwards.

<sup>754</sup> We can cite *estoppel by convention*, which operates when two parties have assumed the existence of a set of facts and acted in reliance. One of the parties cannot call into question this common assumption when to do so would be inequitable for the other. See B. Fauvarque-Cosson, cited above, p. 8.

<sup>755</sup> 1947, K.B. 130.

<sup>756</sup> ‘... *Servi à rendre obligatoire la promesse de ne pas agir en justice pour obtenir le paiement intégral de la somme due lorsque le créancier avait laissé entendre qu’il se contenterait du paiement partiel de la dette, et ce sans exiger de contrepartie constitutive d’une consideration*’, *ibid.* p. 9.

<sup>757</sup> B. Fauvarque-Cosson, cited above, p. 8.

<sup>758</sup> ‘... *Justifie la liberté de choix quant au montant et à la nature de la réparation*’, *ibid.* p. 10.

<sup>759</sup> *Ibid.* p. 10.

<sup>760</sup> On this matter see H. Boucard, *L’agrégation de la livraison dans la vente, Essai de théorie générale*, Université de Poitiers, diff. Lgdj 2005, n°487.

*generalis*<sup>761</sup> in § 242, established as a barrier against the exercise of rights contrary to good faith<sup>762</sup>. The norm *non concedit venire contra factum proprium* sanctions the ‘behaviour of the holder of the right which contradicts the previously adopted attitude on which his partner had relied’<sup>763</sup>. According to some authors, the principle does not suppose a renunciation (*Verzicht*) of the creditor<sup>764</sup>. The inconsistency of the creditor leads to his forfeiture (*Verwirkung*)<sup>765</sup>: it is necessary but it suffices that his attitude has ‘given the other party the impression that he will no longer avail himself of’ his rights<sup>766</sup>, and ‘that one can not reasonably expect the obligated person to submit to their exercise’<sup>767</sup>, in order that he is ‘neutralised’<sup>768</sup>. Other authors adopt a more nuanced analysis: if we detach *Verwirkung* from renunciation in order to attach it to abuse of law<sup>769</sup>, then the link with the tacit renunciation of the creditor is not entirely broken<sup>770</sup>.

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<sup>761</sup> C. Witz, ‘Droit privé allemand t.1 Actes juridiques, droits subjectifs (B.G.B. partie générale, loi sur les conditions générales d’affaires)’, Litec 1992, n°657; F. Ranieri, ‘Bonne foi et exercice du droit dans la tradition du Civil Law’: RIDC 1998/4, p.1055-1092, p.1069; adde B. Jaluzot, ‘La bonne foi dans les contrats (Étude comparative de droit français, allemand et japonais)’: Dalloz 2001, Nouvelle bibliothèque des thèses vol.5, n°1476 onwards.

<sup>762</sup> C. Witz, ‘Droit privé allemand t.1 Actes juridiques, droits subjectifs (B.G.B. partie générale, loi sur les conditions générales d’affaires)’ *op. cit.* n°660, 664; F. Ranieri ‘*Verwirkung et renonciation tacite. Quelques remarques de droit comparé*’, Mélanges en l’honneur de Daniel Bastian, t.1 Droit des sociétés, Litec 1974, p. 427-452, p. 452 n. 70, ‘Bonne foi et exercice du droit dans la tradition du Civil Law’, RIDC 1998/4, p. 1006 onwards, and ‘Le principe de l’interdiction de se contredire au détriment d’autrui ou du venire contra factum proprium dans les droits allemand et suisse et sa diffusion en Europe’, L’interdiction de se contredire au détriment d’autrui, Colloque 13 janv. 2000, dir. M. Behar-Touchais, Centre de droit des affaires et de gestion (CEDAG) de l’Université Paris V, Economica 2001, Coll. Études juridiques, p. 25-36, p. 25 onwards. - R. Zimmerman, *The law of obligations, Roman Foundations of the Civilian Tradition Oxford University Press Inc.*, New York, 1996, p. 673 onwards.

<sup>763</sup> ‘Comportement du titulaire du droit qui se met en contradiction avec l’attitude adoptée antérieurement et à laquelle son partenaire s’est fié’, C. Witz, *ibid.* n°664.

<sup>764</sup> *Ibid.* n° 665.

<sup>765</sup> *Ibid.* n° 666.

<sup>766</sup> ‘Donné l’impression à l’autre partie qu’il ne [se] servi[rait] plus [de ses droits]’, *ibid.* n° 666. But ‘the creditor should not suffer from the fact’ of his delay because the debtor ‘must expect that he use his rights until the limitation period is over’. Simple inaction on the part of the creditor is not sufficient’ therefore ‘to lead to forfeiture’ and n° 692: a ‘creditor who benefits from a long limitation period asserts his claim a long time after the claim first arose. Such behaviour is not in itself at all abusive. It is not the same when the creditor acts in total contradiction with his former behaviour from which the debtor could reasonably have deduced that he had definitively abandoned his claim (*venire contra factum proprium*). The creditor therefore forfeits his right to an effective claim’.

<sup>767</sup> ‘Que l’on ne puisse raisonnablement attendre de l’obligé qu’il se soumette à [leur] exercice’, C. Witz, *ibid.* n° 666; F. Ranieri, ‘*Verwirkung et renonciation tacite. Quelques remarques de droit comparé*’, cited above, p.428.

<sup>768</sup> C. Witz, *ibid.* n° 109.

<sup>769</sup> F. Ranieri, ‘*Verwirkung et renonciation tacite. Quelques remarques de droit comparé*’, cited above, p.428; compare ‘Bonne foi et exercice du droit dans la tradition du Civil Law’, cited above, p.1067, cf. *ibid.* p.1071 onwards, mentioning the current discussions in legal scholarship over the pertinence of a recourse to abuse of law.

<sup>770</sup> F. Ranieri, ‘*Verwirkung et renonciation tacite. Quelques remarques de droit comparé*’, cited above, p.428 onwards; ‘Bonne foi et exercice du droit dans la tradition du Civil Law’, cited above, p.1084, n. 98.

In Swiss law, Article 2 CCS is inspired by the German ‘*model*’<sup>771</sup>. Legal scholarship and case law have adopted the institution of *Verwicklung*<sup>772</sup>, newly linked to abuse of law<sup>773</sup> - but without always removing it from the notion of tacit renunciation<sup>774</sup>.

In Dutch law, it has long been discussed whether the principle of good faith could lead to the extinction of a right. Under the reign of the old code, the *Hoge Raad* was always reluctant to recognise it. An exception was however recognised where a party lost ‘*his right because of his own conduct, incompatible with the exercise of the right in good faith (Rechtsverwerking, equivalent of the German Verwicklung)*’<sup>775</sup>. Today, the limitative function of the principle of good faith operates notably in respect of the inconsistent conduct of the party: ‘*venire contra factum proprium and Verwirkung*’<sup>776</sup>.

**169.** In other national laws, such as French law, the principle prohibiting contradictory conduct which harms another does not appear as such<sup>777</sup>. Nonetheless, we can observe numerous applications<sup>778</sup>, generally based on the duty of good faith and fair dealing<sup>779</sup>. Thus, the Cour de cassation has decided that ‘*by virtue of Article 1134 paragraph 3 of the Civil Code, no one may contradict themselves to the detriment of another, and therefore betray the legitimate expectation of the other party to the contract*’<sup>780</sup>. For example, a party to the contract may not, in pursuance of his interests, invoke and at the same time ignore the existence of one and the same contract,

<sup>771</sup> F. Ranieri, ‘*Bonne foi et exercice du droit dans la tradition du Civil Law*’, cited above, p. 1056, 1073, and ‘*Le principe de l’interdiction de se contredire au détriment d’autrui ou du venire contra factum proprium dans les droits allemand et suisse et sa diffusion en Europe*’, cited above, p.32.

<sup>772</sup> See F. Ranieri, ‘*Bonne foi et exercice du droit dans la tradition du Civil Law*’, cited above, p.1073 onwards.

<sup>773</sup> C. Chappuis, ‘*L’abus de droit en droit suisse des affaires*’, *L’abus de droit, comparaisons franco-suisse*, Séminaire de Genève, mai 1998 [s. d.], Études réunies par P. Ancel, G. Aubert et C. Chappuis, Publications de l’Université de Saint-Étienne, Saint-Étienne, 2001, p. 69-99.

<sup>774</sup> F. Ranieri, ‘*Verwirkung et renonciation tacite. Quelques remarques de droit comparé*’, cited above, p. 432, n. 16.

<sup>775</sup> ‘*Son droit en raison de sa propre conduite, incompatible avec l’exercice de bonne foi de ce droit (Rechtsverwerking, equivalent of the German Verwicklung)*’, A. S. Hartkamp, *op. cit.* p.138.

<sup>776</sup> D. Busch, E. H. Hondius et alii, *op. cit.* p. 50.

<sup>777</sup> On the reasons for the reticence of French law in respect of establishing such a principle, see D. Mazeaud, *La confiance légitime et l’estoppel*, RIDC 2006-2 p.363, especially n° 2 and 3.

<sup>778</sup> For a complete overview of these applications, see D. Mazeaud, article cited above, n° 6.

<sup>779</sup> Certain authors would like the prohibition on contradictory conduct which harms another to be detached from the basis of good faith as it is inconsistency (contradiction in conduct) which is sanctioned above all else. – See in this respect H. Muir Watt, ‘*Pour l’accueil de l’estoppel en droit privé français*’, in Mélanges Y. Loussouarn, Dalloz, 1994, p.303. - D. Houtcieff, ‘*Quelle sanction pour la contradiction?*’: *Revue Lamy droit civil*, juillet/août 2005, n°18, p.5. – Adde B. Fauvarque-Cosson, D. 2005, panorama p.2843, about a case of the Commercial Chamber of the Cour de cassation, of 8 March 2005, which held that the detachment from the approach based on good faith allowed the adoption of an original sanction, borrowed from procedural law, namely *une fin de non-recevoir* (effectively the denial of locus standi), the approach therefore resembling English law.

<sup>780</sup> ‘*En vertu de l’article 1134 alinéa 3 du Code civil, nul ne peut se contredire au détriment d’autrui, et tromper ainsi l’attente légitime de son cocontractant*’, Cass. com. 11 mars 1997, Inédit, pourvoi n°95-16.853, *Lamy cass.*, cited by H. Aubry, in ‘*L’apport du droit communautaire au droit français des contrats: la notion d’attente légitime*’, RIDC, 3-2005, pp.627-651, especially note 46.

according to which he is requiring payment or performing his obligations.<sup>781</sup> More recently, an important case, decided by reference to Article 1134 paragraph 3 of the Civil Code, decided that ‘*in spite of the signature of a united account agreement, the bank, who, in treating the accounts in dispute as independent accounts, had adopted behaviour inconsistent with the implementation of the disputed agreement, of which it had claimed the benefit, had failed in its duties of good faith*’<sup>782</sup>. It is because of the inconsistency of their behaviour that the bank can no longer invoke the benefit of a clause which they had previously disappplied in perfect knowledge of the cause. The case law has also applied the consequences of the principle of consistency in respect of distribution contracts. Although, in principle, the breaking off of these contracts is free, the case law sanctions the party who breaks off the contract having previously engendered in the other party a legitimate expectation of the stability of the contract<sup>783</sup>. Lastly, we also find the approach adopted by Article 8: 102 of the Principles of European Contract Law<sup>784</sup> in French case law. It has therefore been decided that that a party may not simultaneously or successively exercise two incompatible actions. For example, in the name of consistency, a party who is the victim of non-performance cannot at the same time terminate the contract and claim its total or partial performance on an additional basis<sup>785</sup>.

Some national legal systems recognise more varied applications of the principle of consistency.

**170.** It is often recognised that a party may not take advantage of a cause of inefficacy or a non-performance for which that party is responsible<sup>786</sup>. Thus Article 1227 paragraph 1 of the

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<sup>781</sup> Cass. civ. 3<sup>ème</sup>, 13 avril 1988, RTD civ. 1989, p. 743, obs. J. Mestre : ‘*le sous traitant ne peut à la fois se prévaloir du contrat de sous-traitance pour obtenir le paiement de ses travaux et le rejeter pour échapper à ses obligations contractuelles*’.

<sup>782</sup> ‘*En dépit de la signature d’une convention d’unité de compte, la banque, qui, en faisant fonctionner les comptes litigieux comme des comptes indépendants, avait adopté un comportement incompatible avec l’application de la convention litigieuse, dont elle a revendiqué ensuite le bénéfice, avait manqué à son obligation de bonne foi*’, Cass. com. 8 mars 2005: D. 2005, panorama, 2843, obs. B. Fauvarque-Cosson; RDC 2005, 1015, obs. D. Mazeaud; Rev. Lamy, Droit civil, juill./août, 2005, p.5, note D. Houtcieff; RTD civ. 2005, 391, obs. J. Mestre et B. Fages.

<sup>783</sup> Example: when the contractor subordinates, explicitly or implicitly, the maintenance of the distributor is his distribution network to the realisation of important investments on his part, he is liable for unfair breach if he terminates the contract or does not renew it: see Cass. com. 5 avril 1994: Contrats, conc., consomm., 1994, comm. n°159, obs. L. Leveneur; D. 2005, somm. comm., 90, obs. D. Mazeaud; RTD civ. 1994, 603, obs. J. Mestre. - 20 janvier 1998: Contrats, conc., consomm., 1998, comm. n° 56, obs. L. Leveneur; D. 1998, 413, note Ch. Jamin; D. 1999, somm. comm., 114, obs. D. Mazeaud; JCP 1999, II, obs. J.-P. Chazal; RTD civ. 1998, 675, obs. J. Mestre. - 9 avril 2002: RTD civ. 2002, 811, obs. J. Mestre et B. Fages.

<sup>784</sup> See *supra*.

<sup>785</sup> Cass. civ. 3<sup>ème</sup>, 7 juin 1989, Defrénois 1990, 360, obs. J.-L. Aubert; RTD civ. 1990, 100, obs. Ph. Rémy et 473, obs. J. Mestre.

<sup>786</sup> Compare English law where it is generally recognised that *contributory negligence* either will not be invocable as a defence to a contractual claim, or will prohibit any compensation by application of the principle that the damage was not caused by the non-performance. See in this sense, *Principles of European Contract Law, Part I and II, op. cit.* p. 447.

Italian Civil Code provides that if the act of the party contributed to the damage occurring, the reparation will be reduced according to the fault and its consequences. Similar approaches are to be found in Dutch law<sup>787</sup> and German law<sup>788</sup>. In French law, the act of the party seeking performance either totally or partially exonerates the party from whom performance is due according to its causal role. The act of the party to whom performance is due, whether they are at fault or not, totally exonerates the other party when it is the exclusive cause of the damage<sup>789</sup>. In the case of the common fault of both parties, there will only be partial exoneration if the act of the party to whom performance is due constitutes a sufficiently grave fault<sup>790</sup>. It is also notable that the Praetorian approaches<sup>791</sup> which prevent a party who has committed a gross fault from relying on a limitation clause, or which disapply such clauses in the case of failure to meet an essential obligation, are also applications of the principle according to which a party cannot rely on a non-performance for which he was responsible to the detriment of the other party<sup>792</sup>.

It is also notable that, in German law, § 323 VI of the BGB excludes termination when the party to whom performance is due can be seen to be responsible for the event which led to the non-performance<sup>793</sup>.

In addition, the rule, adopted by the Principles of European Contract Law, which allows the exclusion of any entitlement to damages or restitution on the part of the party who knew or should have known of the reason for the contract's inefficacy, can be found in different legal systems. In Spanish law, according to Article 1305 and 1306 of the Civil Code, restitution depends on whether the illegality constitutes a penal infraction and if the unlawful aim was attributable to the two parties or not. In French law, the adage *nemo auditur propriam suam turpitudinem allegans* operates in order to prevent the party who knew of the immoral motive, which led to the invalidity of the contract, from obtaining restitution. However, the case law is reluctant to invoke this maxim when the contract is simply unlawful and not immoral<sup>794</sup>. In the

<sup>787</sup> See the 'act of the creditor' in Article 6: 101 BW. See D. Busch, E. H. Hondius et alii, *op. cit.* p. 327.

<sup>788</sup> § 254 (1) BGB.

<sup>789</sup> Example: Cass. civ. 1<sup>ère</sup>, 6 octobre 1964: 2 [espace] arrêts, Bull. civ. I n° 423 et 424; D. 1965, p. 21, note P. Esmein.

<sup>790</sup> Consistent line of case law since Cass. civ. 1<sup>ère</sup>, 31 janvier 1973: Bull. civ. I n° 41; D. 1973, p. 149, note Schmelk; RTD civ. 1973, p. 576, obs. G. Durry.

<sup>791</sup> See *supra* under Article 0-303.

<sup>792</sup> See in this respect, D. Mazeaud, cited above, n° 16 onwards.

<sup>793</sup> § 323 VI: 'Withdrawal is excluded if the obligee is solely or very predominantly responsible for the circumstance that would entitle him to withdraw from the contract or if the circumstance for which the obligor is not responsible occurs at a time when the obligee is in default of acceptance'.

<sup>794</sup> For the refusal to apply this maxim to unlawful and not immoral agreements, see Cass. civ. 30 juil. 1844: S. 1844, 1, 582. – req. 18 mars 1895: DP 1895, 1, 346; S. 1896, 1, 11 concerning the restitution of price supplements, in particular the transfer of ministerial offices – Cass. civ. I 19 déc. 1960: Bull. civ. I n° 548, p. 447, for restitutions linked to a trading of favours – Com. 20 janv. 1987, JCP 1988 II 20987, n. G. Goubeaux, for restitutions following the invalidation of an illegal company.

same way, this maxim is not invoked in matters of liability. Article 2035 of the Italian Civil Code also prohibits the party who entered into the contract with an immoral aim, shared between the parties, from getting back the money paid. In German law<sup>795</sup> the principle is that of restitution (§ 817 BGB). However, restitution is excluded where the party had real and effective knowledge of the contract's invalidity, which does not include the situation where the party only should have known of the reason for invalidity<sup>796</sup>. The exception, considered to be a rule of punitive character, does not operate if the party was unaware of the legal prohibition. Lastly, in English law, restitution is in principle excluded for the party who knew the cause of the contract's inefficacy<sup>797</sup>.

**171.** The application of the principle of consistency, which supposes that a party may not rely on a right if they have not fulfilled the necessary requirements for its invocability, can be found in the legal systems that recognise the concept of *incombance*<sup>798</sup>. This concept, developed by German, Swiss and Belgian legal scholarship<sup>799</sup>, can be defined as the '*duty the inobservation of which exposes its author not to a condemnation, but to the loss of the advantages attached to the fulfilment of the duty*'<sup>800</sup>. '*The idea with incombance, - at least in the contractual sphere - , is that the fulfilment of the duty incumbent on the party forms a preliminary element, a preliminary condition, to the ability, either of his own undertaking, or the other party's obligation, to be invoked or demanded*'<sup>801</sup>. In the name of consistency, it therefore appears that the party who was required to fulfil certain requirements in order to be able to take advantage of a right, will find themselves deprived of this right if they do not comply with these requirements.

Many illustrations of this principle can be found in French law even if the concept of *incombance* is not recognised as such. The principle is sometimes applied by statute. For

However, the case law is not completely homogenous as some cases have applied the adage to unlawful agreements (Cass. req. 15 fév. 1877: D. P. 1877, 1, 520. – civ. 1<sup>ère</sup>, 16 juil. 1959: Bull. civ. I ° 358) while others have refused to apply it to immoral agreements (Cass. civ. 7 juin 1945: D. 1946, p. 149 n. R. Savatier ; JCP 1946 II 2955, n. J. Hémar ; RTD civ. 1946, p. 30 n. H et L. Mazeaud).

<sup>795</sup> *Principles of European Contract Law, Part III, op. cit.* p. 224.

<sup>796</sup> § 817 § 2 2<sup>nd</sup> phrase BGB.

<sup>797</sup> *Principles of European Contract Law, Part III, op. cit.* p. 225.

<sup>798</sup> Since this is not recognised in English law there is no suitable translation or equivalent and so *incombance* shall be used hereafter.

<sup>799</sup> See F. Luxembourg, *La déchéance des droits, Contribution à l'étude des sanctions civiles*, thèse, Paris II, 2005, n° 68 onwards; S. Licari, *Pour la reconnaissance de la notion d'incombance*, R.R.J. 2002-2, pp. 703; X. Labbé, *L'incombance: un faux concept*, R.R.J. 2005-1, pp. 183. – Adde H. Boucard, *L'agrégation de la livraison dans la vente, Essai de théorie générale*, cited above.

<sup>800</sup> '... *Devoir dont l'inobservation expose son auteur non à une condamnation, mais à la perte des avantages attachés à l'accomplissement du devoir*', G. Cornu, *Vocabulaire juridique*, PUF, See *incombance*.

<sup>801</sup> '*L'idée en matière d'incombance, – au moins sur le terrain contractuel –, est que l'accomplissement du devoir qui pèse sur le débiteur constitue un élément préalable, une condition préalable, à l'exigibilité, soit de son propre engagement, soit de l'obligation de son cocontractant*', see G. Wicker, '*La légitimité de l'intérêt à agir*', Mélanges Y. Serra, n° 29.

example, Article L 313-22, paragraph 2 of the Monetary and Financial Code states that the professional creditor who does not give the guarantor the annual update of information, provided for in paragraph 1 of this provision, is deprived of the interests outstanding since the previous update. Case law also adopts various approaches which require the party seeking performance to fulfil certain requirements before his right can be invoked. Thus, in respect of clauses guaranteeing liabilities, where the guarantor's obligation is subordinated to the beneficiary's undertaking to inform the guarantor of any event which might determine the operation of the clause, it has been judged that this stipulation aimed '*not to define an obligation to do in the sense of Article 1142 of the Civil Code, which would result in damages in the case of non-performance, but rather a contractual fin de non-recevoir preventing the beneficiary from validly invoking his guarantee without firstly having fairly informed the guarantor of the reasons for it being invoked*'<sup>802</sup>. '*Thus, because he has not given the promised information, which in this case is characterised as prerequisite in nature, the beneficiary of the clause, who is by this failure to act deemed to be acting contrary to contractual fairness, is unable to require the performance of guarantor's obligation*'<sup>803</sup>. In the same way, in respect of the transfer of shares requiring approval,<sup>804</sup> it has been decided that the transferor, who was responsible for notifying the transfer of shares in view of obtaining agreement, and who failed to comply with this formality, '*is not able to take advantage of the failure of the condition that he himself prevented the fulfilment of*'<sup>805</sup>. The law of sale also exhibits numerous applications of the principle<sup>806</sup>.

We can also note that the duty incumbent on the party to whom performance is due to minimise the harm suffered, which can be analysed as a form of *incombance*, can be found in several legal systems, as well as in the Principles of European Contract Law. The party is in effect denied the right to demand reparation for the harm that he could have limited. Thus, Article 1227 paragraph 2 of the Italian Civil Code excludes all reparation for the harm that the party could have avoided by showing proof of diligence. German law adopts an analogous

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<sup>802</sup> '*... Non à définir une obligation de faire au sens de l'article 1142 du Code civil, qui se résout en dommages et intérêts en cas d'inexécution, mais bien une fin de non-recevoir conventionnelle interdisant au bénéficiaire de faire valablement jouer sa garantie sans avoir préalablement et loyalement informé le garant des motifs de sa mise en œuvre*', Paris 17 mai 2002, 3<sup>e</sup> ch. B, JCP E 2004. 29, n<sup>o</sup> 1, obs. J.-J. Caussain, Fl. Deboissy et G. Wicker; see also: Paris 6 décembre 2002, 25<sup>e</sup> ch. A, JCP E 2003. 1203, n<sup>o</sup> 3, obs. J.-J. Caussain, Fl. Deboissy et G. Wicker.

<sup>803</sup> '*Ainsi, parce qu'il n'a pas délivré l'information promise, dont il est ici relevé le caractère de préalable, le bénéficiaire de la clause, qui a par là-même manqué à la loyauté contractuelle, est irrecevable à exiger du garant l'exécution de son obligation*', G. Wicker, article cited above, n<sup>o</sup> 31.

<sup>804</sup> See G. Wicker, *ibid*, who holds that *incombance* applies to the operation of a mixed condition.

<sup>805</sup> '*... Ne pouvait se prévaloir de la défaillance d'une condition dont il avait lui-même empêché l'accomplissement*', Cass. com. 27 mars 1990, D. 1991. 503, note J. Bonnard.

<sup>806</sup> See H. Boucard, *L'agrégation de la livraison dans la vente, Essai de théorie générale*, thesis cited above, n<sup>o</sup> 492 onwards – *Adde infra* in respect of the Vienna Convention.



situation for failure to moderate the damage<sup>807</sup>. In English law the principle results from *mitigation of damages*<sup>808</sup>. However, in French law the case law seems to be hostile to the recognition of a duty to minimise the harm suffered by the party seeking performance<sup>809</sup>.

172. Several illustrations of the final function of the principle of consistency, which consists of not being able to obtain contractual sanction in the name of non-performance where it had previously been tolerated, are also found. The commentary to Article 9: 303 (2)<sup>810</sup>, concerning the forfeit of the right to terminate the contract on expiry of a reasonable time, indicates that the approach is recognised in many legal systems on the basis of legal provisions or in the name of a general duty of good faith. In French law, the case law holds that a party who has tolerated non-performance for several years may not, suddenly, validly claim the termination of the contract by operation of law<sup>811</sup>.

We can also note Article 6: 89 BW in Dutch law according to which ‘*a defect in performance can no longer be invoked by the party who has not promptly notified the other party of his protest in this respect after he has discovered, or should normally have discovered, the defect*’<sup>812</sup>.

<sup>807</sup> See § 254 II BGB, where ‘*the fault of the injured person is limited (...) to failing to avert or reduce the damage*’; Article 44 I CO, to which Article 99 III refers: ‘*the court may reduce the damages, or even decline to allocate them, when the facts which (the injured party) is responsible for have contributed to the creation of the damage, its increase, or they have aggravated the debtor’s situation*’.

<sup>808</sup> On which see M. Elland-Goldsmith ‘*La “mitigation of damages” en droit anglais*’, *L’obligation de minimiser les dommages en cas d’inexécution des contrats internationaux* Colloque Feduci, dir. B. Hanotiau [s.l., s.d.] *RDAL* 1987/4 p. 347-358, and ‘*Note sur la “mitigation of damages” en droit américain*’, *ibid.* p.359-361; H. Muir Watt ‘*La modération des dommages en droit anglo-américain*’, *Faut-il moraliser le droit français de la réparation du dommage? (À propos des dommages et intérêts punitifs et de l’obligation de minimiser son propre dommage)*... cited above, p. 45-49.

<sup>809</sup> See, about delictual liability: Cass. civ. 2<sup>ème</sup>, 19 juin 2003, [2 esp.]: Bull. civ. 2003, II, 203; D. 2003, p. 2326, note Chazal; *ibid.* 2004, somm. p. 1346, obs. D. Mazeaud; Dr. et patrimoine nov. 2003, p. 83, obs. Chabas; Resp. civ. et assur. 2004, chron. 2, par Agard; JCP G 2003, II, 10170, note Castets-Renard; *ibid.* 2004, I, 101, n° 9, obs. Viney; RTD civ. 2003, p. 716, obs. Jourdain; LPA 17 oct. 2003, n° 208, p. 16, note Reifegerste; *ibid.* LPA 31 déc. 2003, n° 261, p. 17, note Dagorne-Labbe: where the Cour de cassation considered that ‘*the author of an accident is obliged to rectify all the harmful consequences; that the victim is not obliged to mitigate their loss in the interest of the party responsible*’. The approach in the first case has been criticised by part of the legal scholarship. It consisted of an economic prejudice formed by the loss of business following the permanent partial incapacity of the operator. The victim could easily have avoided the loss of their business following the loss of clientele by hiring a third party to replace them.

<sup>810</sup> *Principles of European Contract Law, Part I and II, op. cit.* p. 414.

<sup>811</sup> Cass. civ. 1<sup>ère</sup>, 8 avril 1987, Defrénois, 1988, 375, obs. J.-L. Aubert; JCP 1988, II, 21037, obs. Y. Picod; RTD civ. 1988, 122, obs. J. Mestre et 146, obs. Ph. Rémy. - Com. 7 décembre 1993: RTD civ. 1994, 856, obs. J. Mestre. - Civ. 1<sup>ère</sup>, 16 février 1999: D. 2000, somm. comm., 360, obs. D. Mazeaud.

<sup>812</sup> ‘*Le défaut dans la prestation ne peut plus être invoqué par le créancier qui n’a pas promptement protesté à cet effet auprès du débiteur après qu’il a découvert ou aurait normalement dû découvrir le défaut*’; see also C. B. P. Mahe and E. H. Hondius ‘*Les sanctions de l’inexécution en droit néerlandais*’, *Les sanctions de l’inexécution des obligations contractuelles, Études de droit comparé*, dir. M. Fontaine et G. Viney, Bruylant/Lgdj, Bruxelles/Paris, 2001, Bibliothèque de la Faculté de droit de l’Université catholique de Louvain t.32, p. 837-870, n° 3: the rule

## B. International law and Acquis communautaire

173. The **Vienna Convention** recognises many applications of the principle of consistency.

Firstly, the right to terminate can be suspended, by virtue of the duty of consistency, as long as the attempts to perform continue. Thus, after the buyer has served notice to perform on the seller, he is forbidden from demanding termination during the time granted<sup>813</sup>. It is the same when, following the refusal of consent, the seller tries to correct delivery. Following Article 47 (2)<sup>814</sup>, the buyer may not declare the contract terminated before the expiry of the time given to the seller unless the seller has declared that he will not perform the contract. Article 48 (2) envisages a similar solution when the seller proposes to remedy a failure to deliver. If the seller *'requests the buyer to make known whether he will accept performance'* but the buyer *'does not comply with the request within a reasonable time'* the seller may proceed to remedy the failure within the time indicated as the absence of protest from the buyer indicates their permission. Therefore, the buyer may not, before the expiry of the time period, take advantage of a remedy that is incompatible with the regularisation of the contract<sup>815</sup>.

Second, the Vienna Convention does not recognise that a party who is responsible for non-performance can rely on that non-performance against the other party. Thus, according to Article 80, *'a party may not rely on a failure of the other party to perform, to the extent that such failure was caused by the first party's act or omission'*.

The Vienna Convention also adopts the concept of *incombance*. Thus, following Articles 38 (1) and 39 (1), the buyer, who *'must examine the goods, or cause them to be examined, within as short a period as is practicable in the circumstances'*, *'loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it'*. The buyer must carry out an inspection of the goods, then, if necessary, refuse to approve them. If he fails to do so then this will result in the loss of his rights, this is to say the release of the seller<sup>816</sup>. In the same way, the buyer may lose his right to avoid the contract if he does not act within a reasonable time<sup>817</sup>.

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follows from the fact that, *'independently of the action taken by the creditor, he should firstly guarantee that the debtor knows of the failure to perform'*.

<sup>813</sup> See Cass. com., 3 déc. 1952, *Bull. civ.* III n°376.

<sup>814</sup> Article 47 (2): *'Unless the buyer has received notice from the seller that he will not perform within the period so fixed, the buyer may not, during that period, resort to any remedy for breach of contract. However, the buyer is not deprived thereby of any right he may have to claim damages for delay in performance'*.

<sup>815</sup> On this question as a whole, see H. Boucard, thesis cited above, n° 503

<sup>816</sup> See H. Boucard, thesis cited above, n° 153.

<sup>817</sup> See Article 49 (2): *'the seller has delivered the goods, the buyer loses the right to declare the contract avoided unless he does so:'*

The Vienna Convention also adopts the duty to mitigate the damage suffered in Article 77: *‘a party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach. If he fails to take such measures, the party in breach may claim a reduction in the damages in the amount by which the loss should have been mitigated’*.

Lastly, we find, as in the Principles of European Contract Law, the principle according to which the statements or the behaviour of one of the parties can prevent that party from relying on a clause requiring modification by writing if the other party has reasonably relied on it<sup>818</sup>. In the same way, we find the prohibition on invoking incompatible remedies. According to Article 46 (1): *‘the buyer may require performance by the seller of his obligations unless the buyer has resorted to a remedy which is inconsistent with this requirement’*.

**174.** In **Community Law**, the concept of consistency finds its roots, as is often the case, in institutional law. The term is introduced, in a general sense, in the Treaty on the European Union in Article 1 § 3, as the Union’s task is *‘to organise, in a manner demonstrating consistency and solidarity, relations between the Member States and between their peoples’*<sup>819</sup>, and it contributes to the foundation of *‘the objective and the supreme purpose of the European Union to which all the general principles of this Union are subordinated’*<sup>820</sup>. It should be looked at in conjunction with another concept of Community law, the general principle of legitimate reliance / expectations which has been established by the ECJ. This principle *‘[corresponds] to an aspect of the principle of legal certainty [and] means that Community authority may not modify, without prior notification and precautions being taken, a provision if it has itself created (...) the legitimate reliance of economic operators ...’*<sup>821</sup>. Within the framework of the duty of consistency, legitimate reliance is expressed through the legitimate expectations of the parties and

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- a) *in respect of late delivery, within a reasonable time after he has become aware that delivery has been made;*
  - b) *in respect of any breach other than late delivery, within a reasonable time:*
    - i) *after he knew or ought to have known of the breach;*
    - ii) *after the expiration of any additional period of time fixed by the buyer in accordance with paragraph (1) of article 47, or after the seller has declared that he will not perform his obligations within such an additional period; or*
    - iii) *after the expiration of any additional period of time indicated by the seller in accordance with paragraph (2) of article 48, or after the buyer has declared that he will not accept performance’.*

<sup>818</sup> See Article 29 (2).

<sup>819</sup> Extracts of Article 1 § 3 TEU.

<sup>820</sup> *‘... L’objectif et la finalité suprême de l’Union européenne à laquelle sont subordonnés tous les principes généraux de cette Union (...); see ‘cohérence’, in F. de la Fuente (translation from the Spanish by J. Denis), Dictionnaire juridique de l’Union européenne, Bruxelles, Bruylant, 1998, p. 103.*

<sup>821</sup> *‘... [Correspond] à un aspect du principe de sécurité juridique [et] signifie que l’autorité communautaire ne peut modifier sans précautions une réglementation si elle a elle-même créée (...) la confiance légitime des opérateurs économiques...’; see ‘confiance légitime’, in T. Debard, B. Le Baut-Ferrarèse & C. Nourissat, Dictionnaire du droit de l’Union européenne, Paris, Ellipses, 2002, especially p. 56.*

implies that each party does what was envisaged in the contract<sup>822</sup>. The principal manifestation of the duty of consistency, namely that the parties may not act inconsistently with their previous undertakings, has been recognised by the Community judge as a defence in the case of *Dionysia Vlachaki*<sup>823</sup>, describing it as ‘[a] related principle of legitimate reliance’<sup>824</sup>, even if, *in fine*, they then rejected it.

### C. Codifications by legal scholars

175. Amongst the different projects studied, it is undoubtedly the **Unidroit Principles** that recognise the most applications of the principle of consistency. The principle is posed by Article 1.8, entitled ‘*Inconsistent Behaviour*’ and which states ‘*a party cannot act inconsistently with an understanding it has caused the other party to have and upon which that other party reasonably has acted in reliance to its detriment*’. As in the Principles of European Contract Law, we find an exception to the free revocation of an offer where ‘*it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer*’<sup>825</sup>. In the same way, according to Article 2.1.18<sup>826</sup>, the statements and behaviour of one of the parties can prevent that party from taking advantage of a merger clause or a modification by writing clause. Article 7.1.5 deals with the prohibition on cumulating incompatible remedies. Thus, a party who grants additional time to perform may not take advantage of any other remedy (termination, damages etc).

The Unidroit Principles also prohibit the party who is responsible for the non-performance from relying on it. Thus, according to Article 7.1.2 ‘*a party may not rely on the non-performance of the other party to the extent that such non-performance was caused by the first party’s act or omission (...)*’. In respect of harm only partially attributable to the party to whom performance is due, Article 7.4.7 states that ‘*where the harm is due in part to an act or omission of the aggrieved party or to another event as to which that party bears the risk, the amount of damages shall be reduced to the extent that these factors have contributed to the harm, having regard to the conduct of each of the parties*’. Lastly, the Principles adopt the duty incumbent on the aggrieved party to mitigate their harm. Thus, ‘*the non-performing party is not liable for harm*

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<sup>822</sup> The duty of consistency appears to correspond to a ‘private’ manifestation of legitimate reliance.

<sup>823</sup> CFI, 8 March 2005, *Dionysia Vlachaki*, wife of Petros Eleftheriadis v. Commission of the European Communities, T-277/03, Rec. 2005 p. 00000

<sup>824</sup> ‘*Principe connexe de la confiance légitime*’, point 72 of the above case.

<sup>825</sup> Article 2.1.4

<sup>826</sup> ‘*A contract in writing which contains a clause requiring any modification or termination by agreement to be in a particular form may not be otherwise modified or terminated. However, a party may be precluded by its conduct from asserting such a clause to the extent that the other party has reasonably acted in reliance on that conduct*’.

suffered by the aggrieved party to the extent that the harm could have been reduced by the latter party's taking reasonable steps'<sup>827</sup>.

We also find the principle whereby the right to terminate the contract is lost if the aggrieved party does not act within a reasonable time<sup>828</sup>. In the same way, the party loses his right to demand performance in kind if he does not require the performance of a non-pecuniary obligation within a reasonable time<sup>829</sup>.

**176.** Several applications of the principle of consistency are to be found in the **European Code of Contract Preliminary Draft**. As in the Principles of European Contract Law we find the rule concerning apparent authority<sup>830</sup>. It is the same in respect of the prohibition on cumulation of two incompatible remedies. Thus for example, according to Article 110, a creditor who grants additional time for performance can not take advantage of the remedies of enforced performance or termination of the contract. In matters of non-performance, according to Article 114 § 6, '*the creditor has no right to dissolve a contract if the non-performance turns solely on an act or omission attributable to him (...)*'. The same article states that '*neither has the creditor this right if he has made the other party convinced that dissolution would not be sought, even in the case of substantial non-performance*'. This project therefore establishes the rule according to which the creditor may not demand the sanction of a non-performance which has previously been tolerated.

**177.** Lastly, the **Proposals for Reform of the Law of Obligations and the Law of Prescription** is the project which recognises the fewest applications of the principle of consistency. This is no doubt explained by the fact that the substantive law, which applies the principle of consistency, is derived from case law which refers, if need be, to Article 1134 paragraph 3 of the Civil Code. Nevertheless, it is still possible to find provisions that apply the principle of consistency.

We find a provision that prohibits the revocation of an offer in contradiction with previous statements. Nonetheless, in contrast to other provisions, the wording chosen does not show the

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<sup>827</sup> Article 7.4.8 (1).

<sup>828</sup> Article 7.3.2 (2): '*If performance has been offered late or otherwise does not conform to the contract the aggrieved party will lose its right to terminate the contract unless it gives notice to the other party within a reasonable time after it has or ought to have become aware of the offer or of the non-conforming performance*'.

<sup>829</sup> Article 7.2.2 (e).

<sup>830</sup> Article 61: '*If a person lacks authority to act in the name and on behalf of another, but this other party acts in such a way as to lead the third party contracting reasonably to believe that the apparent agent has been granted authority, the contract is concluded between the apparent principal and the third party*'.

influence of the principle of consistency as clearly<sup>831</sup>. According to Article 1105-4, ‘*however, where an offer addressed to a particular person includes an undertaking to maintain it for a fixed period, neither its premature revocation nor the incapacity or death of the offeror can prevent the formation of the contract*’<sup>832</sup>.

It is also proposed to introduce the rule drawn from the proverb ‘*nemo auditur*’ into the Civil Code and to extend its scope to all unlawful acts, and not to immoral ones alone<sup>833</sup>.

In respect of the prohibition on the creditor demanding reparation of damage for which he is responsible, there is reason to apply Article 1350, shared between both types of liability, which states that ‘*a victim cannot recover any reparation where he deliberately sought the harm*’<sup>834</sup>. Article 1351 further specifies that ‘*a partial defence to liability can only apply where the victim’s fault contributed to the production of the harm*’<sup>835</sup>.

Lastly, the proposals establish the principle of a duty to mitigate damage. Thus, Article 1373, shared between both orders of liability, states that ‘*where the victim had the possibility of taking reliable, reasonable and proportionate measures to reduce the extent of his loss or to avoid its getting worse, the court shall take account of his failure to do so by reducing his compensation, except where the measures to be taken were of a kind to have compromised his physical integrity*’<sup>836</sup>.

## **IV. Proposed text**

### **Article 0-304: Duty of consistency**

No party shall act inconsistently with any prior statements made by the party or behaviour on the part of the party, upon which the other party may legitimately have relied.

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<sup>831</sup> See however, D. Mazeaud, *La confiance légitime et l’estoppel*, article cited above, n° 30, for whom the provision shows the penetration of the concept into the French legal order.

<sup>832</sup> J. Cartwright and S. Whittaker, *op. cit.*

<sup>833</sup> Article 1162-3: ‘*Restitution may be refused to a person who has knowingly violated public policy, public morality or more generally, any mandatory rule*’, *ibid.*

<sup>834</sup> *Ibid.*

<sup>835</sup> The provision then states that ‘*in the case of personal injury, only a serious fault can lead to a partial defence*’, *ibid.*

<sup>836</sup> *Ibid.*

## ***GUIDING PRINCIPLES OF EUROPEAN CONTRACT LAW***

### **Section I. Freedom of contract**

#### **Article 0-101: Freedom of the parties to enter into a contract**

Each party is free to contract and to choose the other party

The parties are free to determine the content of the contract and the rules of form which apply to it.

Freedom of contract operates subject to compliance with mandatory rules.

#### **Article 0-102: Respect for the freedom and rights of third parties**

Each party can only contract for themselves, unless otherwise provided.

A contract can only produce an effect in as much as it does not result in an infringement of unlawful modification of third party rights.

#### **Article 0-103: Freedom of the parties to modify or put an end to the contract**

By their mutual agreement, the parties are free, at any moment, to terminate the contract or to modify it.

Unilateral termination is only effective in respect of contracts for an indefinite period.

### **Section II. Contractual Certainty**

#### **Article 0-201: Principle of binding force**

A contract which is lawfully concluded has binding force between the parties.

In addition to the performance of the contractual obligations, each party is bound to comply with the duties which can be implied from the principle of contractual fairness.

In the course of performance, the binding force of the contract can be called into question if an unforeseeable change of circumstances seriously compromises the usefulness of the contract for one of the parties.

#### **Article 0-202: Right to performance**

Each party can demand from the other party the performance of the other party's obligation as provided in the contract

**Article 0-203: Rights and duties of third parties**

A contract creates a situation which third parties must respect and upon which they may rely without being able to require performance.

**Article 0-204: Principle favouring the maintenance of the contract**

When a contract is subject to interpretation, or when its validity or performance is threatened, the effectiveness of the contract should be preferred if its destruction would harm the legitimate interests of one of the parties.

**Section III. Contractual Fairness**

**Article 0-301: General duty of good faith and fair dealing**

Each party is bound to act in conformity with the requirements of good faith and fair dealing, from the negotiation of the contract until all of its provisions have been given effect.

The parties may neither exclude this duty, nor limit it.

**Article 0-302: Performance in good faith**

Every contract must be performed in good faith.

The parties may avail themselves of the contractual rights and terms only in accordance with the objective that justified their inclusion in the contract.

Each party is required not to do anything that prevents the performance of the contract or that infringes the rights that the other party acquires from the contract.

Where one of the parties, without compromising the performance of the contract, has acted in such a way as to reduce the benefit that the other party could legitimately expect from the contract, the party is required, at the request of the other party, to renegotiate the contents of the contract.

**Article 0-303: Duty to cooperate**

The parties are bound to cooperate with each other when necessary for the performance of their contract.

**Article 0-304: Duty of consistency**

No party shall act inconsistently with any prior statements made by the party or behaviour on the part of the party, upon which the other party may legitimately have relied.