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# International Business Law

An introduction to the legal instruments  
and to the legal environment of business  
from an international perspective



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## **VI. Contracts in general**

### **1. Omnipresence of contracts; contract law as necessary and fundamental knowledge for managers**

Criminal law, constitutional law or extra-contractual liability relate to the legal environment of business. By contrast, contracts are legal *instruments* of business. Fundamentally, a company aims at selling goods or services, in exchange for an income to be received from its purchasers or clients; however diverse the goods and services are, whatever the amount or type of payment is, they are necessarily sold or provided, and paid, in virtue of contracts. Contracts are an unavoidable part of any business activity. Also as regards *how* a company structures its activities, internally or externally, it necessarily uses contracts: it does so to have relationships with employees, agents, distributors, suppliers or service providers (as diverse as transporters, consultants or banks). The same applies to relationships with partners, investors or creditors. In short, for any company, contracts are everywhere; they are the omnipresent tools of many aspects of its activities and existence.

Contracts are legal instruments, but they are not designed for lawyers. They are made for the ordinary fulfillment of business activities. And indeed, if one attempts a rough quantitative approach, it can be said that lawyers intervene only in a minuscule proportion of contracts. Regarding the fulfillment of contracts, lawyers usually intervene only in case of problems of fulfillment (“defective fulfillment”, or “non-performance”) – and this only when the interests at stake justify their intervention. Regarding the making (“conclusion”) of contracts, lawyers intervene only in complex or large contracts (or in the drafting of standard contract texts that will have to be used in multiple opportunities).

*A fortiori*, contracts cannot be properly approached if they are apprehended only from the point of view of their judicial consequences: of course, as legal instruments, contracts are *enforceable* before courts of justice; but the proportion of contracts that need to be brought before a court of justice is infinitesimal<sup>214</sup> in comparison with the contracts that are simply fulfilled as they have been made, without judicial enforcement or even any threat or allusion to an intervention of a judge or even to its character of legal obligation. This being said, the awareness of the legally binding nature of contracts is an element that contributes to their spontaneous fulfillment. And the (even vague, unexpressed and uncertain) anticipation of how a judge would understand and enforce a contract guides the parties to a contract about their own interpretation thereof. Thus, legal rules and judicial decisions that interpret and enforce contracts are important for the practice of contracts – and they are important not only for lawyers, but also for managers, who, in reality, make, interpret and fulfill the immense majority of contracts without the assistance of lawyers.

## 2. Definition of contracts

A contract can be defined as an agreement, between two persons or more, which contains at least one promise about the behavior of any person and creates legal obligations. *Concentrated definition*

The fundamental element of this definition is the consensual element: a contract is an agreement; it is conceived as something wanted by the parties who have made it. *- consent*

Its object is the less precise element of the definition: any promise about any behavior may be the object of a contract (it can be said that exceptions thereto affect the validity, not the concept of contract). *- promise(s)*

That it creates legal obligations distinguishes the contract from other promises, which have a merely social character (courtesy) or are issued – perceptibly – without the intention to be bound. If not spontaneously fulfilled, a contract is enforceable with the assistance of courts of justice: either the entitled party can sue to obtain its fulfillment in nature, or it can obtain compensation in money (damages). *- legal obligations*

These elements are examined in details in the following pages.

Contrary to a belief that is widespread among non-lawyers, a contract is *not necessarily a document*<sup>215</sup>; however advisable it may be to make contracts in written (at least complex ones or those that are not immediately fulfilled), and although some types of contracts are required by particular laws to respect a form in order to be enforceable or valid, the form does not belong to the *definition* of a contract. *Role of formalities*

### **3. Free will as basis of contracts (*freedom of contract*), in a context where trust is protected**

*Essentiality of free will*

Conceptually, a contract is based on the free will (free consent) of each of the parties who enter into it; it is an agreement. At the moment of forming the contract, the free will of each party is decisive, as regards whether a contract will be formed and what its content will be<sup>216</sup>. To try a daring and simplistic overview, one could say that half of the rules of general contract law derive from this principle.

*Protection of legitimate trust*

This role of the free will of each party shall however be understood not in a formalistic or individualistically absolutistic way, but in a context where the legal system also protects the *trust*, or *legitimate confidence*, that the other party, who receives a statement expressing the will, may have about it. *Good faith* is protected<sup>217</sup> simply because – and to the extent that – such other party, addressee of a statement, believes that the person who declares his consent to a contract or to a clause actually wants what he says, if the contrary is not perceptible. Regarding the legally decisive meaning of a statement expressing the consent, reasonable expectations about the meaning of such statement are protected. In other words, the free will expressed by each party is decisive, but an *addressee may rely on what reasonably appears to be the free will*, if he is attentive to the relevant circumstances. In the same daring and simplistic overview attempted in the previous paragraph, one could say that the second half of rules of general contract law derive from the need to reasonably protect good faith, i.e. the legitimate and reasonable confidence in other persons' expressions of their will.

*Obligations once a contract has been entered into*

One essential aspect about the role of the free will is that it is decisive *until this will consists in entering into a contract*. Once a contract is made, the parties to it are bound with each other;

as from that second phase, their relationship consists in obligations<sup>218</sup>; the unilateral will that a party may have as from that moment is not decisive for the interpretation or fulfillment of their contract.

### ***3.1 Practical consequences of the elementary role of free will***

Each of the parties is free to enter into a contract. This means in particular that it can freely, sovereignly, state under which conditions it will enter into a contract, whatever these conditions – reasonable, questionable or fully unreasonable and arbitrary – might be.

#### **3.1.1 Freedom to break off negotiations**

The freedom of contract can notably be seen as the freedom *not* to enter into a contract.

*Legal rule:  
freedom of not  
entering into a  
contract*

A practical consequence is that each party is free to break off contract negotiations. It can do so for any reason; it can even do so without any reason; the sole fact of not wanting to enter into a contract is legitimate. From a legal point of view (and whatever might be appropriate commercially or courteously), a party is not obliged to give any ground to the other party to explain why this decision is taken. It is enough to notify having decided that negotiations cease.

This means in particular that, as such, the simple fact of terminating negotiations shall not create a liability.<sup>219</sup>

This is one of the elements that, philosophically and systematically, justify the binding force of contracts. In today's understanding, its source is the consent of each party to be bound, the consent to binding contractual obligations; a contract is a freely decided self-constraint. Therefore, the legal system supposes and shall ensure that this consent be real and

*Justification of  
the binding  
character of  
contracts*

not forced. The right to freely break off negotiations is crucial in this regard: a contract deserves to be binding notably because, in the legal system, nothing obliges a person to enter into a contract. If there were an obligation to enter into a contract, even by only obliging a party to compensate the other when it breaks off negotiations, the decision of such party would not be free enough to justify why a contract is binding.

*Pre-contractual liability because of some behavior prior breaking-off*

There are some cases in which a liability arises out of the behavior in negotiations ("*pre-contractual liability*"). This shall be the case only because of behaviors other than the fact of breaking them off<sup>220</sup>. Such – bad faith and illegal – behaviors consist e.g. in concealing circumstances that should have been disclosed, or in negotiating a contract without having any intention at all to possibly conclude<sup>221</sup>, or in giving the impression that one's intention to possibly conclude is much more probable than it is in reality, or in misleading the other about the parameters of one's future decision to possibly conclude. In such cases, the termination of negotiations can actually *reveal* losses that legally have to be compensated as a consequence of the former illegal behavior<sup>222</sup>. However important these situations are intellectually – although their presence in legal literature is reversely proportional to the very limited number of cases where pre-contractual liability is actually recognized by the courts<sup>223</sup> –, they should never lead to overlook that the rule is the freedom to break off negotiations.

### 3.1.2 Freedom of the parties as to the content of a contract

The parties can give to their contract whatever content they wish. The only – and necessary – condition for this is that they be in agreement.

This applies to the object and nature of the contract. The parties can wish to enter into a classical contract, like the contract of sale (transfer of ownership in exchange for money), or a contract of lease (temporary transfer of an asset in exchange for a – mostly revolving – payment), or their gratuitous variants (gift), or, regarding services, like the deposit, transportation, agency, employment or work contract. In many legal systems, such “classical” contracts have been explicitly contemplated and regulated by the legislator; provisions of statutes (e.g. Civil code or Code of contracts or Code of obligations, or a particular statute like a “Sales Act”) include provisions that govern such contracts (especially to the extent that the parties have not foreseen their own solutions to particular questions). But – in the modern legal systems<sup>224</sup> – the freedom of the parties is not limited to choosing the contract they wish among a limited listing of contract types foreseen and declared admissible by the legislator. The parties can agree on an operation that has not been contemplated at all by the legislator. In the recent history of Law – the 19<sup>th</sup> and 20<sup>th</sup> centuries –, this has notably happened with the creation of the contracts of licensing (leasing an asset of intellectual property), of leasing (a combination of lease and sale), of franchising, of factoring or of maintenance. Such contracts were created not as a decision taken by the legislator. Parties identified particular practical needs and agreed on a way to combine obligations to appropriately deal with their actual needs, and this did not correspond to a classical contract; they so gave birth to a contract that was not less valid and binding than classical contracts. If this new combination of obligations corresponded to frequent needs, its repetition may have evolved into creating *a new type of contract* (as the well-known aforementioned examples of licensing, leasing, franchising, etc., show). It happens then that the legislator, when revising or redrafting its code or other statutes on contracts, creates

*Freedom as to  
object and  
nature of  
contract*

specific provisions on such new types of contracts. This being said, the phenomenon of business practices and business needs constantly creating new contracts and, by repetition of the same, new types of contracts, is constantly active and always ahead of the legislator's new laws; even if some of these creations may be questionable (some complex derivative financial products<sup>225</sup>, which are all new contracts), the flexibility that the freedom of the content represents is useful: it allows the law to never be late as regards the practical needs of the participants to commercial and economical life who wish to organize their mutual cooperation, in the most diverse ways that they may imagine and agree on.

The extreme rarity of limits is illustrated, for example, by the possibility to make contracts, the object of which is another contract (e.g. the option contracts<sup>226</sup>). A contract can also have as its object an abstention (e.g. restraint of trade<sup>227</sup>). The only limits are those foreseen by the legislator mainly because of strong moral considerations or of major interests. This does not require for example to forbid a contract that consists in selling the property of somebody else: the seller in such a case enters into the obligation of transferring ownership of an object that he does not own; this does not oblige him to a theft, but presupposes that he will acquire from the current owner the ownership on the property at stake in order to fulfill his contractual obligation; if he does not succeed, he will owe a compensation to the buyer. Such contract is therefore legally possible.

In law related to business life – at least in liberal economies –, limits that consist in forbidding a type of contract are extremely rare; they are enacted only when a clear need of prohibition becomes apparent. For example, in the acme of the financial crisis that followed the insolvency of the bank Lehman Brothers in September 2008, legislators urgently forbade the formation

of “naked call options” (“short selling”) on shares of financial institutions, because of the serious disturbances on the entire – dangerously weakened – financial system that these contracts were suspected to favor.<sup>228</sup> The type of contract – naked call options – was however never forbidden as such.

By contrast, limits are much more numerous about the *clauses* *Freedom as to clauses* of contracts. For example, the parties have a considerable freedom in agreeing on the regime of their liability; but most laws (so-called “mandatory” or “imperative” provisions) do not allow to totally excluding liability for an intentional or grossly negligent breach of obligation.<sup>229</sup> Also, the parties are free to determine the time-limits of their contractual rights, i.e. the time that each of them has at his disposal to claim fulfillment (or compensation) before a court of justice (“statute of limitation”<sup>230</sup>); but most laws restrict this freedom by not allowing excessively short or excessively long time-limits. This being said, these limitations remain exceptional; the principle is that the parties are nearly totally free to agree on whatever clauses they want.

One must distinguish from the absence of limitations about the type of contracts, i.e. nature and object in general, as well as from the exceptional character of mandatory rules limiting the freedom of contract clauses, a considerable quantity of limitations that result from the practical actions that are forbidden by criminal and administrative law<sup>231</sup>; also, many actions require a state approval, i.e. they are allowed to holders of such approval, but forbidden to others<sup>232</sup>. Conceptually, the parties can agree on these actions, but their contract is exposed to be “null” or “void” – or “invalid”. However, even when the obligation to perform a forbidden action is null, the contractual freedom allows the parties to agree on several valid obligations in that regard: for example, a party can contractually certify that the promised behavior is not forbidden, or can guarantee *Prohibited behaviors as objects of contracts*

that the prohibition will be suppressed (or that otherwise a non-forbidden alternative action will be performed); this party will therefore be obliged to compensate the other party if such contractual assertions or guarantees are not complied with.

*General  
limitations in  
particular fields  
of law*

In some particular fields of law, e.g. related to family relationships, the contractual freedom is very limited also as to the object and nature of contracts that can be entered into. This results from the sensitiveness of societies to these questions and to the idea that family relationships (notably marriage) are a *status*.<sup>233</sup> This justifies a *numerus clausus* of the type of contracts that can be entered into (contract between spouses about the general regime by which their property would be liquidated in case of divorce; contract with heirs about future inheritance).

*Limitations  
resulting from  
the concept of  
contract*

Some limitations as regards what content the parties can give to the agreement result from the *concept itself* of contract. The rule that a contract cannot oblige a person who is not a party to it is a simple consequence of the essential characteristic that a contract is an agreement and binds its parties because they have agreed to it. A person who is not a party has not agreed and is not bound<sup>234</sup>. However, the flexibility that results from the freedom of contract reaches so far that a party can enter into multiple obligations about the behavior of a person who is not party to the contract: for example, a party can guarantee that a definite behavior of such person will take place, and be thus obliged to compensate the other party if this behavior does not take place.<sup>235</sup>

### **3.2 Overview of the effects resulting from a concluded contract**

When a contract has been validly made (“concluded”), it obliges its parties to fulfill it.

If it is not spontaneously fulfilled in the due time, the law gives to the party who is entitled to receive fulfillment (“the aggrieved party”) the right to continue requesting the fulfillment (“specific performance”) and, additionally, to obtain compensation for the consequences of the delay (“damages for late or belated fulfillment/performance”).

*Right (claim) to obtain fulfillment and compensation of delay*

The aggrieved party may also – in many circumstances only after it grants a new time-limit (“grace period”) to the non-fulfilling party – renounce to the specific performance and terminate the contract. In this case, it is entitled to receive (in addition to the restitution of what it already performed itself) compensation for non-performance.

*Right to terminate and obtain compensation for non-performance*

If a contract is only partially fulfilled in time, the right to compensation for late partial performance exists for the portion in delay. If a contract finally remains partially unfulfilled, the aggrieved party can terminate the contract at least for the unfulfilled portion and obtain compensation for non-performance for the unfulfilled portion; if the partial non-fulfillment amounts to a substantial breach of the entire contract, the aggrieved party may terminate the entire contract.

*In case of partial late or non-performance*

In all these situations (late or non-fulfillment, total or partial), there is no right to compensation if the fulfillment has not occurred in due time because it was impossible as a consequence of irresistible events that were unforeseeable (typically referred to as “*force majeure*”); even under such circumstances, termination is possible (at least after a grace

*Exception to right of compensation*

period) and, in case of termination, restitution of what was already performed is due.

*Calculation of compensation:  
- ordinary rule*

When owed, the compensation (for late performance or for non-performance, total or partial) is determined by a comparison between, on the one hand, the financial situation of the aggrieved party after the non-performance and, on the other hand, the financial situation that would have existed if the contract had been perfectly fulfilled.

This rule is simple in its general and abstract expression. Its implementation can often lead to very complex calculations and debatable evidence. Damages can include not only the actual losses and expenses (*damnum emergens*) resulting from non-fulfillment, but also the missed earnings (*lucrum cessans*) that are the consequence thereof; and some elements of injury (loss of reputation, moral harm) are barely quantifiable in money.

*- rules and instruments to simplify compensation*

To favor practicability, some particular legal rules simplify the calculation, notably regarding the compensation for late payment (a standard interest is set forth by the law) or the compensation for non-delivery of goods which have a market price (the law allows the aggrieved party to opt for damages consisting in the difference between the contractual price on the day of agreed delivery and the market price on the same day). The parties also have the possibility to agree in their contract on a lump sum that will be payable as compensation in case of breach ("liquidated damages"). Considering the frequent difficulties to make evidence of the entire losses, all these simplifying mechanisms are widely used and actually have the effect that procedures of compensation are completed much more quickly than if full compensation is sought.

In the judicial practice, compensation (simplified or full) is by far the most frequently sought remedy in case of breach of contract. It is theoretically possible, except when the performance requires a personal activity of the party in default, to obtain from a court of justice a judgment ordering fulfillment in nature (“specific performance”), e.g. delivery of goods, transfer of ownership of real estate or intellectual property, absence of competing activity. However, in many cases where specific performance would be thinkable, the practical duration of judicial proceedings creates a considerable risk that, at the moment where the judgment would be enforced, the fulfillment in nature would have lost its practical interest. Therefore, except when it is possible to obtain specific performance by urgent procedures (“injunctions”), the aggrieved party in practice most frequently renounces to specific performance and sues for compensation.

*Compensation v. specific performance in judicial practice*

Besides this overview, the termination, restitutions, compensation and force majeure<sup>236</sup> will be dealt with in detail later in this chapter (section 5)<sup>237</sup>, as well as in the chapters that address the contract of sale<sup>238</sup> and the contract of licensing<sup>239</sup>.

*Further reading on non-fulfillment*

### ***3.3 Interactions of freedom and good faith in making and interpreting contracts***

#### **3.3.1 The mechanism of offer and acceptance**

Legal provisions analyze the fundamental mechanism by which a contract is formed as the exchange of an offer and an acceptance.

An offer consists in making a proposal to enter into a contract. If it is accepted by the addressee, the contract is concluded.

*Definition of offer*

More precisely, the conditions for an offer to exist in the legal sense are that it shall be “sufficiently definite” and shall

*“indicate the intention of the offeror to be bound in case of acceptance”*.<sup>240</sup>

*Definiteness*

The requirement of sufficient definiteness is based on a necessity: a contract can exist only if it is possible to know what has been agreed on, what the consented operation consists in; and notably, the parties – and a judge in case of subsequent litigation arising e.g. out of non-fulfillment – shall be able to know what they have to fulfill. Typically, for a contract of sale, the goods that are to be delivered by the seller must have been defined by the offer; for a contract of services, the services to be rendered by the provider must have been determined. It is also required that it be possible to determine what the remuneration of the other party will consist in. These – essential – elements may also be determined by references (to catalogues, to a market price, to past practices between the parties), which can be explicit or implicit.

The offer does not need to determine (directly or by reference) the solutions to all questions that might arise (e.g. the liability and destiny of contract, in case of non-fulfillment or of force majeure – irresistible impossibility –, the obligations in case of particular requests by a party, the time-limits during which contractual claims can be raised, etc.). The legal systems provide for such solutions in statutory law or in unwritten law. Therefore, the absence of an (explicit or implicit) agreement on such solutions (which can be described as “generally secondary points” or “generally non-essential elements of the contract”) does not preclude the contract to be made.<sup>241</sup> The offer does not need to determine them, but it can do so: if the offer contains particular solutions on these non-essential points, and if it is accepted, so that a contract is made, these particular solutions will apply between the parties; they will prevail on the solutions foreseen by the law (exceptions exist only for the rare solutions foreseen by the law that are “mandatory” or

“compulsory” because they protect major interests, incl. the preservation of a fundamental balance between the parties’ reciprocal rights and obligations).

As regards the intention to be bound in case of acceptance, it can be said that, in general in business life, such intention is presumed if a person proposes a commercial operation. Particular – perceptible – circumstances may make understand that it is not the case: if an offer is made as a pedagogical example, or in an obvious anger, or clearly as a hypothesis for a reflection (e.g. in a brain storming to find a solution when negotiations are in a deadlock), it does not indicate an intention to be bound in case of acceptance. The same applies if, explicitly, the person who makes the proposal states that it does not want to enter into legal, enforceable obligations, but only want to conclude a gentlemen’s agreement with no possible recourse to judges and legal approaches. A more frequent and practically very important instrument for making proposals, which does not amount to making an offer, is the *solicitation of offer(s)*: it consists in asking the addressee(s) to make an offer. Such a solicitation can be very precise, notably as precise as an offer would be. But even in such cases, if it is clearly presented as solicitation, the proposal is not binding for its author (it will bind only the addressee who, in reply to such solicitation, makes an offer). *Intention to be bound*

In regard with all these particular circumstances, whether a proposal is a binding offer does not depend only on the will of the person proposing. It depends on whether this particular will is perceptible. If reasonably, in good faith, having attentively taken into account the facts that were perceptible, the addressee can understand that there is a real, binding offer, this reasonably perceptible meaning of the proposal shall prevail and the proposal is treated as a binding offer, in spite of the – intimate – will of the author of the proposal.<sup>242</sup>

*Time during which an offer is binding*

When a valid offer has been made, an acceptance will create the contract if it is received in time by the offeror.

*- time fixed in the offer itself*

As the expression of the will of the offeror, the offer itself may explicitly indicate the time during which a received acceptance will create the contract.<sup>243</sup> In this regard, there are nearly no restrictions to the will of the offeror: the offer can indicate that it needs to be accepted within a fixed number of days, or of hours, or even just of minutes,<sup>244</sup> or even of seconds or until a fixed date and hour (otherwise it will lapse, so the contract will not be created by the acceptance replying – too late – to that offer); the time for acceptance can be as short as the offeror wishes, or as long (several months of duration, or even years, are possible, save restrictions aiming at protecting the offeror against a clearly excessive restriction to his or her freedom resulting from a too long offer<sup>245</sup>); the offer itself can also indicate if and how it can be withdrawn or revoked by the offeror.

*- time determined by general rules*

If the offeror has not indicated the duration of the offer, general rules apply. They aim at corresponding to what the offeror impliedly wanted in this regard or to what he apparently wanted, as an addressee acting reasonably and in good faith should have perceived.

*-- oral offer*

These rules are based on experience. A first rule sets forth that an offer made verbally shall be – if such oral offer has not mentioned otherwise – accepted immediately;<sup>246</sup> it lapses automatically at the end of the conversation.

*-- other offers*

The second rule relates to all offers made in writing. It provides that an offer shall be “*accepted within a reasonable time, due account being taken of the circumstances of the transaction, including the rapidity of the means of communication employed by the offeror*”.<sup>247</sup>

The implementation of this rule may be simple if there is a *trade usage* (e.g. in the international trade of fresh eggs, it was observed that a standard duration of 24 hours exists as a usage<sup>248</sup>); such usages do, however, not seem to be frequent or precise.

The criterion that most often guides the determination of the duration – in absence of a time fixed by the offer itself – is therefore the reasonableness.

In this regard, the means of communication used can be of assistance to note whether an acceptance is not wanted urgently (as from the 21<sup>st</sup> century, most means of communications are immediate; the criterion of fax or e-mail is therefore not decisive to indicate whether an offer is urgent; by contrast, the use of a non-immediate means of communication, which occurs e.g. if a sample or original documents are sent by courier, may reasonably be interpreted as the indication that no urgent acceptance is needed to form the contract).

Besides this aspect, the circumstances to take into account include the *nature of the proposed object* and the *situation of the parties*. An offer related to perishable goods is expected to trigger a quick reply. This may vary depending on the conditions of storage. Offers on physically stable goods (coal, phosphates, metals, etc.) can also need to be accepted quickly due to expensive conditions of storage or to volatility of market price. The – perceptible – financial situation of the offeror is also very relevant: an offer of rent made by a landlord may need to be accepted quickly if the premises are unoccupied and offered for immediate rent; by contrast, if the premises are offered for a remote future date, a considerably longer duration of offer is reasonable and thus legally decisive. The situation of the addressee of the offer (“offeree”) is also relevant to the extent that it was known to the offeror: for example, if an offer was

needed to obtain financing from third parties (investors, bank) or to be discussed by corporate bodies (board of directors, top management, shareholders), the usual time needed for the announced negotiations or discussions shall be taken into account to determine what a reasonable duration of offer is.

The reasonableness can also be determined by the behavior of the parties after that the offer has been issued. For example, if the offeror, without fixing a time limit, has the addressee understand that it is not yet urgent to reply, this must be taken into account; even if a long time has elapsed, it cannot be considered that the offer can reasonably lapse shortly after such behavior. On the other hand, if the addressee, upon receipt of the offer, notifies to the offeror that he considers that the offer is valid until a determined moment that he states in his notice, this moment – if not unreasonable – will be decisive for the duration of the offer if the offeror approves or does not react.

The reflections related to the reasonableness show well that making of contract consists in determining the will of the parties and notably what each of them can perceive as the *apparent* will of the other party. This said, it is obvious that the reasonableness criterion can lead to debates and, whenever possible, an offeror avoids uncertainty by fixing a time-limit for acceptance; and the addressee of an offer made without time-limit will beneficially reduce uncertainty by notifying (as soon as possible) his opinion about the moment until which he considers the offer is valid.

*Rejection  
terminates the  
offer*

It is important to note that the fact of rejecting an offer terminates it<sup>249</sup>. A counteroffer is treated as a rejection of the initial offer; the addressee, who makes the counteroffer, is the new offeror.

This shall be considered by every addressee who is interested in an offer, but also eager to try improving its terms. In such circumstances, the reply to an – interesting – offer should preferably not be a counteroffer (which will terminate the offer), but a mere question whether the terms of the offer could be changed (also in a precise sense)<sup>250</sup>. If not awkwardly formulated, such question cannot be considered as a counteroffer (amounting to rejection of the offer).

The acceptance consists normally in an expression of assent. *Acceptance*  
Any reply with modified terms is not an acceptance, but a counteroffer (which, as seen, terminates the offer; some nuances are dealt with in the following section under the title “modified acceptance”<sup>251</sup>).

The offer can specifically indicate with which formalities the acceptance shall be made. It can e.g. prescribe that the acceptance has to be made in writing (and it can specify if e-mail, facsimile or original documents are required); it can also prescribe that proof of some contemporary payment shall be provided. *- formalities if required by offer*

If the offer does not contain precisions of that kind, an expression of assent, written or oral, is an acceptance. *- any form*

Besides, a behavior that clearly means acceptance is also treated as such<sup>252</sup> (for example a payment), if perceptible by the offeror within the time for which the offer is binding.<sup>253</sup> *- behavior*

The silence to an offer does usually not constitute an acceptance.<sup>254</sup> However, it can be treated as such if particular circumstances show that both parties understand it like this (or appear to do so). This illustrates the interactions of free will and good faith. It can occur because of past practices between the parties, e.g. if over several identical operations, the offeror had always considered the offer as accepted unless the addressee *- silence?*

dispatched a rejection. It can also occasionally occur if the addressee perceives that, believing subjectively in good faith that the offer is accepted, the offeror starts fulfilling the contract and this fulfillment is perceptible to the addressee; in such case, a legal duty of the addressee to explicitly react and reject the offer might arise, so that the lasting silence in such particular circumstances could be considered as acceptance (“*qui tacet consentire videtur ubi loqui potuit ac debuit*”<sup>255</sup> – a person who remains silent is deemed to consent in cases where he could and should speak).

Particular situations where silence might be effective as acceptance relate to *the acceptance sent in time that reaches the offeror too late* and to the *(slightly) modified acceptance*. They will be dealt with in the following sections.<sup>256</sup>

By contrast, *in itself*, the fact that an offer indicates that it will be deemed accepted unless rejected does not have the effect that silence to such offer will be deemed to constitute acceptance; in this situation, indeed, the statement of the offeree is purely unilateral and nothing in the behavior of the addressee allows him to believe that the addressee shares the same approach.

*Exchange of offer and acceptance in an infinity of variations*

Finally, it can be said that contracts are not necessarily made by the exchange of an offer and an acceptance.<sup>257</sup> Clearly, many negotiations are much more complex and dozens or hundreds of offers and counteroffers are made. However, the approach of contract formation seen as the exchange of offer and acceptance is fundamentally accurate also in such situations: it often happens in the course of complex and long negotiations that a last proposal is made (which may just consist in modifying an extremely limited aspect of the previous proposal) and this last proposal is accepted; this actually forms the contract. There can of course be situations in which a term

sheet is made for the commercial terms and negotiations continue as regards the exact drafting: in such circumstances, the parties have simply reserved that the contract negotiations continue and the contract formation will be made when a common final text is accepted and signed; in this case, the final version sent by the first party who has signed is the offer, and the signing of that text by the other party is the acceptance. The mechanism of offer and acceptance is true also regarding particular situations like auctions: the conditions of the auction state how participants make offers and how one of them is accepted (usually, the auctioneer solicits offers from the participants, whereas he has in advance committed to accept the higher offer if no further offer is made for a certain time). The mechanism of exchange of offer and acceptance is not to be seen in a formalistic or narrow manner; the fact that an offer reflects the will of the offeror allows infinite variations.

### 3.3.2 Late acceptance

The rules related to late acceptance illustrate particularly well the interaction of free will and good faith.

An “acceptance” that reaches the offeror after the time indicated by the offer (or determined by other criteria) does not respect one of the conditions of the offer upon which acceptance would have formed the contract: the offer had lapsed and was thus not valid as such at the moment of “acceptance”. Legally, such statement is therefore not an acceptance forming the contract.

*Legal analysis of  
a late  
acceptance*

But, still from a legal point of view, such late “acceptance” nevertheless expresses the will of the addressee of the offer to agree on the terms contained in the (formerly valid) offer. It is therefore reasonable and logical to consider that this statement can be treated as a new offer, which is made by the addressee.

Most laws allow the initial offeror, who receives such late acceptance, to notify that he accepts this “acceptance” in spite of its belated arrival;<sup>258</sup> from a strict legal point of view, this notice consists in accepting the new offer that the late acceptance constitutes.

*A contrario*, if the initial offeror does not accept this new offer, no contract is formed; this is logical, because the addressee who sent his acceptance after the time-limit set by the offer cannot legitimately expect that his late “acceptance” has formed the contract.

*Late acceptance sent in time*

A particular rule applies in case where *the acceptance was sent in time, what the offeror can perceive, but the transmission is delayed*, so that it finally reaches the offeror after the expiry of the offer duration. This occurred frequently when postal mail was used; nowadays, it can still happen with mistakes of courier or with delays in e-mail traffic. In these circumstances (“*If a letter or other writing containing a late acceptance shows that it has been sent in such circumstances that if its transmission had been normal it would have reached the offeror in due time*”<sup>259</sup>), the rule is that the offeror must react immediately; if he does not want to be bound, it must notify the addressee that the acceptance arrived belatedly and has thus not formed the contract (“*the late acceptance is effective as an acceptance unless, without delay, the offeror orally informs the offeree that he considers his offer as having lapsed or dispatches a notice to that effect*”<sup>260</sup>).

Even in such case, the late acceptance (sent in time) does not form the contract; indeed, it reaches the offeror after the time that he has indicated as being required to form the contract. The *will* of the offeror must be respected and the contract cannot be imposed to him when one of the conditions that he had set has objectively not been respected.

However, *good faith* requests here a reaction from the offeror, because the addressee of the initial offer who sent in time the acceptance can normally believe – in good faith – that the acceptance has reached the offeror in due time. That is why the law imposes a duty to react if the offeror does not want to be bound: if he does not notify the addressee that his “acceptance” reached him too late, he is bound. The lack of reaction, i.e. the silence that lasts, forms the contract.

### 3.3.3 Modified acceptance

As it has been seen above, a reply to an offer that contains *Principle* other terms than those of the offer cannot, normally, be considered as an acceptance. It is a rejection of the offer; since it expresses the will of the addressee to agree and to be bound on modified terms, it is logical and reasonable to consider it as a counter-offer.<sup>261</sup> The initial offeror can therefore accept this counter-offer of the addressee; this creates the contract. *A contrario*, if he does not accept it, no contract is formed; this is logical since the addressee who sent such modified “acceptance”, i.e. has proposed terms different from those of the offer, cannot consider in good faith that such has formed the contract.

Laws foresee a particular regime for the case where the addressee sends “a reply to an offer which purports to be an acceptance but contains additional or different terms which do not materially alter the terms of the offer”; in such situations, if the offeror does not object (orally or by a notice), the contract will be formed with the modified terms.<sup>262</sup> *Particular rule: role of silence if the modified terms do not materially alter the offer*

This rule should be applied carefully and in compliance with its function, which is to protect good faith. The fundamental idea is that the addressee of an offer who expresses his clear will to accept and adds terms that he can consider as unproblematic for the offeror normally expects in good faith that the contract *- function of the rule: protection of good faith*

is concluded. Such addition of terms is most often made with the goal of facilitating the fulfillment or clarifying the relationship.

- *silence as acceptance*

If these conditions are present, and if the initial offeror must perceive that the slight modifications are made with such purposes, he must take into account that the addressee considers that the contract is concluded. Therefore, good faith requires him to object if he does not want the contract with these slightly modified terms (and then, not the modified acceptance itself, but the lack of reaction – the lasting silence – forms the contract).

- *condition: non-significance of modified terms*

For this to be true, the added terms shall be really not significant; only in such case it can be considered by the addressee that they are unproblematic for the offeror. For the international contract of sale, the UN Convention specifies that *“Additional or different terms relating, among other things, to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party’s liability to the other or the settlement of disputes are considered to alter the terms of the offer materially”*.<sup>263</sup> Therefore, for example, a modified acceptance that proposes to pay a price that is lower even for a minuscule amount, or to pay one of the portions of the price slightly later than proposed in the offer, will not be submitted to the legal regime under which the silence of the initial offeror forms the contract. The aforementioned listing contained in the UN Convention shows that this regime only applies to mere precisions, which clarify the relationship or facilitate fulfillment, or for which it appears obvious that they are unproblematic for the offeror; only in such cases the addressee can believe in good faith that the modified acceptance he sent has formed the contract.

## VI. Contracts in general

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It can be noted that there is notably no such legitimate belief if the offer explicitly mentioned that not any change to its terms would be accepted<sup>264</sup> or, also, if the addressee himself mentioned in his modified acceptance that he is expecting an explicit assent to his modified terms<sup>265</sup> (in the latter case, his “modified acceptance” is clearly a simple counteroffer, which cannot trigger the particular regime where the silence of the initial offeror forms the contract).

*- circumstances  
excluding effect  
of silence as  
acceptance*

Beyond the literal meaning of the text of the UN Convention related to the international contracts of sale, some nuances can be admitted in consideration of the function of the concerned rules, which is to protect good faith, even when the change contained in the modified acceptance is related to an element categorized by the said convention as “material”. Notably, if such change appears to be advantageous to the initial offeror, the absence of reaction of the offeror can be submitted to the particular regime where silence is interpreted as acceptance. For example, in an international contract of sale, if the modified acceptance sent by the (potential) buyer specifies a place of delivery that is closer to the place of business of the seller than what was proposed in the offer, the change appears to be advantageous to the seller (since less expensive for him); therefore, the seller’s lack of reaction to such change may have the effect of an acceptance, despite the abstract categorization of the UN Convention that classifies the place of delivery as a material element. The same relates to conditions of payment: if the potential buyer dispatches a modified acceptance that contains a quicker payment than what the seller proposed in his offer, the seller’s silence may be interpreted as acceptance. In such cases, if the seller does not want a place of delivery that is apparently more beneficial to him, or does not want conditions of payment apparently better for him, he is free to

*- terms modified  
in a way  
advantageous to  
the offeror*

refuse them; but good faith requires in such cases that he notifies the buyer of his rejection of these modified terms.

### 3.3.4 Conclusion of contract dependent on agreement on specific matters or in a particular form

*Standard situation*

In the standard situation, and as discussed in relation with the question of definiteness of offer<sup>266</sup>, the contract is considered as validly made if the parties have agreed on the objectively essential points, i.e. the elements that cannot be determined by general rules or interpretation (e.g., in a contract of sale: at least the goods, if the price can be determined by a market price or other circumstances; otherwise, the goods and the price).

*Good faith prevails over intimate will*

This results from (and is conditioned by) an idea based on good faith: each of the parties can reasonably believe that, if both have agreed on these points which are the generally sufficient elements, the contract is made (since the other points can be determined otherwise). The protection of good faith prevails here over the intimate will of the party who wishes “privately” or “secretly” that an agreement be found on another – objectively non-essential – element, but fails to communicate this to his negotiation partner.

*Agreement reserved on generally secondary element*

Good faith also implies the reverse solution in the cases where a party expresses that he wishes that an agreement be reached on an element that is objectively not essential (i.e. which could be determined without their agreement). In such situation, the other party cannot reasonably believe in good faith that the contract is made until an agreement has been found on that element, however secondary it might ordinarily be. Here, the free will and the good faith are in full coherence: provided a party gives known the conditions of his consent to an agreement, he cannot be bound until agreement is found on all

elements he reserved<sup>267</sup>; and no negotiation partner can, in good faith, believe the opposite.

Regarding the way this party shall express that an agreement on such generally secondary element is a condition for him to be contractually bound, it can be said in practical terms and from the point of view of good faith that, the more secondary the element objectively is, the more clearly the party shall say that this element is a condition for him.

The same applies to a party's will of having the contract drafted in a particular form (written, notarial) or subject to the approval of another person or entity (e.g. approval of board of directors, or of shareholders, or of an advisor). Normally – except, in most legal systems, when the law specifically says otherwise<sup>268</sup> – contracts are validly concluded without particular formalities. If a party wishes e.g. the contract to be made in written, he must say this clearly before the agreement is made orally (the same if he wishes that a third person's approval be obtained before the agreement becomes binding). However, it must be recognized that, for complex or very large operations, it can sometimes be *impliedly* reserved that the agreement will be binding only when drafted in written and signed. The larger and more complex an operation is, the more likely it is that such reservation must, in good faith, be admitted to have been done impliedly (and, at least, the less insistent a party needs to be to reserve the written form). *Reserved form*

This said, the parties can agree that the contract is made although they recognize that some or several secondary element(s) still needs to be solved (but without that, at the moment, the absence of such solution hinders the contract to be already binding).<sup>269</sup> If they have expressed such will to be bound, no party can in good faith invoke later the absence of agreement on such point. Their will is that either a private *Contract made with term deliberately left unfixed*

mechanism fixes that point (e.g. themselves by agreement, or a third party if they have foreseen his intervention), or, if this does not happen, that the judge fixes it.<sup>270</sup>

### 3.3.5 Interpretation of contracts

*Common will  
decisive if  
proven*

When a contract has been concluded, questions may arise about the exact meaning of some of its clauses. The priority criterion is the actual (real) common will of the parties:<sup>271</sup> if it can be proven that they understood a clause in a common way, this way will be decisive (even if this way represents a discrepancy to the *ordinary* meaning of the expressions used<sup>272</sup>). This is the simple consequence of the fact that a contract is fundamentally based on the free consent of its parties.

*If common will  
unproven: good  
faith*

If the common will of the parties cannot be proven, the good faith becomes decisive for the interpretation of the contract. This means in general that *“the contract shall be interpreted according to the meaning that reasonable persons of the same kind as the parties would give to it in the same circumstances”*.<sup>273</sup>

*- aspects to take  
into account*

As regards general criteria to help determine what “reasonable persons” would have understood in the same circumstances, the legal doctrine has identified the following aspects to be taken into consideration (listed below from the more individual circumstances to the more abstract ones):<sup>274</sup>

- preliminary negotiations between the parties;
- practices which the parties have established between themselves;
- the conduct of the parties (also subsequent to the conclusion of the contract<sup>275</sup>);
- the nature and purpose of the contract;
- the meaning commonly given to terms and expressions in the trade concerned;
- usages.

If very individual circumstances can be identified, they are relevant. For example, the legal doctrine recognizes that *“if it is established that one party intended the contract to have a particular meaning, and at the time of the conclusion of the contract the other party could not have been unaware of the first party’s intention, the contract is to be interpreted in the way intended by the first party”*.<sup>276</sup>

If such individual circumstances are not established, general rules based on experience are applied, which are inspired by the idea of good faith. Among these rules, there are in particular the following ones:

- general rules of interpretation

- terms which have been individually negotiated take preference over those which are not;<sup>277</sup>
- terms and expressions shall be interpreted in the light of the whole contract or statement in which they appear;<sup>278</sup>
- contract terms shall be interpreted so as to give effect to all the terms rather than to deprive some of them of effect;<sup>279</sup>
- if contract terms supplied by one party are unclear, an interpretation against that party is preferred (*“in dubio contra proferentem”*)<sup>280</sup>.

For the particular situation “where a contract is drawn up in two or more language versions which are equally authoritative, there is, in case of discrepancy between the versions, a preference for the interpretation according to a version in which the contract was originally drawn up”.<sup>281</sup>

In addition to the question of how the parties should have understood the expressions of their contract, the interpretation of a contract also consists in determining what the parties have impliedly agreed; good faith (understood as individualized implementation of equity and reasonableness, and not anymore as how to understand an actual statement) plays a crucial role. In some circumstances, *actual implied clauses* can

Missing (non-agreed) terms

be identified; very often, it is not anymore a question of interpretation<sup>282</sup>, but a question of supplementing (or “supplying”)<sup>283</sup> *a missing clause*, i.e. finding a solution to a question that the parties *would* have agreed on, *if* they had thought to that question. In case of judicial litigation, establishing such missing clause is in reality a creative action of the judge – even if he is obliged to attentively find and take into account all elements that enable him to determine what the parties would probably have wanted; the judge determines a hypothetical will of the parties, in an individualized approach, but doing so, he unavoidably<sup>284</sup> looks for a reasonable and equitable solution.<sup>285</sup> If no individual hypothetical clause can be established, the contract will be supplemented by the general rules contained in the law related to similar contracts or in judgments rendered in relation to similar contracts.<sup>286</sup>

#### **4. Effects of contracts**

The main effect of a contract is to oblige its parties to fulfill it, i.e. to perform the main object about which they have, most of the time, explicitly agreed (i.e., in a contract of sale, to deliver the goods and, for the buyer, to pay the price; in a contract of licensing, to allow the use of an intellectual property right and, for the licensee, to pay the royalties; etc.). However, once a contract is concluded, it may often happen that several (or many) questions arise beyond the simple performance; they can relate to the need of determining more precisely the object of the contract or to the need of dealing with an incident. All solutions that the law brings to these questions are also effects of contracts.

What has been laid down above in the section about the interpretation of contracts applies here: if the parties have explicitly agreed on their own solution, such will be decisive; if they have not explicitly foreseen their own solution, so that the contract contains no explicit clause to deal with the question, there is a “gap” or loophole that has to be filled in. Depending on the legal system, the procedure of filling-in such gaps will be done by interpretation, incl. “supplementing interpretation” that consists in finding an individual solution for the “missing clause” (or “omitted term”), or by applying the general solutions set forth by statutory (codified) or unwritten law. For completeness, it can be mentioned that sometimes, only for a very limited number of questions, the law foresees mandatory solutions from which the parties cannot derogate.

The rules that are mentioned below are solutions generally foreseen by the law (in most legal systems). As just mentioned, unless specifically indicated otherwise, the parties are free to agree on their own solution, which will, in that case, prevail.

#### **4.1 Duty to cooperate**

*In general;  
illustrations*

The laws recognize a general duty of each party to cooperate with the other in order to make possible the fulfillment of contract.<sup>287</sup> For example, if the seller shall prepare shipment of the goods according to the specifications of the buyer, the buyer has the duty to timely send such specifications; a buyer<sup>288</sup> who is contractually entitled to receive goods at his warehouse shall give access to the seller (or the seller's carrier) to this warehouse; or if he is entitled to have goods delivered on a vessel of his choice, he shall notify the seller which vessel has been chosen and give instructions to the captain of the ship to allow loading.

*In particular,  
cooperation  
regarding state  
permissions*

Regarding more complex situations, if it appears that a state permission (administrative license) must be obtained in order for the contract to be fulfilled, the duty of cooperation consists first in each party being obliged to provide documents related to itself (registration, etc.) that have to be filed with the competent state authority. A particular cooperation will then consist in accomplishing the administrative procedure. In absence of a contract clause or of particular circumstances indicating otherwise (e.g. indications in the administrative regulation itself), the legal doctrine presumes that if only one of the parties has its place of business in the state which requires the permission to be obtained, this party shall take the measures necessary to obtain this permission (i.e. write to the authorities, file documents, pay the fee); if both parties have their place of business in the same country, the legal doctrine presumes that the party whose performance requires permission shall do the administrative proceedings.<sup>289</sup> It is also presumed that the party obliged to do the administrative proceedings shall bear the costs thereof; it shall also inform the other without delay about the results of the proceedings.<sup>290</sup> The allotment of the tasks and of the costs to one party pursuant to

these presumptions will yield to the regime of a specific clause if the parties agree on such (even if it is *a priori* less reasonable, the parties can freely stipulate that the party who has no place of business in the state that requires permission will have to do the proceedings;<sup>291</sup> they can also specify that the party who does not do the proceedings will bear the costs).

The duty of cooperation in the form of a duty to *inform* the other party is foreseen by legal rules in different situations, notably in case of *force majeure*, as shown in section 4.7 below.

#### **4.2 Time and order of performance**

The moment at which the contract has to be fulfilled is usually determined by a date or by a period of time. Laws presume, if a *date* is contractually fixed (without further precisions), that the performance is due *at* that date; if a *period* is contractually fixed, the standard presumption is that the obliged party may fulfill *at any time during* that period – unless particular circumstances indicate that the party entitled to receive performance has the right to choose a specific date within the period.<sup>292</sup> If no time of performance is indicated in the contract, it does not mean that the obliged party can freely choose when he wishes to perform; the standard presumption is that he shall perform during a reasonable time<sup>293</sup>.

*Time at which  
fulfillment is due*

The rules about the order of performance are important notably because they determine if a party is obliged to perform before the other, i.e. to take the risk of credit (with other words: the risk of performing whereas the other party will not perform spontaneously, exposing the performing party to the necessity of proceeding judicially and advancing the costs therefor, with possibly eventual losses if the other party is insolvent<sup>294</sup>).

*Order in which  
obligations shall  
be fulfilled*

*- simultaneous fulfillment*

Laws presume that, if the performances of the parties can be rendered simultaneously, the parties are obliged to render them simultaneously.<sup>295</sup> The fundamental idea is that, if possible, no party shall be obliged to grant credit to the other.

The practical consequence is that, in these situations, each party has the right to withhold performance until the other party tenders its own performance<sup>296</sup> (to licitly do so, this party must notify the other).

*- consecutive performances*

When a party is obliged to perform first, the other party is entitled to suspend its own performance until the first party has actually performed<sup>297</sup> (and not only tendered performance). The justifying ideas are that a party who has not fulfilled yet whereas it was obliged to do so embodies an increased risk of credit (non-willingness or incapacity to perform), and that, independently of this, the prior performance of the first party may be legitimately necessary for the other party to be able to perform (e.g. the financial situation of a seller may be organized in such way that it can dispatch goods only when a prepayment or a letter of credit is received; the non-payment or non-delivery of a letter of credit actually hinders shipment of the goods).

*Free common will*

On all these questions, the parties may freely agree on their particular solutions that can be totally different (e.g. they can stipulate the clause according to which each party has to perform its obligation on the due date, without any right to suspend if the other party has not fulfilled<sup>298</sup>).

#### **4.3 Anticipated and partial performance**

*Anticipated fulfillment*

Laws generally allow the creditor (i.e. the party entitled to receive performance, also referred to as "the obligee") to refuse anticipated performance, unless he has no legitimate interests to refuse<sup>299</sup>; indeed, in absence of interests, a refusal

would amount to utmost uncooperativeness and infringe good faith. To avoid the risk of debating whether there is legitimate interest in refusing an anticipated performance, the parties can stipulate a clause: its content can either be that anticipated performance is always allowed, or that it is absolutely excluded. In this case, such clause of course prevails.

The general rule is that anticipated performance of one party does not affect the obligations of the other party<sup>300</sup> (e.g. a buyer who accepts delivery before it was due is normally<sup>301</sup> not obliged to pay before the ordinary term).

Regarding a partial fulfillment, the general presumption is that – besides having obviously a claim to the entire fulfillment and to compensation for any unperformed portion<sup>302</sup> – the creditor is allowed to refuse a partial fulfillment, unless he has no legitimate interest in doing so.<sup>303</sup> The right to refuse is based on the idea that, in many circumstances, a portion of what has been agreed may not correspond to anything useful for the creditor; normally, no one can determine better than himself if it is so; he shall thus, as a principle, have the right to refuse. However, if even a portion of the promised performance is reasonably usable for the creditor<sup>304</sup>, totally refusing it amounts to uncooperativeness and infringes with elementary good faith; one understands that a *practical* interest of the creditor can consist in the fact that he expects compensation for a total non-fulfillment to be more rewarding than a partial fulfillment and compensation for the unfulfilled part; such – practically understandable – approach of the creditor denatures the goal of compensation and does not aim at protecting a legitimate interest of his. Therefore, in such cases, no right to refuse partial fulfillment shall be recognized.

If the parties have specifically agreed that the creditor would categorically have the right to refuse a partial fulfillment, or, to

*Partial  
fulfillment*

*Particular  
clauses prevail*

the contrary, that a partial fulfillment cannot be refused in any case, such explicit clause prevails and the above presumptions and reflections do not apply.

#### **4.4 Right to subcontract or delegate performance**

*Presumptions*

Laws presume that a debtor may have his obligations performed by a third party (i.e. by subcontracting or delegating), unless a personal performance is of importance or at least not indifferent for the creditor.<sup>305</sup> Performance by a third party does not alter, regarding the liability, the promised standard of quality – contractually binding for the debtor in every case.

For deliveries of goods, it can be assumed that performance by a third party is acceptable (unless the object to deliver must be prepared with a personal care by the debtor himself or unless a difference of quality is probable depending on the person who delivers). For monetary obligations, save exceptional circumstances,<sup>306</sup> it can always be assumed that performance by a third party is acceptable. The same applies for the delivery of standard financial products (shares, bonds; the institution that delivers them is irrelevant). By contrast, for services, it will be considered in general that personal fulfillment is necessary.

*Particular clauses prevail*

As for other rules regarding the effects of contracts, these presumptions can be freely overruled by a specific clause stipulated by the parties: a clause can reserve the service provider's ability to have his obligations performed by a subcontractor; and, to the contrary, a clause can impose that a monetary obligation can be performed only by the debtor.

#### **4.5 Place of delivery**

*Particular clauses prevail*

The parties are totally free to determine the place of performance by stipulating clauses to that effect.

If they do not do so, the general presumption is that a monetary obligation (payment) shall be performed at the place of business of the creditor at the moment of contract formation<sup>307</sup> (a particular rule applies if the payment must take place against immediate delivery of goods or against handing-over of documents representing them; in such case, the presumption is that the place of payment is the place of delivery respectively of handing-over).<sup>308</sup> It is also foreseen that, if the creditor changes his place of business between the moment of conclusion and the moment when payment is due, he shall bear any additional expenses arising from this change.<sup>309</sup>

*Presumption for  
monetary  
obligations*

Regarding other obligations, the general presumption is that the place of performance is the debtor's place of business at the moment of conclusion of the contract<sup>310</sup> (and increased costs for the creditor resulting from a change of the debtor's place of business after that moment shall be borne by the debtor<sup>311</sup>).

*General  
presumption for  
non-monetary  
obligations*

Particular presumptions apply however. In the contract of sale, it is presumed that, if the contract involves transportation, it is the obligation of the seller to hand over the goods to the first carrier; the place of performance is therefore the place where the first carrier intervenes. In the other cases, if the parties know that the goods are located or shall be manufactured in a specific place, such place is the place of delivery.<sup>312</sup> In many contracts of services, it can be assumed even without explicit clause that the performance shall be made at the client's place of business.

*Particular  
presumptions  
resulting from  
the nature of the  
transaction*

In all cases, the determination of the place of performance is an extremely important question. Beyond its importance for organizing of the transaction and bearing some of its costs, it can play a crucial role, notably, to determine whether an event

*Influence of  
place of  
performance*

is possible to overcome and, therefore, amounts or not to force majeure.<sup>313</sup>

#### **4.6 Right to assign contractual claims**

*Principle*

It is a general rule that a right (claim) can be assigned (i.e. transferred) by the creditor to a third party without the debtor's consent.<sup>314</sup> The idea justifying this rule is that it does not change anything substantial for the debtor to fulfill in favor of another person than the initial creditor (this distinguishes fundamentally the transfer of rights from the transfer of debt: the person of the debtor is essentially crucial, since the creditworthiness of a debtor – i.e. the likeliness that he will perform – varies dramatically from person to person). The laws foresee simply that the assignment shall be notified to the debtor; until the notice, he can perform in favor of the initial creditor.<sup>315</sup>

*Presumed exception*

There is a general exception to the free transferability of claims only for the contracts in which it was perceptible for the creditor that the debtor had entered into the obligation to perform specifically because of the person of the creditor and that the identity of the creditor remains essential for him (contract *intuitu personae*). For such situations, most laws (referring to “the nature of the transaction” or “the relationship between creditor and debtor”) recognize that an assignment is possible only with the consent of the debtor.<sup>316</sup>

*Costs arising from assignment*

For the case where performance would – contrary to the general assumption – be significantly more burdensome for the debtor as a consequence of the assignment, some rules foresee that the concerned claim is not assignable without the debtor's consent<sup>317</sup>; more accurately, the proper rule seems rather to be that the supplementary costs shall be borne by the beneficiary of the assignment (“assignee”); and only if these costs cannot

be borne (for any reason) by the assignee, the debtor's consent is necessary for the assignment to be effective.

The parties can of course stipulate clauses that differ from the presumptions above. Even in a context where the debtor was eager to perform only in favor of a definite creditor, this creditor can convince the debtor to accept a clause that foresees a full transferability of the claims; such clause prevails on the debtor's initial wishes. A clause can also foresee unhindered assignability even if the assignment renders performance more burdensome for the debtor. And, by contrast, a contract can strictly foresee that no assignment of claims is possible; this is appropriate if the debtor wishes to be sure to have the ability to e.g. set-off his debt against reciprocal claims that the debtor might have against him (out of another contract), or if he wants to avoid the risk of having to perform in favor of a person with which he does not wish to be in business in any manner (e.g. a competitor).

*Particular  
clauses prevail*

#### **4.7 Regime in case of force majeure**

Laws presume that there is no liability of the non-fulfilling debtor if it is proven that the fulfillment of the contract has been impossible as a consequence of an event or events ("impediment[s]") which is or are beyond the debtor's control; it is required that he could not be expected to have taken such event(s) into account at the moment of concluding the contract; it is also required that he could not avoid or overcome the event(s) and its (their) consequences.<sup>318</sup>

*Exemption from  
liability in force  
majeure*

These events and their legal treatment are referred to, also in English (as well as in other languages<sup>319</sup>), by the French expression "force majeure".<sup>320</sup>

The event can consist in natural disasters (earthquake, flood, tempest, etc.), in human events (e.g. war, social troubles, strike)

*Force majeure  
events*

or in purely legal events (notably a governmental order or law that prohibits the fulfillment of the operation that was contractually agreed<sup>321</sup>): whatever the origin of the events, the criterion is whether they make the fulfillment actually impossible for the debtor. The second element of the general definition of force majeure events is their foreseeability, i.e. whether the debtor should reasonably have taken them into account at the moment of entering into the contract. The third criterion is whether it was possible to avoid or overcome these events or their consequences.

*Efforts and  
influence of time*

The aspect of impossibility of performance is to be understood in relation with the efforts that the debtor shall do. In this regard, the question is not necessarily answered in the same manner in the course of time. The fulfillment can be impossible when the events arise, whereas a certain period of time afterwards, either they disappear or, in spite of their persistence, the debtor becomes able to implement a practical solution to fulfill the contract, i.e. an alternative way to the originally planned one. The liberation (exemption) of liability exists only as long as the debtor was really unable to fulfill<sup>322</sup> (even by using an alternative way).

*Right of  
termination*

The aggrieved party can terminate in the same manner as he is allowed to do in all situations of non-fulfillment:<sup>323</sup> if the time is of essence, he can decide to terminate immediately<sup>324</sup> (but without right to compensation); in the other cases, he has to first give a supplementary period of time and can terminate if the fulfillment still has not occurred after this time has elapsed<sup>325</sup> (in such cases where the non-fulfillment is due to force majeure, it is frequent in practice that the creditor extends or repeats these “grace periods”, be it in a spirit of cooperativeness and consideration for the debtor, or in an approach that takes into account the absence of alternative

suppliers and the absence of right to compensation due to the force majeure).

An essential aspect of the legal regime related to force majeure is that, however exempt from liability for non-fulfillment, the debtor affected by force majeure events is obliged to inform the other party about the fact that the events have occurred and about their influence on his ability to perform. This is essential for the exemption in case of force majeure to be equitable and fair, considering that the non-fulfillment affects the creditor without compensation. It must be noted that the debtor is *liable for the consequences of failing to inform the creditor* about the force majeure event.<sup>326</sup> A breach of this duty to inform may create a liability that is sometimes not smaller than the liability for non-fulfillment.<sup>327</sup>

*Obligation to inform*

The parties can agree on specific clauses with regard to any aspect of the force majeure.

*Particular clauses prevail*

They can do so about the definition of the events that lead to exempt the debtor from liability. For example, it can always be disputed whether a strike in the company of the debtor is “beyond his control” (is unforeseeable, or impossible to overcome, e.g. by making concessions to the strikers). To avoid such debates, the parties can explicitly agree that any strike in a party’s company leads to exemption of liability. Or they can agree on the contrary.

Regarding the way of overcoming or surmounting the impediment, they can also specifically agree on clauses related to the alternative ways of fulfilling, describing which efforts are expected in case of force majeure or which are not. They can even agree on clauses that will automatically adapt the contract in case of specific cases of force majeure: for example, regarding the place of performance<sup>328</sup>, they can agree that the

country of performance be changed in case where a national law prohibits the fulfillment in the country where the debtor has his main place of business (it can also be explicitly agreed that, in such case, a fulfillment by another company – for the account of the debtor – is allowed).

Clauses can also foresee a suspension of the contract for the duration of the impediment, for a maximal period of time. They can put in place a regime according to which the contract is automatically terminated after that the force majeure has lasted for a certain number of days.

The particular clauses can also describe precisely the time during which the debtor must notify the other party about the fact that the force majeure event has occurred.<sup>329</sup> They can also prescribe that a particular proof of the force majeure event shall be provided with the notice.<sup>330</sup>

Such clauses clarify considerably the legal situation in case of force majeure. However, as these few examples show, they can deal with an infinity of hypotheses, whereas the probability that the event occurs remains – whatever the exact figure is – relatively low. Thus, in spite of their usefulness in case such event occurs, drafting detailed force majeure clauses may rationally not be a rewarding investment. Practically, in most contracts containing such clauses, only standard force majeure clauses are agreed; and most of the time, they simply replicate the general rules that have been presented at the beginning of this section.<sup>331</sup>

#### ***4.8 Regime in case of imbalance resulting from substantially changed circumstances***

##### *Occurrences*

In contracts that are not of immediate fulfillment (“long term contracts”), the time can bring substantial changes of circumstances, out of which disappears the balance that had

been thought by the parties to exist regarding what each of them would obtain out of the contract.

This happens for example if a seller has entered into the obligation to deliver commodities over a certain period of time, e.g. one year, for a fixed price (“future contracts” or “futures”<sup>332</sup>), whereas in the course of that year, the cost of these commodities, which he himself has to purchase from suppliers, increases dramatically. The same applies to a seller in a long term sale of manufactured products, for which raw materials (metals, oil, jute, etc.) are an important part of the production costs, for a fixed contract price, if the market price of raw materials needed for production significantly increases. Reversely, the value of the agreed currency of payment<sup>333</sup> can be severely affected by a massive devaluation or strong inflation; the fixed price means in such events that the seller receives considerably less than what his representation was at the moment of entering into the contract.

Such situations happen in contexts of economic turmoil or political troubles (e.g. with increase of custom duties<sup>334</sup>).

They shall be distinguished from force majeure events. The problem is *not the impossibility* to fulfill, but the excessive cost of performance (or the strongly reduced value of remuneration). Physically and legally, it is possible to fulfill. Two types of changes in custom regulation illustrate the difference: a prohibition of import may constitute force majeure; an increase of custom duties (import tax) disturbs the balance.

*Distinction from  
force majeure*

When major disturbances of that kind occur, the disadvantaged party may wish to withdraw from the contract or to have it adapted. The economic basis on which this party had based the contract has disappeared.

*Principle:  
implementing  
the binding force  
of contracts*

Contrary to what regards force majeure events, which liberate the affected party from liability, the standard answer of the law to these disturbances of the contractual balance is that the contract shall nevertheless be fulfilled as it has been concluded;<sup>335</sup> a refusal to do so obliges the debtor to compensate the other party, as in other situations of non-fulfillment.

*Justification*

This principle is logical, in spite of its harshness, which can *prima facie* create a feeling or impression of unfairness.

It results first from the fundamental function of contracts, especially of long term contracts, and their economic role. They are meant to give – to both parties – an instrument to plan their activities and to base these on some stable parameters. If changes to contracts could be imposed to a party in case of economic turmoil, such legal regime would add a major factor of instability (and probably contribute to increase the turmoil).

Besides, it shall be taken into account that the parties can only be aware that the *nature of a long term contract* is to have them enter into the risk of changed circumstances. Accordingly, the party who did not want to be entirely exposed to such risk could have either abstained from entering into such contract, or could have used one of the instruments limiting or excluding this risk; and these instruments are numerous. For example, the agreement can contain a clause, pursuant to which the price of performance (e.g. of the sold products, which remain to be manufactured) will be adapted if the market price of supplies increases after the moment of concluding the contract (e.g. if definite raw materials used to manufacture the products increase by at least a certain percentage). If a seller did not insist that such clause be stipulated, and accepts to enter into a contract without such, it has accepted the risk of price variation. Furthermore, the legal system – thanks to the freedom of

contracts – grants many other instruments to every party. A seller in a long term contract may organize his affairs to secure his own supplies at a sustainable price. Independently of more complex instruments, elementary possibilities exist: at the moment of entering into a contract in virtue of which definite supplies will be needed, a seller can constitute, at a convenient price, some stock (reserve) of the needed supplies; or in parallel to the contract by which he commits to deliver goods to his buyer in the future at a fixed price, he can also enter into contracts by which he will receive in the future supplies at a fixed price.<sup>336</sup> Moreover, he can use more sophisticated instruments: one consists in the options, i.e. the rights to obtain delivery of supplies at a fixed price in the future, if he decides so (i.e. “if he exercises the [call] option”);<sup>337</sup> other instruments consist in obtaining insurances against price variations (“hedging”). The existence of these multiple instruments against the risks resulting from price variations is a supplementary reason to consider that imposing a change to a contract, against the will of a party, would be illegitimate.

Superfluously, when it is perceived as unfair that a first party, based on the discussed legal principle, claims the fulfillment of a contract that has become disadvantageous for the second party seeking for adaptation, this feeling can be submitted to a test: is it likely that this second party would have granted a price reduction if, as a result of an exactly opposite variation of the market price, the contract had become more advantageous for him? The binding force of contracts, which means here that unconditional promises shall be respected, is finally not less fair than punctual compassionate approaches, which are subjective and narrow, omitting to take into account the fundamental, essential and useful functions of long term contracts.

*Exception to  
handle extreme  
imbalance*

However, the law may make exceptions in order to handle extreme disturbances of the contract balance (“hardship”<sup>338</sup>, “fundamental alteration of the contract equilibrium”<sup>339</sup>). Such extreme disturbances have occurred for example in times of hyperinflation (like the German inflation of 1922-1923, which reduced the value of the Mark by ca. 1 trillion times<sup>340</sup>, meaning that prices agreed in advance in Marks were reduced to a real value of zero) or of wars or other major troubles. In such circumstances, courts of justice – somewhat spontaneously, reasoning in equity – allowed the disadvantaged party to terminate the contract or adapted its terms to reestablish some equilibrium.

*Conditions for  
the exception*

In addition to the extreme character of the disturbance, the conditions to entitle the disadvantaged party to terminate the contract or to have it adapted are relatively strict. First, the imbalance must have occurred after that the contract was concluded<sup>341</sup> (otherwise, if the party just did not know the imbalance<sup>342</sup>, he might *cancel* the contract *for mistake* – which is a different issue<sup>343</sup>). Then, it is required that, at the time of concluding the contract, the disadvantaged party could not reasonably have taken into account the events that represent this extreme change of circumstances<sup>344</sup> (the criterion of reasonableness is important in the sense that most of the extreme changes can theoretically be taken into account; a realistic approach requires that one identifies whether the change really was probable enough to practically deserve being contemplated as a hypothesis by the parties). Also, these events shall be beyond the control of the disadvantaged party.<sup>345</sup> Finally, it is required that the disadvantaged party had not assumed the risk of the change of circumstances<sup>346</sup>.

*Theoretical  
justification of  
the exception*

If all these conditions are fulfilled, the law does, in some manner, as if the parties had tacitly submitted their contract (i.e. the unchanged obligation to fulfill it) to an implied clause

supposing that circumstances will not change to an extreme extent (“*clausula rebus sic stantibus*”). A certain balance constitutes the silently agreed economic basis of their agreement<sup>347</sup> (this theoretical justification, in spite of its elegant Latin wording, is not more decisive than compassion for the disadvantaged party and the strong feeling of unfairness in case of excessive imbalance).

In reality, except where an initially short-term contract happens to have to be fulfilled later as planned (and thus unexpectedly submitted to the risk of changed circumstances), the requirement that the risk should not have been assumed by the disadvantaged party works as an extensive limitation to his right to terminate the contract or have it adapted: as mentioned above, in long term contracts with fixed prices, each party takes the risk that costs (price of supplies) increase or decrease, with, as a consequence, the contract being finally more advantageous or more disadvantageous than if it had been a short-term contract, fulfilled immediately. In long term contracts, the parties naturally enter into obligations in consideration of variations (“*rebus sic non stantibus*”).

*Restrictive  
practice in long  
term contracts*

The parties are of course free to agree on a specific regime. Such can consist in precise clauses that prescribe the price to be automatically adapted when a parameter of costs varies (in proportion of that variation, often under-proportionally<sup>348</sup> or strictly proportionally – “open price”). Or it can consist in a clause prescribing a general right of each party to have the contract adapted in case where some parameters of costs vary more significantly than in a minimal proportion; instead of an entitlement to have the contract adapted, the clause can foresee a right of the disadvantaged party to terminate it. These rights can be stipulated independently, for example, of the possibility to reasonably take into account the possibility of changed circumstances, or of all other requirements that derive

*Particular  
clauses prevail*

from the law when no clause has been stipulated for the change of circumstances. To the contrary, a clause can be stipulated that even in case of extreme imbalance, no adaptation will be possible. All such clauses prevail over the standard regime.

#### **4.9 Regime applicable to notices**

*Form of notices:  
- principle*

As a rule, if the contract does not specify a particular form, a notice that a party makes to the other party (in order to make or accept an offer, to grant a time-limit, to inform the other party, to terminate the contract, etc.<sup>349</sup>), can be in any form; legally, written or oral notices are equally valid. Of course, from a practical point of view, oral notices, or notices sent by ordinary (i.e. non-registered) mail, may be difficult or impossible to prove. However, if proven, they are legally effective.

*- good faith  
and/or implied  
agreements*

In particular circumstances, some forms of notice can be contrary to good faith or to implied agreements; for example, if parties have always communicated together by telephone to ensure reality of communication and quality of understanding, a party who breaks off this common practice and notifies a grace period or termination to the not-intensely used registered office of a company or to the private address of an often-travelling person, or even sends such notice by e-mail<sup>350</sup>, may be regarded as not complying with good faith or with implied agreements. Several rules therefore set forth that a notice is valid only if it is done “by any means *appropriate to the circumstances*”<sup>351</sup>.

*- particular  
explicit clauses*

Of course, the parties can have set forth a specific regime in their contract. They can in particular prescribe registered mail (in which case this form is not only relevant to prove that the notice has been done, but also a condition for the notice to be

legally valid<sup>352</sup>); they can also agree that notices must first be done by an immediate means of communication and confirmed by registered mail. They can also agree on an exact way of how notices shall be drafted (this is very frequently agreed for the cases where options are exercised).

Independently of the form of notice, a general rule sets forth that a notice becomes effective at the moment where it *reaches* its addressees.<sup>353</sup>

*Delivery of  
notice as  
condition and  
moment of  
effectiveness:  
- general rule*

It means, on the one hand, that the *dispatching* (even perfectly proven) of a notice is not the relevant moment (and is not sufficient) for its effectiveness<sup>354</sup>. The risk of non-delivery (and of delayed delivery) lies with the sender.

On the other hand, the rule means that the addressee's *knowledge* of the notice is not a condition for its effectiveness. It is enough that the notice has reached its addressee. In this regard, it is understood in general that a notice has reached its addressee when it is accessible to him in the ordinary course of business, i.e. if it is delivered to his usual place of business or usual mailing address<sup>355</sup>. In this regard, the notice needs not to be delivered (by the courier) in person to the addressee: communication to associates, assistants or secretaries is usually sufficient<sup>356</sup>. This applies as far as it can be assumed that they are able to correctly transmit the notice, which shall be assumed nearly always for written notices but not necessarily for oral notices. These rules were originally conceived for communications by postage or courier (and then by telex or facsimile), but have revealed to be appropriate for electronic communications also; for these, it is assumed in general that a delivery on the addressee's server is the moment at which the notice is accessible<sup>357</sup>. Risks of communications between the addressee and his server are thus borne by the addressee.

- *particular rules* Some legal rules foresee a regime that differs from the above, particularly if it is proven that a notice has been sent by a means of communications that is appropriate in the circumstances, whereas the receipt cannot be proven.<sup>358</sup> By contrast, in some contracts for which rules aim at providing an increased social protection, registered mail, as well as a standardized content, might be legally prescribed for important notices like termination.<sup>359</sup>

- *particular clauses* Pursuant to the general freedom of contract, the parties can of course agree on a different regime in their contract. They can agree that the *dispatching* of a notice by registered mail is sufficient. Or, to the contrary, they can agree that a notice becomes effective only when its receipt is acknowledged. Also, they can agree that the notice must be made directly and personally to a specific person, in his own hands (in which case delivery to employees, associates or assistants in the usual place of business is not sufficient).

*Withdrawal of notice* Regarding the withdrawal of a notice – which can be particularly important, notably, for the making or acceptance of an offer or for a termination or cancellation of contract –, the general rule is that a first notice has no effect if a second notice withdrawing it reaches the addressee before or at the same time as the first notice itself<sup>360</sup>.

#### ***4.10 Rules to determine openly missing elements of the contract***

*Openly missing element* There are several general rules to determine an element about which no agreement has been made. Some will be studied specifically with the contract of sale<sup>361</sup>.

- *remuneration in general* In general, unless the remuneration is an objectively essential element of the contract, so that one cannot assume that parties are contractually bound if they have not agreed on it<sup>362</sup>, one

will assume that a “usual”<sup>363</sup> or “reasonable”<sup>364</sup> remuneration is due.

The same applies when the parties have agreed that a third person (e.g. an expert) shall determine an element of the contract (often: the remuneration) but this third person is unable or refuses to do so. If a suitable substitute third person cannot be appointed by the judge to determine this element<sup>365</sup>, it is presumed that the judge has the power to fix himself this element by following what is customary in the field of business or otherwise to fix it reasonably<sup>366</sup> and equitably<sup>367</sup>.

*- missing determination by contractually appointed third person*

Legal rules also presume that, if the determination of the contractual element by the third person is grossly unreasonable, the parties are not bound by it<sup>368</sup> (unless they have explicitly agreed that they would accept also such grossly unreasonable determination<sup>369</sup>; such agreement cannot be presumed and might in practice occur only very exceptionally); the judge has the power to set himself a reasonable element in its stead.<sup>370</sup>

*- unreasonable determination by the third party*

If one of the parties had received the right to determine an element of the contract, the other party is not bound if this determination is grossly unreasonable; a reasonable determination by the judge shall be substituted.<sup>371</sup>

*- unreasonable determination by a party*

If a contractual element was agreed to be determined by reference to a factor or index that does not exist or has ceased to exist, the legal rules assume that the nearest equivalent factor shall be substituted<sup>372</sup>.

*- in-existent factor of reference*

For all these situations, the freedom of contracts allows of course the parties to agree on a different regime<sup>373</sup>; in particular, they can explicitly foresee that, in case where the factor disappears or does not exist, or if the third person appointed by them refuses to determine or determines the element unreasonably, the contract shall not bind them at all.

*Particular clauses*

#### **4.11 Due quality of performance**

*Quality standard* It happens frequently that the contract describes the object or services to be delivered by a generic definition, without specifying a particular standard of quality. In most legal systems, the general rule is that in such situations, the obliged party shall render performance of “not less than average quality”<sup>374</sup>. With other words, the party who performs cannot freely choose the level of quality. For the international contract of sale, it is presumed that the seller shall deliver goods that are “*fit for the purposes for which goods of the same description would ordinarily be used*”;<sup>375</sup> this also means in substance and in most cases that quality shall not be less than average quality of goods of that category.

*Best efforts or result due* A similar question is whether a party owes a result or “his best efforts” to perform an activity. The question is crucial notably because remuneration depends on this: if the party owes a result and does not reach it in spite of his best efforts, he is not entitled to remuneration (whereas he would be entitled if he had been obliged only to perform best efforts). Termination and liability also depend on that question of the nature of due performance.

There is no general presumption that an obligation consists in providing best efforts rather than in reaching a result, or the opposite.<sup>376</sup> But there are particular abstract presumptions depending on the nature of contract: in a contract of sale, a result (transfer of property) is presumed as due, as well as in a contract of deposit or transportation; by contrast, contracts of mandate (agency) or employment ordinarily oblige the agents or employees only to do their best efforts in order to reach the contemplated results.

This being said, the parties can agree on individual clauses by which, e.g. a seller can promise only to do his best efforts to

deliver specific goods, or an agent can promise categorically that a result will be achieved.

When best efforts are due, legal rules presume that the obliged party shall make *“such efforts as would be made by a reasonable person of the same kind in the same circumstances”*<sup>377</sup>. Individual clauses can set a higher or lower standard.

#### ***4.12 Costs of performance***

The general rule regarding costs of performance is that they are borne by the party obliged to perform.<sup>378</sup> For example, costs to perform a payment (bank fees) are due by the party who owes the payment.<sup>379</sup> To deliver goods, the costs of supplies and of transportation until the place of delivery are to be borne by the seller, i.e. they are supposed to be included in the price. To perform services, any costs to acquire the material needed for the performance, or any costs of subcontractors are to be borne by the service provider. This applies only to the extent that no particular rule sets forth the contrary<sup>380</sup> and, of course, that no contractual clause has been agreed with a different regime.

#### ***4.13 Assimilation of anticipated breach to ordinary breach***

As a rule, the contract also impliedly obliges the parties to abstain from acting in a way that endangers the fulfillment. Therefore, if a party has a behavior that, before obligations are due, shows that he will not fulfill, the other party has usually the same rights as if a non-fulfillment had already occurred.<sup>381</sup> In particular, as practical consequence, this other party may suspend fulfillment of his own obligations<sup>382</sup> (and might even terminate if the behavior does not change, notably if no reasonable assurance of performance is shown<sup>383</sup>).

This assimilation of anticipated breach to ordinary breach can be excluded by contractual clauses.

#### ***4.14 Right to terminate long term contracts outside cases of non-fulfillment***

In addition to the situations where a party is entitled to terminate a contract because the other party breaches his obligations, it is assumed that, even without specific contractual clause to that effect, very long term contracts, with revolving performance, allow a party to “exit” (i.e. to terminate for the future), if further performance becomes unsustainable for a party. However, the unsustainable character shall be interpreted very restrictively.

#### ***4.15 Currency of performance***

*General rule*

The general rule is that a payment can always be performed in the currency of the contractual place of payment: if the debt is expressed in another currency, the debtor can pay the equivalent in the currency of the place of payment.<sup>384</sup>

*When payment only in a specific currency is agreed*

An exception applies if the parties have specified in a clear manner that the payment can only be made in a particular currency.

This may be significant since some currencies are not perfectly liquid. A party might be able to perform payment (of the equivalent amount) in the currency of the place of payment on the due date, but only a few days later in the contractual currency; in some cases, this is crucial (e.g. if time of payment is of essence<sup>385</sup> or in case of variations).

Additionally, it has some significance because the payment in a specific currency requires the party who does not have liquidities in that currency to purchase them (usually at a higher rate than the rate applicable for banks).

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In case of late payment, the creditor may request payment *Late payment* either to the exchange rate that applied on due date or to the exchange rate at the moment of actual payment.<sup>386</sup> Contractual clauses can deprive the creditor of such choice.

## 5. Non-performance: termination, restitution, compensation

*Technicalities and substance*

The exact regime of non-performance varies from a legal system to the other more than the questions dealt with in section 4 above. In addressing such issue, especially when the decision of terminating the contract is taken, it is important to verify what (international or national) law is applicable and to strictly comply with the conditions prescribed by that particular law; some details, formulations or technicalities can trigger different effects.

This being said, the practical issues are the same nearly all over the world and, beyond technicalities, the solutions of most legal systems are materially very similar.

The questions are whether a non-performance allows *termination*, i.e. putting an end to a contract, and, if yes, how to determine *compensation and restitutions*. In case non-performance does not allow termination, the main issue is compensation.

### 5.1 Termination: necessary and non-necessary “grace period” (or supplementary time for performance)

*Termination possible if non-performance is a fundamental breach*

When a contract party faces non-performance by the other party at the time where fulfillment is due, termination (or “avoidance” or “cancellation”<sup>387</sup>) by the aggrieved party is possible immediately if this non-performance already *amounts to a fundamental breach*.<sup>388</sup>

*- clause “time is of essence”*

It is the case, notably, if it has been stipulated in the contract that “*time is of the essence*”.<sup>389</sup>

*- grace period fixed and elapsed*

If no such clause has been stipulated, the aggrieved party will have to set a supplementary time-limit (“grace period”) to still allow the breaching party to perform. This grace period shall be

of reasonable length.<sup>390</sup> After expiry of that grace period, if performance is still outstanding, the aggrieved party has, as a rule, the right to terminate.<sup>391</sup>

Besides, setting a supplementary grace period is not necessary if the behavior of the breaching party shows that it would be useless: this obviously occurs when the breaching party explicitly declares that he will not fulfill<sup>392</sup>; it also occurs if, in any other manner, the behavior of the breaching party gives the aggrieved party reason to believe that he cannot reasonably expect the breaching party to change his behavior and perform (and this will be generally assumed if the breaching party's behavior is intentional)<sup>393</sup>. In these cases, the breach is considered as being immediately fundamental; the aggrieved party has thus the right to terminate without having to fix any grace period and to wait for it to lapse.

- debtor's  
behavior  
ascertaining  
continuation of  
non-  
performance

It shall be noted that, even when the aggrieved party has the right to immediately terminate, he has *the possibility* to nevertheless fix a grace period<sup>394</sup> (this is useful if, in spite of stipulations according to which "time is of the essence", the creditor actually thinks at the moment of non-performance that a later fulfillment is nevertheless useful; or, if the behavior objectively gives few hopes of a fulfillment, the creditor however thinks that a grace period has some chance of constituting a pressure that will convince the debtor to fulfill). If the aggrieved party has set such grace period although he was not obliged to do so, he can terminate only at the end of that grace period<sup>395</sup> (or immediately if, during the grace period, the breaching party explicitly states that he will not fulfill<sup>396</sup>).

Optional grace  
period

Accordingly, in case of fundamental breach, an aggrieved party may decide to set such optional grace period in order to avoid possible difficulties in demonstrating that the breach was initially fundamental; the grace period allows terminating

without the legal risks related to whether a breach is fundamental or not.

*Notice of termination:  
- nature*

The termination shall be done by a notice<sup>397</sup> of the aggrieved party to the breaching party.<sup>398</sup> The grace period can *include* the notice that, if performance is not done during the grace period, the contract will be automatically terminated (i.e. without new notice).<sup>399</sup>

*- timeframe for dispatching notice*

In many legal systems, the notice of termination has to be sent within a reasonably short time after that the time-limit for performance has elapsed (i.e. shortly after having reached the contractual date in case where it had been stipulated that “time is of the essence”; or, in the other cases, shortly after that the grace period has elapsed). If the aggrieved party does not send at that time a notice of termination, he loses – at least in a provisory way – the right to terminate.<sup>400</sup> Practically, he shall again request performance and, in case he has indicated a time limit in this request, he can terminate if the performance is outstanding when the time-limit elapses.

*Particular clauses prevail*

As for nearly all rules discussed in the section 4, the parties are free to agree on a different regime.

They can define themselves what fundamental breach is. If their definition thereof is very restrictive, they reduce the possibilities of termination (non-fulfillment is then dealt with almost exclusively by compensation). They can, to the contrary, have a very broad definition of fundamental breach (where also the non-accomplishment of simple preparatory acts entitles to termination).

They can also agree on technicalities, for example stipulate what exactly the duration of a grace period is. They can specify the timeframe during which termination shall be sent. Very

frequently, they stipulate a particular formality for the termination (e.g. registered mail<sup>401</sup>).

All such particularly stipulated clauses prevail over the standard regime resulting from provisions in statutes or codes (or precedent judgments that form law<sup>402</sup>).

The termination for non-performance shall be distinguished from the “termination” of contracts that have (unlike a “one-off” sale or service) *a lasting or revolving fulfillment* (“contracts of duration”), like contracts of lease, licensing, deposit, employment and many other services or deliveries. These contracts with revolving fulfillment can, as a general rule, be terminated for the future (*pro futuro* or *ex nunc*) also *outside situations of non-fulfillment*. Clauses and laws can limit this possibility of termination, i.e. foresee a minimum duration of contract or a minimum length of the termination notice (e.g. several months or even more); some clauses or laws also foresee, to the contrary, that immediate termination is possible at any time or, at least, ensure that termination is possible in very short times.

*Distinction:  
termination  
outside non-  
fulfillment*

In cases of non-fulfillment, the rules described above for the contracts in general do also apply to contracts with lasting or revolving obligations – with some nuances (notably regarding the already performed services or deliveries, as it will be seen below).

In contracts regulated according to a need of social protection (which are mainly duration contract like employment or apartment lease),<sup>403</sup> termination even for non-fulfillment is subject to particular statutory rules: the grace period to comply with contract obligations has a minimum length; the notice fixing it, as well as the notice of termination usually have to respect particular formalities.<sup>404</sup>

*Particular  
statutory rules*

## **5.2 Effects of termination**

### 5.2.1 Obligations to fulfill cease

*Description*

The termination for non-fulfillment is the aggrieved party's crucial decision by which he renounces to the fulfillment of the contract as it has been agreed. Performance of the promises will not take place.<sup>405</sup> In this sense, termination eliminates the initial – and main – obligations of both parties. It gives birth to different obligations, notably restitution (if something has been performed) and compensation for non-performance.

*Comparison with alternative*

Instead of terminating, the alternative decision of the aggrieved party is to continue requesting fulfillment of the contract. This party may also proceed judicially and obtain from the competent court of justice an order of fulfillment in nature ("specific performance"). In some situations, the court may directly award what the aggrieved party is entitled to receive; this can notably occur for the transfer of ownership, which the court is able to perform by ordering the real estate registrar or intellectual property register to record the aggrieved party as new owner.<sup>406</sup> The court may also award a (e.g. daily) penalty if the non-fulfilling party continues refusing to perform.<sup>407</sup> The time needed in practice and multiple difficulties in obtaining actual enforcement lead in most cases the aggrieved party to prefer termination and compensation. This choice can also be made if, in a first stage, the aggrieved party had insisted on and (unsuccessfully) sought fulfillment in nature ("specific performance").<sup>408</sup>

### 5.2.2 Restitution

*Principle*

The party who has fulfilled (totally or partially) a contract that is then terminated may claim *restitution* of what he or she has performed.<sup>409</sup>

This implementation of this rule may be simple or (very) complex.

If money was transferred, compensatory interest is, as a rule, due from the moment of transfer.<sup>410</sup> If property was transferred, not only the property itself<sup>411</sup>, but also the benefits that the transferee drew from the property (since the moment of transfer and until restitution) shall be restituted to the transferor<sup>412</sup>; the transferee can on his side receive reimbursement of the expenses necessary to preserve the property<sup>413</sup>.

Complex questions arise when the transferred property has been damaged until restitution or if its value decreased meanwhile, as well as if restitution is not possible. Solutions of the legal systems vary. The CISG states that, as a rule, termination by the buyer is not allowed in such case<sup>414</sup>; but it also foresees exceptions if the buyer is not responsible for the impossibility of restitution<sup>415</sup>. Other systems, which *also* deal with the complex question of restitution of services which, by nature, cannot be “restituted”, prescribe in general restitution in value<sup>416</sup>; this being laid down in theory, the practical evaluation (of services or of property that is irrecoverable at the time of termination) by other criteria than the contractually agreed price is often extremely delicate and debatable<sup>417</sup>.

*Complex situations and exceptions*

### 5.2.3 Compensation for non-fulfillment

A breach of contract obliges the breaching party to compensate the other party (“the aggrieved party”), unless the breach was due to force majeure or if the liability of the breaching party is otherwise excluded (notably by a clause of exemption).<sup>418</sup>

*Obligation to compensate*

The compensation consists in an amount of money that shall put the aggrieved party as nearly as possible into the position in which he or she would have been if the contract had been duly

*Definition of compensation*

performed.<sup>419</sup> In this sense, compensation is a financial (monetary) substitute to fulfillment. Practically, one should compare two financial situations of the aggrieved party: the current situation after the breach, and the hypothetical situation that would have existed if the breach had not occurred, i.e. if the contract had been fulfilled.

It results from this general definition that losses and expenses resulting from the breach (e.g. higher price paid to an alternative supplier, damages paid to third parties, travel expenses, legal fees, etc.) are to be compensated (*damnum emergens*), as well as the missed earnings or loss of profit (i.e. the margin of which the aggrieved party was deprived – *lucrum cessans*).<sup>420</sup>

*General rules on calculation of compensation*

The full compensation can give rise to debatable questions about whether an expense is really the consequence of the breach (in legal jargon: whether there is “causation” between breach and loss); the same can happen as to alleged missed earnings. Compensation is likely to be particularly debated when it is sought for loss of reputation or of image, or for moral harm and emotional prejudice.<sup>421</sup> A general rule limits, at least when the breach is not intentional<sup>422</sup>, the extent of compensation to what was reasonably *foreseeable*, at the time of concluding the contract, as a possible consequence of the breach.<sup>423</sup> Another general rule is that compensation is not due to the extent that the aggrieved party is responsible for the losses<sup>424</sup>, e.g. when his (awkward) reaction to the breach increased the losses. The legal systems also prescribe that the aggrieved party shall, to the extent that it is reasonably feasible, reduce himself or herself the losses<sup>425</sup>; to be coherent, the costs of the measures taken for that purpose (also unsuccessfully) are reimbursable by the breaching party<sup>426</sup>.

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In view of these difficulties, particular rules allow to considerably simplify the assessment of damages.

*Rules to simplify calculation of compensation*

In some situations, it can be identified that the aggrieved party, as a consequence of termination, has concluded a “substitute transaction” (e.g. contract with alternative, substitute or replacement supplier, or with substitute client); compensation can be claimed in such situations as the difference between the price of original (non-fulfilled) transaction and the price of the substitute transaction (provided it was concluded in good faith).

*- in case of substitute transaction*

427

When the contractual performance, which the breaching party did not make, has a current price (or “[liquid] market price”)<sup>428</sup>, the situation is even simpler: compensation can be claimed as the difference between the contract price and the current price at the moment of due performance or of termination.<sup>429</sup>

*- in case of performance with current price*

These rules make compensation practicable and, all in all, an efficient way to remedy breach of contract.

For the breach of a monetary obligation, compensation includes at least an interest on the due amount (in addition, obviously, to the due amount itself).<sup>430</sup> Besides, it must be noted that, if it is calculated with a value date before judgment (e.g. moment of breach or of termination), the amount of compensation for breached non-monetary obligations also triggers an interest from that date.<sup>431</sup>

*- accruing interest*

Efficient remedies can also result in the various clauses that the parties can agree on in order to simplify calculation of compensation. The most radical way in this regard is to agree on “liquidated damages”, i.e. a lump sum (fixed amount) that becomes due in case of breach.<sup>432</sup>

*Contractual clauses*

*Judicial powers  
of (discretionary)  
assessment*

The discretion of the court to assess damages<sup>433</sup> and the doctrine of the loss of a chance (pursuant to which the amount of a possible loss is awarded in proportion of its judicially assessed probability)<sup>434</sup> are tools that can be useful to ensure that a clear breach with uncertain financial consequences nevertheless triggers some equitable compensation. A particularly careful argumentation of the court, and a marked attention to the arguments raised by both parties, is necessary in order to avoid risks of arbitrary decisions on such uncertain matters.<sup>435</sup>

#### 5.2.4 Unaffected contractual effects

Termination does in no case affect clauses and obligations that are meant to operate also after or in spite of termination.<sup>436</sup>

The most classical examples are the clauses about governing law and settlement of disputes.<sup>437</sup>

Besides, clauses that set forth general duties to protect interests that exist independently of the contract shall normally not lose their validity. For example, a clause obliging the parties to keep confidential the information that is accessed as a consequence of the contract shall continue to bind the parties in spite of termination. Similarly, if a clause set a particular standard of care regarding risks of physical injuries related to the fulfillment of contract, it shall normally continue to apply.

The destiny of clauses like those related to non-competition (“restraint of trade”) is more complex. To endeavor drawing here a general rule, it can be said that, if they were stipulated as an exchange of the performance (which did not occur), termination shall trigger their end; by contrast, if they were stipulated because of anything that occurred in spite of termination (e.g. access to information), they shall continue to be binding after termination.<sup>438</sup>

### **5.3 Partial non-performance**

A partial non-performance might be fundamental for the contract as a whole, or not. It is fundamental, in particular, if the delivered partial fulfillment is – perceptibly – of no interest for the aggrieved party (e.g., in a contract of sale, if the incomplete delivered quantity of compliant goods is useless for the buyer because he needed the total promised quantity to constitute together a particular whole or aggregate, provided it is not reasonably possible for the buyer to obtain the missing quantity from an alternative supplier<sup>439</sup>). In such situations, the aggrieved party may terminate the contract as a whole;<sup>440</sup> if it is done so, the rules exposed above (about termination, restitution, compensation) apply without particularity.

*Fundamental breach for the entire contract*

If the partial non-performance is not a fundamental breach for the contract as a whole, it may however allow the aggrieved party to terminate partially the contract, if the non-performance relates to a part to which a counter-performance can be apportioned<sup>441</sup>. In a contract of sale on a quantity of goods identical to each other, it can be assumed that the price (counter-performance) is proportional to the quantity; if a part of this quantity is not delivered, the contract can be terminated for the non-delivered quantity.<sup>442</sup> On the one hand, the price is due for the delivered quantity, proportionally to the price agreed for the total quantity; on the other hand, the regime of termination – covering end of obligations, restitution and compensation – applies to the non-performed portion.

*Fundamental breach of a portion (in a divisible contract)*

It can happen<sup>443</sup> that the partial non-performance is neither a breach fundamental for the contract as a whole, nor allows a termination of a portion (because the non-performance does not relate to a part to which a counter-performance can be apportioned); in that case, the only remedy available to the aggrieved party is compensation.

*Other cases*

*Particularity of contracts with revolving performance*

Particular situations consist in contracts with revolving performance (e.g. monthly deliveries or “installments”). The non-performance of one installment does not necessarily allow the aggrieved party to cancel the contract for the future; it can happen that a non-performance of one installment is not a fundamental breach for the contract as a whole.<sup>444</sup> In these situations, termination will be possible only for the non-performed installment;<sup>445</sup> for future installments, the contract continues to exist.

By contrast, it can happen that the non-delivery of one installment is a breach fundamental for the contract as a whole; it is so notably if it gives to the aggrieved party grounds to conclude that the future installments will not be performed.<sup>446</sup> In this case, the aggrieved party can terminate the entire contract, i.e. also for the future installments.

***5.4 Effects of the breach of contract in absence of termination***

*Situations*

In many cases, a contract is breached without that the aggrieved party terminates it.

The most frequent situation is the case of late performance. It can also happen that a party does not comply at all with an obligation, without that the aggrieved party terminates the contract (e.g. because it is a minor point<sup>447</sup> or, in general, because the non-termination is more interesting than termination).

*Consequences*

The consequence of all such breaches is compensation. It is calculated as described above in the case of termination. The aggrieved party is entitled to receive an amount of money that will put him or her in the same financial situation as if the contract had been entirely fulfilled as promised. The various

rules exposed above about compensation apply (foreseeability, mitigation, etc.).

In particular, regarding late performance, even the rules to simplify calculation of compensation apply to some extent: if a performance has a current price, compensation can be determined as the difference between the market value on the contractual due date and the value on the date on which the late performance occurred.<sup>448</sup>

## **6. Initially vitiated contracts**

The contracts can be affected by defects from their origin, which can trigger their invalidity (“nullity”, “voidness”).

This occurs if the will of a party has been submitted to an influence, as a consequence of which it is not possible to consider that the consent was sufficiently free (“genuine”) to justify the binding force of the concluded contract. If the consent was not genuine, the affected party can – if he acts timely – cancel the contract; this annuls (or “nullifies” or “makes void” or “avoids”) the contract. The consent can be so vitiated by fraud (intentional misrepresentation), threat or essential mistake.

The other large category of invalidities relates to situations where a contract violates (“infringe”) legal provisions, from its origin. As a rule, this triggers nullity of the contract (by contrast, if a legal provision enters into force after that the contract was concluded, this – unless such subsequent law specifically provides an invalidity<sup>449</sup> – can have as consequence an impossibility of performance, which shall rather be approached under the point of view of force majeure<sup>450</sup>).

### ***6.1 Vitiating assent – affected party’s right to cancel the contract***

The field of law of vitiating assent is quite diversely regulated for the mistake. As regards intentional misrepresentation and threat, solutions are widely identical worldwide: they will be dealt with first (6.1.1 and 6.1.2), whereas mistake is examined afterwards (6.1.3).

6.1.1 Intentional (“fraudulent”) misrepresentation (civil fraud)

If, during contract negotiations, one of the parties intentionally provides the other party with wrong information, and if this information is relevant for the other party to enter into the contract (or to do it on the agreed conditions), the misled (“deceived”) party has the right to cancel (“avoid”) the contract.<sup>451</sup> The behavior of the misleading party is often referred to as “fraudulent misrepresentation” or, shortly, “fraud” (and it may also – but not necessarily – amount to criminal fraud)<sup>452</sup>.

*Right to cancel in case of intentionally wrong information*

The deceived party shall notify his decision to cancel the contract within a reasonable time (which is variable depending on the legal systems) after that he has become aware of the wrongness of the information provided.<sup>453</sup>

*Notice of cancellation: timeframe and effects*

As a rule, cancellation is similar to termination: the effects of the contract cease. There is no claim to fulfillment anymore; already transferred property shall be restituted<sup>454</sup>. The situation is more nuanced in case where restitution is practically impossible.<sup>455</sup>

By giving intentionally wrong information, the misleading party has acted illegally. Therefore, the deceived party is entitled to compensation, which shall put him into the position that would have existed if the wrong information had not been provided. As a rule, one can consider that the deceived party shall be put into the position in which he would have been if he had not concluded the contract.<sup>456</sup> If the deceived party cancels the contract, the expenses related to this contract shall be compensated, as well as the other consequences of the fact that the cancelled contract had been concluded: compensation shall thus notably include the profit that was not obtained from (alternative) contracts that would have been concluded (with

*Liability of misleading party*

other suppliers or clients) if the misleading party had not given wrong information and led the deceived party to enter into the finally cancelled contract. If the deceived party does not cancel the contract,<sup>457</sup> the compensation amounts to the losses resulting from the contract concluded under the influence of intentional misrepresentation; additionally, compensation includes the profit that was not obtained from contracts that would have been concluded (with alternative suppliers or clients) if he had not concluded the contract resulting from misrepresentation.

*Intentionally  
undisclosed  
information*

Not only positively wrong information entitles the deceived party to cancel the contract for fraudulent misrepresentation. Cancellation is also possible if a party has intentionally abstained to disclose information which, pursuant to good faith and fair dealing, should have been communicated in the negotiations.<sup>458</sup> Determining whether there is a duty of disclosure is not obvious.<sup>459</sup> Usually, it is the case when a party positively perceives that the other party is in error; a general *duty to disabuse* may be recognized, at least in relationships where some level of cooperativeness is expected (by contrast, it may be different in the context of contracts – occasionally – made between competitors, where none of the parties expects any cooperativeness beyond the explicit obligations).

*Partial  
cancellation*

In some situations, only a partial cancellation is possible. It is so in particular if the misleading information influences only a part of the contract and the remainder of the contract can be upheld.<sup>460</sup> Also, for the situations where it is possible to correct and adapt the contract in order to have it comply with what would have been concluded if the misleading information had not been provided, some legal systems may consider that only such partial “cancellation” (actually: correction) is available<sup>461</sup>.

Besides, except when an excessive time has elapsed since the moment where the deceived party discovered the wrongness of information, he may lose the right to cancel the contract: this occurs if, after having discovered the wrongness of information provided, he confirms (explicitly or by his behavior)<sup>462</sup> that he considers the contract as being binding (e.g. because he requests it to be fulfilled<sup>463</sup>).

*Loss of right to cancel*

If intentional misrepresentation has been committed by a representative of a party (or a party's auxiliary acting within his functions), the regime described in this section applies without restriction. By contrast, if an act of intentional misrepresentation was done by an *independent* third party, cancellation by the deceived party is possible only if the other party knew or ought to have known of that intentional misrepresentation.<sup>464</sup>

*Misleading representation by a third party*

### 6.1.2 Threat (civil extortion)

A contract can be cancelled if it is the result of illegitimate threats, which could be described as civil extortion (which is not necessarily also a criminal extortion<sup>465</sup>).

The right of the victim to cancel the contract requires the threat to be serious and imminent, so that the victim has no reasonable alternative but to conclude the contract. Such threat must either be an act that is wrongful in itself or that is illegitimate as a means to obtain the conclusion of the contract.<sup>466</sup>

The right of the victim of a threat to cancel the contract resulting from the threat follows the same rules as the right of the deceived party to cancel the contract resulting from intentionally wrong information<sup>467</sup> (the right to cancel may be lost if the extorted party does not cancel within a reasonable time after that the illegitimate pressure has ceased<sup>468</sup>).

The liability of the extorting party follows the same rules as the liability of the misleading party<sup>469</sup>.

### 6.1.3 Mistake (error)

*General view;  
definitions of  
mistake*

The right to cancel a contract in case of mistake<sup>470</sup>, when such is not the result of intentional misrepresentation of a party, is highly delicate. It is one of the most subtle questions of contract law.

The general idea in most systems is that the mistake shall not only have been decisive for the mistaken party to enter into the contract; it must have been really *essential*.

Some systems also require that the mistake be excusable; if the mistake is faulty, cancellation is not possible. Other systems do not set forth this condition, but create a liability of the mistaken party in case he cancels the contract although he was negligent in the formation of his error.<sup>471</sup>

The *Unidroit Principles on International Commercial Contracts* (article 3.2.2) propose an interesting compromise that reflects the different criteria that have emerged in the debates of jurisprudence and legal doctrine in many legal systems, so as to reach – in our opinion – a balanced regime:

*“(1) A party may only avoid the contract for mistake if, when the contract was concluded, the mistake was of such importance that a reasonable person in the same situation as the party in error would only have concluded the contract on materially different terms or would not have concluded it at all if the true state of affairs had been known, and (a) the other party made the same mistake, or caused the mistake, or knew or ought to have known of the mistake and it was contrary to reasonable commercial standards of fair dealing to leave the mistaken party in error; or (b) the other party had not at the time of avoidance reasonably acted in reliance on the contract.*

*(2) However, a party may not avoid the contract if (a) it was grossly negligent in committing the mistake; or (b) the mistake relates to a matter in regard to which the risk of mistake was assumed or, having regard to the circumstances, should be borne by the mistaken party”.*

A similar approach is made by the *Principles of European Contract Law* (article 4:103):

*“(1) A party may avoid a contract for mistake of fact or law existing when the contract was concluded if: (a) (i) the mistake was caused by information given by the other party; or (ii) the other party knew or ought to have known of the mistake and it was contrary to good faith and fair dealing to leave the mistaken party in error; or (iii) the other party made the same mistake, and (b) the other party knew or ought to have known that the mistaken party, had it known the truth, would not have entered the contract or would have done so only on fundamentally different terms.*

*(2) However a party may not avoid the contract if: (a) in the circumstances its mistake was inexcusable, or (b) the risk of the mistake was assumed, or in the circumstances should be borne, by it”.*

The regime of cancellation follows substantially the same rules as in case of fraudulent misrepresentation or threat: cancellation must be notified within a reasonable time (in some legal systems: immediately).<sup>472</sup> This right is lost if the behavior of the mistaken party amounts to confirm the contract. The effects of cancellation are the same. *Regime of cancellation*

By contrast, the issue of liability is different. The liable party is not necessarily the counterparty of the mistaken party. The rule is rather that the party who should have been aware of the mistake is liable.<sup>473</sup> *Liability*

A rule that exists in parallel to the regime of mistake as ground to cancel the contract is that, if a party has negligently generated an error of the other party, he can be held liable even if the other party is not entitled to cancel the contract.<sup>474</sup>

*Adaptation of contract*

Another particular rule related to mistake is that, if the other party declares to the mistaken party, who cancels the contract, that he is ready to fulfill a contract corresponding to what the mistaken party would have wanted, this eliminates the right to cancel the contract; in such case, the parties are bound by the contract corresponding to what the mistaken party had understood.<sup>475</sup>

*Particular clauses excluding cancellation*

Finally, it must be noted that, as a rule, the parties may exclude (at least substantially) the right to cancel the contract for mistake<sup>476</sup>. By contrast, one generally assumes that they cannot exclude the right of cancelling for fraud or threat.<sup>477</sup>

## **6.2 Illegality**

The general rule is that a contract that infringes mandatory law is “null and void”. No party has a claim for fulfillment. If performance has taken place, it must be, as a rule, restituted. However, the impossibility of restitution will trigger nuanced solutions.<sup>478</sup>

In addition, illegality often raises the question of liability of the party who was aware or ought to have been aware of illegality; if the other party was not negligent in being unaware of illegality, he is entitled to compensation.<sup>479</sup>

## Notes to chapter VI: contracts in general

<sup>214</sup> See, for the quantitative role of judicial procedures with regard to the existence and implementation of legal relationships in general, below p. 533, especially ad note 1212.

<sup>215</sup> For example, article 11 of the UN Convention on the Contracts for the International Sale of Goods (CISG) sets forth: “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*”. Article 1.2 of the UNIDROIT PRINCIPLES say (under the title “*No form required*”): “*Nothing in these Principles requires a contract, statement or any other act to be made in or evidenced by a particular form. It may be proved by any means, including witnesses*”.

<sup>216</sup> The text of the UNIDROIT PRINCIPLES expresses this (under the title “*Freedom of contract*”) in the following way: “*The parties are free to enter into a contract and to determine its content*” (article 1.1).

<sup>217</sup> Article 1.7 of the UNIDROIT PRINCIPLES provides for that “*Each party must act in accordance with good faith and fair dealing in international trade. The parties may not exclude or limit this duty*”. Professionals from Common Law systems are very reluctant to admit the existence of a general duty to act in compliance with good faith. They mainly fear that interpretation of contracts might become unpredictable. However, the criterion is not really different from the *reasonableness*, with which Anglo-American lawyers are familiar. In relation with this approach, the article 1.8 of the UNIDROIT PRINCIPLES simply outlines one aspect of article 1.7 but is likely to look more acceptable to Anglo-American lawyers: “*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*”.

<sup>218</sup> As regards this phrase, article 1.3 of the UNIDROIT PRINCIPLES say (under the title “*Binding character of contract*”): “*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*”.

<sup>219</sup> See e.g. article 2.1.15 of the UNIDROIT PRINCIPLES, subs. 1: “*A party is free to negotiate and is not liable for failure to reach an agreement*”.

<sup>220</sup> In this regard, the formulation of article 2.1.15 subs. 2 the UNIDROIT PRINCIPLES may lead to confusions. This results from the actual arising of losses in case where negotiations are broken off, although the bad faith behavior is anterior to the breaking-off. See below note 222.

<sup>221</sup> Article 2.1.15 of the UNIDROIT PRINCIPLES, subs. 3: “*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*”.

<sup>222</sup> If the contract had been concluded in spite of the prior bad faith behavior, the losses do not occur; therefore, even if the prior behavior did not comply with legal duties, it had no detrimental financial consequences and cannot therefore lead to an obligation to compensate. See in this regard ROUILLER, in *Regards comparatistes sur le phénomène contractuel* (2007), p. 50 ad note 46.

<sup>223</sup> This is notably so because of the importance of these situations for the understanding of the effects that freedom of contract has.

<sup>224</sup> This was not the case in the classical Roman law, which had a limited number (*numerus clausus*) of binding contracts. This resulted from the conception that the binding effect was the result of a sacred action of entering into obligations, with particular formulas to be used; in the later periods of the Roman Empire, innominate contracts (i.e. beyond the *numerus clausus*) started to be admitted.

<sup>225</sup> See e.g. BAUEN/ROUILLER, *Swiss Banking* (2013), chap. 29-31.

<sup>226</sup> See below p. 503 sq.

<sup>227</sup> See below p. 190 sq. spec. ad note 438.

<sup>228</sup> See e.g. the General Decree of the German stock-exchange regulator (“*Federal Financial Supervisory Authority*”) *BaFin* of 19<sup>th</sup> September 2008, modified on 21<sup>st</sup> September 2008 (allowing some exceptions), extended by a General Decree of 29<sup>th</sup> May 2009 on the Extension of the Provisions of the General Decrees of 19<sup>th</sup> and 21<sup>st</sup> September 2008. See also NY Times 21<sup>st</sup> September 2008, *More regulators move to curb short-selling*; WSJ 28<sup>th</sup> October 2008, *Japan Cracks Down on Naked Short Selling*. — In 2012, a EU Regulation was adopted (N° 236/2012, “on short selling and certain aspects of credit default swaps”), which was challenged by the UK, but finally affirmed by the European Court of Justice on 22<sup>nd</sup> January 2014 (case C-270/12; see also below note 1182).

<sup>229</sup> See e.g. below p. 291 ad note 610.

<sup>230</sup> See above p. 44 ad note 66.

<sup>231</sup> For a “catalogue” of over 500 examples of administrative provisions prohibiting behaviors that can be the object of contracts, see ROUILLER, *Der widerrechtliche Vertrag* (2002), p. 1-30.

<sup>232</sup> *Competition law* (antitrust law) is similar in this regard. It prohibits contracts and behaviors – which are not prohibited in general – to certain actors of the economy (those with dominant positions).

<sup>233</sup> See the famous expression created by Henry MAINE, *Ancient Law, its connection with the early history of society and its relation to*

*modern ideas* (1861), p. 170 (*in fine*): “we may say that the movement of progressive societies has been hitherto been a movement from Status to Contract”.

<sup>234</sup> The ancient Latin phrase “*res inter alios acta aliis nec nocet nec prodest*” (explicit equivalents of which can be found e.g. in the civil codes of Quebec, article 1443, and of Russia, article 308 subs. 3), often quoted to describe this, lacks nuances to the extent that a contract can create *rights* for the benefit of other parties (the most widespread example is the insurance contracts, notably for situations like death of a person who designates beneficiaries, or like insolvency of an employer who creates benefits payable to employees). See e.g. article 5.2.1 UNIDROIT PRINCIPLES: “*The parties (the ‘promisor’ and the ‘promisee’) may confer by express or implied agreement a right on a third party (the ‘beneficiary’). The existence and content of the beneficiary’s right against the promisor are determined by the agreement of the parties and are subject to any conditions or other limitations under the agreement*”.

<sup>235</sup> There are many other situations of that type: for example, the parties can foresee that an expert (a person not party to the contract) will have a definite behavior and that the content of their obligations will vary depending on this; in international trade, buyer and seller may agree that a certification company will issue a report about delivery, and that the obligation to pay depends on this report. The contract of sale does however not by itself oblige the certification company to do anything; for that purpose, a supplementary contract must still be concluded by the parties to the contract of sale and the certification company.

<sup>236</sup> P. 165 sq.

<sup>237</sup> P. 182 sq.

<sup>238</sup> Below p. 289 sq.

<sup>239</sup> Below p. 333 sq.

<sup>240</sup> Article 14 subs. 1, 1st sentence CISG: “*A proposal for concluding a contract addressed to one or more specific persons constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance*”. Article 2.1.2 of the UNIDROIT PRINCIPLES is literally identical. Article 2:201 subs. 1 PECL is identical as regards the meaning.

<sup>241</sup> See more details on p. 152 sq.

<sup>242</sup> Article 2:102 PECL is clear in this regard: “*The intention of a party to be legally bound by contract is to be determined from the party’s statements or conduct as they were reasonably understood by the other party*”.

<sup>243</sup> See article 18 subs. 2, 2<sup>nd</sup> sentence, 1<sup>st</sup> part CISG: “An acceptance is not effective if the indication of assent does not reach the offeror within the time he has fixed”. Article 2.1.7, 1<sup>st</sup> sentence of the UNIDROIT PRINCIPLES, formulates this positively: “An offer must be accepted within the time the offeror has fixed”; identical, article 2:206 subs. 1 PECL.

<sup>244</sup> Short deadlines are recognized as a classical tactic of negotiations Richard SCHELL, *Bargaining for Advantage: Negotiation Strategies for Reasonable People* (2<sup>nd</sup> ed., 2006), p. 179 sq.

<sup>245</sup> A binding offer is indeed a unilateral – conditional – obligation, which becomes unconditional and bilateral when accepted. In practical terms, as long as a binding offer is pending, the offeror must be ready to fulfill the proposed contract in case his offer is accepted.

<sup>246</sup> Article 18 subs. 2, 3<sup>rd</sup> sentence CISG says: “An oral offer must be accepted immediately unless the circumstances indicate otherwise”. Identical, article 2.17, 2<sup>nd</sup> sentence, of the UNIDROIT PRINCIPLES.

<sup>247</sup> Article 18 subs. 2, 2<sup>nd</sup> sentence, 2<sup>nd</sup> part CISG; article 2.17, 2<sup>nd</sup> sentence, of the UNIDROIT PRINCIPLES. Article 2:206 subs. 2 PECL mentions simply: “within a reasonable time”.

<sup>248</sup> See decision of the Swiss Supreme Court ATF/BGE 50 (1924) II 13, spec. p. 18 (*in casu* offer accepted after 22 h 30 min, i.e. within the timeframe; and, since the seller did not fulfill – in the belief that the contract was not concluded - damages for non-performance were awarded).

<sup>249</sup> Article 17 CISG: “An offer, even if it is irrevocable, is terminated when a rejection reaches the offeror”.

<sup>250</sup> See the English case *Stevenson v. McLean* of 1880 (5 QBD 346) summarized by P. NAYLER, *Business Law in the Global Marketplace* (2005), p. 64-65 and 89; the Court recognized that, by asking whether the seller, who had offered 3800 tons of iron against immediate payment, would be ready to receive payment 2 months after delivery or could indicate “the longest limit [he] would give”, the buyer had made an *inquiry* and not a counteroffer; the offer was thus still in existence after the inquiry (and, since accepted after that the inquiry remained unanswered, the contract was validly formed).

<sup>251</sup> Sec. 3.3.3, p. 149 sq.

<sup>252</sup> Article 18 subs. 1, 1<sup>st</sup> sentence CISG says: “A statement made by or other conduct of the offeree indicating assent to an offer is an acceptance”. Article 2.1.6 subs. 1, 1<sup>st</sup> sentence, of the UNIDROIT PRINCIPLES is identical.

<sup>253</sup> Article 18 subs. 3 CISG says that “if, by virtue of the offer or as a result of practices which the parties have established between

*themselves or of usage, the offeree may indicate assent by performing an act, such as one relating to the dispatch of the goods or payment of the price, without notice to the offeror, the acceptance is effective at the moment the act is performed, provided that the act is performed within the period of time laid down in the preceding paragraph*". See also articles 2:205 subs. and 2:206 subs. 3 PECL.

<sup>254</sup> Article 18, subs. 1, 2<sup>nd</sup> sentence CISG: "*Silence or inactivity does not in itself amount to acceptance*". Articles 2.1.6 subs. 1, 2<sup>nd</sup> sentence, of the UNIDROIT PRINCIPLES and 2:204 subs. 2 PECL are identical.

<sup>255</sup> This Latin maxim is said to have been coined in 1298 by Pope BONIFACE VIII (*Liber Sextus* 5, 13, 43, part of the *Decretals* in the *Corpus Iuris Canonici*); see Detlef LIEBS, *Lateinische Rechtsregeln und Rechtssprichwörter* (7<sup>th</sup> ed., 2007), p. 195 sq.

<sup>256</sup> Sec. 3.3.2 and 3.3.3, p. 147-152.

<sup>257</sup> See e.g. article 2:211 PECL, which is however formulated cautiously: "*The rules in this section apply with appropriate adaptations even though the process of conclusion of a contract cannot be analysed into offer and acceptance*".

<sup>258</sup> Article 21 subs. 1 CISG: "*A late acceptance is nevertheless effective as an acceptance if without delay the offeror orally so informs the offeree or dispatches a notice to that effect*". Article 2.1.9 subs. 1 of the UNIDROIT PRINCIPLES is identical.

<sup>259</sup> Text of article 21 subs. 1 CISG, 1<sup>st</sup> part. Article 2.1.9 subs 2 of UNIDROIT PRINCIPLES is nearly identical.

<sup>260</sup> Continuation of the text quoted ad note 259.

<sup>261</sup> Article 19 subs. 1 CISG: "*A reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer*". Articles 2.1.11 subs. 1 of the UNIDROIT PRINCIPLES and 2:208 subs. 1 PECL are identical.

<sup>262</sup> Article 19 subs. 2 CISG: "*However, a reply to an offer which purports to be an acceptance but contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance, unless the offeror, without undue delay, objects orally to the discrepancy or dispatches a notice to that effect. If he does not so object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance*". Article 2.1.11 subs. 2 of the UNIDROIT PRINCIPLES is identical. Article 2:208 subs. 2 PECL contains a precision: "*A reply which gives a definite assent to an offer operates as an acceptance even if it states or implies additional or different terms, provided these do not materially alter the terms of the offer. The additional or different terms then become part of the contract*".

<sup>263</sup> Article 19 subs. 3 CISG.

<sup>264</sup> This situation is contemplated by article 2:208 subs. 3 lit. a PECL: *“However, such a reply will be treated as a rejection of the offer if: (a) the offer expressly limits acceptance to the terms of the offer”*.

<sup>265</sup> This situation is contemplated by article 2:208 subs. 3 lit. c PECL (*“the offeree makes its acceptance conditional upon the offeror’s assent to the additional or different terms, and the assent does not reach the offeree within a reasonable time”*).

<sup>266</sup> See above p. 140 (esp. ad note 241).

<sup>267</sup> See article 2.1.13 of the UNIDROIT PRINCIPLES: *“Where in the course of negotiations one of the parties insists that the contract is not concluded until there is agreement on specific matters or in a particular form, no contract is concluded before agreement is reached on those matters or in that form”*; see also article 2:103 subs. 2 PECL: *“However, if one of the parties refuses to conclude a contract unless the parties have agreed on some specific matter, there is no contract unless agreement on that matter has been reached”*.

<sup>268</sup> See above p. 129 ad note 215.

<sup>269</sup> See article 2.1.14 (*“Contract with terms deliberately left open”*) subs. 1 of the UNIDROIT PRINCIPLES: *“If the parties intend to conclude a contract, the fact that they intentionally leave a term to be agreed upon in further negotiations or to be determined by a third person does not prevent a contract from coming into existence”*.

<sup>270</sup> See article 2.1.14 subs. 2 of the UNIDROIT PRINCIPLES: *“The existence of the contract is not affected by the fact that subsequently (a) the parties reach no agreement on the term; or (b) the third person does not determine the term, provided that there is an alternative means of rendering the term definite that is reasonable in the circumstances, having regard to the intention of the parties”*. The way the judge fixes a point deliberately left open is, in reality, not very different than what he does when a term is involuntarily omitted, see, on the interpretation, p. 156, on *“missing (non-agreed) terms”*.

<sup>271</sup> See article 4.1 subs. 1 of the UNIDROIT PRINCIPLES: *“A contract shall be interpreted according to the common intention of the parties”*. See also article 5:101 PECL quoted below in note 272.

<sup>272</sup> Article 5:101 subs. 1 PECL: *“A contract is to be interpreted according to the common intention of the parties even if this differs from the literal meaning of the words”*.

<sup>273</sup> Article 4.1 subs. 2 of the UNIDROIT PRINCIPLES.

<sup>274</sup> This listing is inspired by articles 4.3 of the UNIDROIT PRINCIPLES and 5:102 PECL.

<sup>275</sup> It can be debated if the subsequent behavior (posterior to the conclusion of the contract) is legitimately relevant to interpret what is decisive under the point of view of good faith, since these circumstances are meant to determine what the parties should have understood at the moment of making the contract. However, this point of view (which is occasionally adopted e.g. by the Swiss Supreme Court) seems too formalistic and omits that a contract is a “living relationship”: indeed, if, after conclusion of the contract, a party behaves in a manner that shows how he understands the contract, the other party shall react if this understanding does not comply with his; otherwise, this other party creates an expectation of the first party, whose understanding seems unchallenged: this party’s belief is reinforced by the lack of reaction and will deserve to be protected from the point of view of good faith. This being said, it is true that this criterion has no priority and, normally, cannot *change* the contract; the sense *clearly* arising from preliminary negotiations will normally prevail. But if no such clear sense is established, this criterion can be of importance.

<sup>276</sup> Article 5:101 subs. 2 PECL. Very close, article 4.2 subs. 1 of the UNIDROIT PRINCIPLES: “*The statements and other conduct of a party shall be interpreted according to that party’s intention if the other party knew or could not have been unaware of that intention*”. — In addition to the situations with that party’s understanding is specific, but within the general meaning of a word, it can happen that such understanding is really awkward or even, sometimes, fully contrary to the objectively clear meaning of a word, e.g. if a party perceptibly uses a word for another (e.g. mixes up “call option” with “put option”). It can be even very elementary, due to inattention: for example, if the parties always mentioned in talks taking place e.g. in January 2014 that the contract being negotiated would have to be fulfilled in the course of the next months, and, when they conclude the contract, write that “*fulfillment shall take place until 30<sup>th</sup> April 2015*”, it must be understood that “*until 30<sup>th</sup> April 2014*” is meant.

<sup>277</sup> Article 5:104 PECL.

<sup>278</sup> Articles 4.4 of the UNIDROIT PRINCIPLES and 5:105 PECL.

<sup>279</sup> Article 4.5 of the UNIDROIT PRINCIPLES and 5:106 PECL.

<sup>280</sup> Articles 4.6 of the UNIDROIT PRINCIPLES and 5:103 PECL. See e.g., quoting this provision, judgment of 15<sup>th</sup> December 2011 of (German) Landgericht Frankfurt a.M. (Causa Sport 2012, 67); German Arbitration Court for Sport (Deutsches Sportschiedsgericht), award of 17<sup>th</sup> December 2009, N° DIS-SVSP-02/08, pp. 10 sq.).

<sup>281</sup> Article 4.7 of the UNIDROIT PRINCIPLES and 5:107 PECL.

<sup>282</sup> Same approach in the Commentary (2010) N° 1 to article 4.8 UNIDROIT PRINCIPLES (p. 146).

<sup>283</sup> This action can also be said to consist in *completing* the contract. For the use of the expression “supply”, see below note 286.

<sup>284</sup> The only exception – quite merely theoretical – is the case where the parties have explicitly and fully agreed on a clause in the negotiations and finally renounced to put it in the final text of their agreement because they were sure that the question solved by this clause would not arise; in such situations, it can be said that there is a truly hypothetical will of *the parties themselves* (which can be simply *uncovered* by the judge, rather than being actually worked out by him; see below note 285).

<sup>285</sup> The judge is not the parties. Contrary to them, who can agree on unreasonable and arbitrary solutions (“*stat pro ratione voluntas*”), his powers (in a society respectful of its citizens) only allow him to work out and elaborate reasonable and equitable solutions. It can be said that the hypothetical will of the parties is a *normative hypothetical will* (“*volonté hypothétique normative*”, ROUILLER, *Droit suisse des obligations et Principes du droit européen des contrats* [2007], pp. 557, 590 sq., 605; in a French and comparative approach, DESCAUDIN, *Etude comparative du rôle du juge dans l’interprétation des contrats* [2010], p. 309 [note 1291 *in fine*] and p. 312 [note 1307] and 321 [note 1349]).

<sup>286</sup> Article 4.8 of the UNIDROIT PRINCIPLES deals with the issue of missing terms (under the title “*Supplying an omitted term*”) as follows: “(1) *Where the parties to a contract have not agreed with respect to a term which is important for a determination of their rights and duties, a term which is appropriate in the circumstances shall be supplied. (2) In determining what is an appropriate term regard shall be had, among other factors, to (a) the intention of the parties; (b) the nature and purpose of the contract; (c) good faith and fair dealing; (d) reasonableness*”. Article 6:102 PECL is similar in its effects, but it does not make any difference between implied terms and omitted terms. Same approach in a comparative approach based on French and Tunisian laws, Ali ZARROUK, *L’implicite et le contenu contractuel: Etude de droit compare* (2012), p. 458 (N° 617 *in fine*).

<sup>287</sup> Article 1:202 PECL sets forth: “*Each party owes to the other a duty to co-operate in order to give full effect to the contract*”; article 5.1.3 of the UNIDROIT PRINCIPLES says: “*Each party shall cooperate with the other party when such co-operation may reasonably be expected for the performance of that party’s obligations*”.

<sup>288</sup> There is a particularly strong duty of cooperation of the contract strictly gives the right of specification to the buyer (and excludes the

rule of article 65 subs. 1 CISG according to which the right passes to the seller: *“If under the contract the buyer is to specify the form, measurement or other features of the goods and he fails to make such specification either on the date agreed upon or within a reasonable time after receipt of a request from the seller, the seller may, without prejudice to any other rights he may have, make the specification himself in accordance with the requirements of the buyer that may be known to him”*.

<sup>289</sup> UNIDROIT PRINCIPLES, article 6.1.14: *“Where the law of a State requires a public permission affecting the validity of the contract or its performance and neither that law nor the circumstances indicate otherwise (a) if only one party has its place of business in that State, that party shall take the measures necessary to obtain the permission; (b) in any other case the party whose performance requires permission shall take the necessary measures”*. This provision appears to be applied when national laws govern the contract. See e.g. ICC Arbitral Award N° 12112, quoted in Yearbook Commercial Arbitration XXXIV (2009), pp. 77-110, spec. N° 86 (award under Albanian law; for consideration under Swiss law, ROUILLER, *Droit suisse des obligations et Principes du droit européen des contrats*, 2007, p. 267).

<sup>290</sup> UNIDROIT PRINCIPLES, article 6.1.15: *“(1) The party required to take the measures necessary to obtain the permission shall do so without undue delay and shall bear any expenses incurred. (2) That party shall whenever appropriate give the other party notice of the grant or refusal of such permission without undue delay”*. For this provision, see e.g. award of 25<sup>th</sup> January 2002 rendered by the Arbitration Court of the Lausanne Chamber of Commerce and Industry (case 863 of the database [www.unilex.info](http://www.unilex.info)).

<sup>291</sup> This is the case when an exporter with no place of business in the buyer’s country concludes under DDP incoterm (see below chapter VIII, p. 277).

<sup>292</sup> See article 6.1.1 of the UNIDROIT PRINCIPLES: *“A party must perform its obligations: (a) if a time is fixed by or determinable from the contract, at that time; (b) if a period of time is fixed by or determinable from the contract, at any time within that period unless circumstances indicate that the other party is to choose a time; (c) in any other case, within a reasonable time after the conclusion of the contract”*. Articles 33 CISG and 7:102 PECL are identical.

<sup>293</sup> See above note 292 *in fine*. Some laws foresee that obligations are due for fulfillment “immediately”, unless circumstances indicate otherwise (e.g. article 75 of the Swiss Code of obligations).

<sup>294</sup> In addition to risks resulting from solvency, the procedural risks are also significant: the party which pre-performs may lose its trial because, notably, of deficient evidence or successful defenses of the debtor.

<sup>295</sup> Article 6.1.4 subs. 1 of the UNIDROIT PRINCIPLES: *“To the extent that the performances of the parties can be rendered simultaneously, the parties are bound to render them simultaneously unless the circumstances indicate otherwise”*. Article 7:104 PECL is identical.

<sup>296</sup> Article 7.1.3 subs. 1 of the UNIDROIT PRINCIPLES: *“Where the parties are to perform simultaneously, either party may withhold performance until the other party tenders its performance”*. Article 9:201 subs. 1 PECL foresees a more nuanced, though somewhat unpredictable regime.

<sup>297</sup> Article 7.1.3 subs. 2 of the UNIDROIT PRINCIPLES: *“Where the parties are to perform consecutively, the party that is to perform later may withhold its performance until the first party has performed”*. See also the provisions in article 8:106 subs. 2, 1<sup>st</sup> sentence PECL: *“During the additional period the aggrieved party may withhold performance of its own reciprocal obligations [...]”* and, identical, article 7.1.5 subs. 2, 1<sup>st</sup> sentence of the UNIDROIT PRINCIPLES, both quoted completely in note 395.

<sup>298</sup> Such clause is relatively frequent in contractual practice; its goal is to limit possibilities of non-performance founded on the *allegation* that the other party has not or will not fulfill.

<sup>299</sup> Article 6.1.5 subs. 1 of the UNIDROIT PRINCIPLES: *“The obligee may reject an earlier performance unless it has no legitimate interest in so doing”*.

<sup>300</sup> Article 6.1.5 subs. 2 and 3 of the UNIDROIT PRINCIPLES: *“(2) Acceptance by a party of an earlier performance does not affect the time for the performance of its own obligations if that time has been fixed irrespective of the performance of the other party’s obligations. (3) Additional expenses caused to the obligee by earlier performance are to be borne by the obligor, without prejudice to any other remedy”*.

<sup>301</sup> It will be different if the obligation of the buyer is determined in reference to the date of actual delivery by the seller (see above note 300). However, in such case, the buyer (if he does not want to be obliged to pay earlier than he had planned in virtue of the contractual date of delivery) *has a legitimate interest* in refusing anticipated performance by the seller.

<sup>302</sup> See above p. 137.

<sup>303</sup> Article 6.1.3 subs. 1 of the UNIDROIT PRINCIPLES says: *“The obligee may reject an offer to perform in part at the time performance is due,*

*whether or not such offer is coupled with an assurance as to the balance of the performance, unless the obligee has no legitimate interest in so doing*". For the CISG and the EUROPEAN PRINCIPLES OF CONTRACT LAW, this results from the restrictions to the possibility of terminating the entire contract in case of partial fulfillment, as referred to in note 304.

<sup>304</sup> Besides being the criterion laid down in the UNIDROIT PRINCIPLES as shown in note 303, this is in reality also the criterion resulting from the UN Convention on the Contracts for the International Sale of Goods: article 51 subs. 2 CISG allows to terminate the contract in case of partial fulfillment *only if such amounts to a fundamental breach of contract* ("*The buyer may declare the contract avoided in its entirety only if the failure to make delivery completely or in conformity with the contract amounts to a fundamental breach of the contract*"), which supposes that it substantially deprives what the creditor was perceptibly expecting from the contract (article 25 CISG: "*A breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result*"). A very similar approach results from articles 8:103 lit. b and 9:302 PECL.

<sup>305</sup> The system of the EUROPEAN PRINCIPLES OF CONTRACT LAW (PECL) implies that performance by a third party is always acceptable unless the contract *requires* otherwise (which means in that system: either explicitly or implicitly, see above p. Missing (non-agreed) terms sq., ad notes 282-286); it results from article 7:106 subs. 1 ("*Except where the contract requires personal performance the creditor cannot refuse performance by a third person if: (a) the third person acts with the assent of the debtor; [...]*").

<sup>306</sup> For example if a payment by the particular third party generates difficulties for the payee, notably because this third party is a resident of a country under sanctions (notably, over several periods, Iran, esp. for US payees), from whom payments cannot be received without risks or a heavy administrative burden.

<sup>307</sup> Article 6.1.6 subs. 1 of the UNIDROIT PRINCIPLES: "*If the place of performance is neither fixed by, nor determinable from, the contract, a party is to perform: (a) a monetary obligation, at the obligee's place of business*". Article 7:101 subs. 1 lit. a PECL is identical. See also the CISG quoted in note 308.

<sup>308</sup> See article 57 subs. 1 CISG: "*If the buyer is not bound to pay the price at any other particular place, he must pay it to the seller: (a) at*

*the seller's place of business; or (b) if the payment is to be made against the handing over of the goods or of documents, at the place where the handing over takes place".*

<sup>309</sup> Article 57 subs. 2 CISG: *"The seller must bear any increase in the expenses incidental to payment which is caused by a change in his place of business subsequent to the conclusion of the contract".* Identical, but more general, article 6.1.7 subs. 2 of the UNIDROIT PRINCIPLES: *"A party must bear any increase in the expenses incidental to performance which is caused by a change in its place of business subsequent to the conclusion of the contract".*

<sup>310</sup> Article 6.1.6 subs. 1 lit. b of the UNIDROIT PRINCIPLES. See also article 31 lit. c CISG: *"If the seller is not bound to deliver the goods at any other particular place, his obligation to deliver consists: [...] (c) in other cases—in placing the goods at the buyer's disposal at the place where the seller had his place of business at the time of the conclusion of the contract".*

<sup>311</sup> See note 309 *in fine*.

<sup>312</sup> Article 31 lit. a and b CISG: *"[the seller's obligation consists] (a) if the contract of sale involves carriage of the goods—in handing the goods over to the first carrier for transmission to the buyer; (b) if, in cases not within the preceding subparagraph, the contract relates to specific goods, or unidentified goods to be drawn from a specific stock or to be manufactured or produced, and at the time of the conclusion of the contract the parties knew that the goods were at, or were to be manufactured or produced at, a particular place—in placing the goods at the buyer's disposal at that place; [...]"*.

<sup>313</sup> For force majeure, see section 4.7 (p. 165 sq.). Another aspect determined by place of performance is the currency of payment (see section 4.15, p. 180 sq.).

<sup>314</sup> Article 11:102 subs. 1 PECL. See also article 9.1.7 subs. 2, first part, of the UNIDROIT PRINCIPLES quoted below in note 316.

<sup>315</sup> Article 9.1.10 of the UNIDROIT PRINCIPLES: *"(1) Until the obligor receives a notice of the assignment from either the assignor or the assignee, it is discharged by paying the assignor. (2) After the obligor receives such a notice, it is discharged only by paying the assignee".* Article 11:303 PECL.

<sup>316</sup> Article 11:302 PECL. Article 9.1.7 subs. 2 of the UNIDROIT PRINCIPLES: *"(1) A right is assigned by mere agreement between the assignor and the assignee, without notice to the obligor. (2) The consent of the obligor is not required unless the obligation in the circumstances is of an essentially personal character".*

<sup>317</sup> Article 9.1.3 of the UNIDROIT PRINCIPLES: “A right to non-monetary performance may be assigned only if the assignment does not render the obligation significantly more burdensome”.

<sup>318</sup> Article 79 subs. 1 CISG: “A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it, or its consequences”. Article 7.1.7 subs. 1 of the UNIDROIT PRINCIPLES is nearly identical: “Non-performance by a party is excused if that party proves that the non-performance was due to an impediment beyond its control and that it could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences”.

<sup>319</sup> Even in the Russian language the expression *форс мажор* is used.

<sup>320</sup> See the *Commentary of the UNIDROIT PRINCIPLES*, 2010, p. 237. See also the international rules on letters of credit (UCP600, below p. 280 sq., notes 555), article 36.

<sup>321</sup> If the agreement was already contrary to law at the moment of its formation, the situation amounts to initial illegality (section 6.2, p. 200 sq.).

<sup>322</sup> Article 79 subs. 3 CISG refers to the variation of impossibility in the course of time: “The exemption provided by this article has effect for the period during which the impediment exists”. Article 7.1.7 subs. 2 of the UNIDROIT PRINCIPLES has an identical meaning: “When the impediment is only temporary, the excuse shall have effect for such period as is reasonable having regard to the effect of the impediment on the performance of the contract”.

<sup>323</sup> This is explicitly reserved by Article 79 subs. 5 CISG: “Nothing in this article prevents either party from exercising any right other than to claim damages under this Convention”. The same is said in article 7.1.7 subs. 4 of the UNIDROIT PRINCIPLES: “Nothing in this Article prevents a party from exercising a right to terminate the contract or to withhold performance or request interest on money due”.

<sup>324</sup> See p. 182 ad note 389.

<sup>325</sup> See p. 182 ad note 391.

<sup>326</sup> Article 79 subs. 4 CISG: “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*". Article 7.1.7 subs. 3 of the UNIDROIT PRINCIPLES is identical.

<sup>327</sup> This may happen in the cases where, if the debtor had informed the creditor about the force majeure quickly after its occurrence, the creditor could have concluded an alternative contract with another supplier, whereas this possibility does not exist anymore later (when the creditor learns about the inability of the debtor to perform). As long as alternative contracts – under the same conditions – are practically available, the debtor's notice of inability allows the creditor to avoid any damage. — Besides, it can happen that, unaware of the debtor's inability to perform, the creditor enters into a second contract that, for its own fulfillment, presupposes that the first contract will have been fulfilled (e.g. resale of the goods, or any other contract). The missed earnings that the creditor will not receive from this second contract because of its own non-fulfillment (and possibly the compensation that the creditor will have to pay to his counterparty in this second contract because of his own non-performance) are damages that the debtor who failed to inform about the force majeure event will have to compensate.

<sup>328</sup> For its importance regarding force majeure, see e.g. above p. 164 ad note 313.

<sup>329</sup> Typically, such clauses can be longer than the reasonable time that would result from article 79 subs. 4 CISG, e.g. 20 business days, or shorter (e.g. "immediately", or "24 hours").

<sup>330</sup> Very often: a certificate or confirmation issued by a local Chamber of commerce.

<sup>331</sup> The similarity to the general regime can be shown by various texts proposed by professional associations: see e.g. "Red Book" of the International Federation of Consulting Engineers (commonly referred to under the abbreviation "FIDIC" for the French name Fédération Internationale des Ingénieurs-Conseils), clauses 19.1 and 66.1 (see e.g. Nael BUNNI, *The FIDIC Forms of Contracts* [2013]); see also the *General Conditions for the Supply of Mechanical, Electrical and Related Electronic Products* of the European Engineering Industries Association (commonly referred to as "ORGALIME" for its French name Organisme de Liaison des Industries Métalliques Européennes), article 39 sq. The consensus in the approach of force majeure is also visible in other international texts, like article 25 of the *General Conditions for the Supply of Plant and Machinery for Export* issued by the Economic Commission for Europe (ECE) in 1957; see also the developments on *Exemption Clauses* of UNCITRAL's *Legal Guide on*

*Drawing Up International Contracts for the Construction of Industrial Works* (1988; chapter XXI, p. 233-240).

<sup>332</sup> The expression “futures” also refers to *options* (as seen in chapter XIII/1.2 and 1.3, p. 502 sq.)

<sup>333</sup> See section 4.15, p. 180 sq.

<sup>334</sup> If the seller has to deliver across the border and assume the costs (e.g. in case the incoterm clause DDP has been agreed [see below p. 277]). If the custom duties have to be borne by the buyer (as foreseen by most clauses), their strong increase may significantly disturb the balance to his detriment (provided the buyer cannot transfer this increased cost to his own clients).

<sup>335</sup> Article 6:111 subs. 1 PECL: “*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*”. Article 6.2.1 of the UNIDROIT PRINCIPLES is similar.

<sup>336</sup> For such (long)-term contracts, see below chapter XIII/1.2, p. 502 (“forward contracts”).

<sup>337</sup> On options (especially call options), see below chapter XIII/1.3, p. 503-509.

<sup>338</sup> Title to articles 6.2.1 sq. of the UNIDROIT PRINCIPLES.

<sup>339</sup> Article 6.2.2 *principio* of the UNIDROIT PRINCIPLES.

<sup>340</sup> In 1914, 4.2 German Marks were worth 1 US dollar. After the hyperinflation started in August 1922, the rate reached 4'200'000'000'000 to 1 in December 1923 (see e.g. Wolfgang FISCHER, *German Hyperinflation 1922/23: A Law and Economics Approach* [2010], p. 59 and 85).

<sup>341</sup> Article 6:111 subs. 1 PECL.

<sup>342</sup> In our opinion, for this specific point, the approach of the UNIDROIT PRINCIPLES (article 6.2.2 lit. a), which handles posterior *occurrence* of imbalance like the posterior *discovery* of imbalance, is not accurate.

<sup>343</sup> See section 6.3, p. 198 sq.

<sup>344</sup> Articles 6:111 lit. c PECL and 6.2.2 lit. b of the UNIDROIT PRINCIPLES.

<sup>345</sup> This is explicitly foreseen by article 6.2.2 lit. c of the UNIDROIT PRINCIPLES.

<sup>346</sup> Articles 6:111 subs. 2 lit. c PECL (“*the risk of the change of circumstances is not one which, according to the contract, the party affected should be required to bear*”) and 6.2.2 lit. d (“*the risk of the events was not assumed by the disadvantaged party*”).

<sup>347</sup> The German expression for the situation is “*Wegfall der Geschäftsgrundlage*” (disappearance of the basis of the deal).

<sup>348</sup> A famous example is the case *Eastern Airlines Inc. v. Gulf Oil Corp.* (US District Court for the Southern District of Florida, 415 F Supp 429; 1975), in which the price clause foresaw a limited, under-proportional adaptation of price referring to, but not replicating an index (Plats), whereas actual market price increased by four times. Hardship was not acknowledged.

<sup>349</sup> Article 1.10 subs. 4 of the UNIDROIT PRINCIPLES mentions also the general concept of “communication of intention” (“*For the purpose of this Article ‘notice’ includes a declaration, demand, request or any other communication of intention*”). Article 1:303 subs. 6 PECL uses the general concepts of “statement” or “declaration” (“*In this Article, ‘notice’ includes the communication of a promise, statement, offer, acceptance, demand, request or other declaration*”).

<sup>350</sup> See the example in the *Commentary to the UNIDROIT PRINCIPLES*, 2010, p. 29, for a person who does not regularly reads his e-mails.

<sup>351</sup> Article 1:303 subs. 1 PECL: “*Any notice may be given by any means, whether in writing or otherwise, appropriate to the circumstances*”. Article 1.10 subs. 1 of the UNIDROIT PRINCIPLES: “*Where notice is required it may be given by any means appropriate to the circumstances*”.

<sup>352</sup> The idea is that the form shall draw the attention of the addressee.

<sup>353</sup> Article 1.10 subs. 2 of the UNIDROIT PRINCIPLES: “*A notice is effective when it reaches the person to whom it is given*”. Article 1:303 subs. 2 PECL: “*Subject to paragraphs (4) and (5), any notice becomes effective when it reaches the addressee*”.

<sup>354</sup> In English law, the *mailbox theory* sets forth a different regime, similar to article 27 CISG quoted below.

<sup>355</sup> See article 1:303 subs. 3 PECL: “*A notice reaches the addressee when it is delivered to it or to its place of business or mailing address, or, if it does not have a place of business or mailing address, to its habitual residence*”. Article 1.10 subs. 3 of the UNIDROIT PRINCIPLES: “*For the purpose of paragraph (2) a notice ‘reaches’ a person when given to that person orally or delivered at that person’s place of business or mailing address*”.

<sup>356</sup> See for example *Commentary of the UNIDROIT PRINCIPLES*, p. 30.

<sup>357</sup> See explicitly article 10 subs. 2 of the *UN Convention (2005) on the Use of Electronic Communications in International Contracts*; see also *Commentary of the UNIDROIT PRINCIPLES*, p. 30 (“*when [the electronic communication] becomes capable of being retrieved by the addressee at an electronic address designated by the addressee*”). As of 2013, this convention is signed by 20 countries and applicable in 3, notably Singapore.

<sup>358</sup> Article 27 CISG: “Unless otherwise expressly provided in this Part of the Convention, if any notice, request or other communication is given or made by a party in accordance with this Part and by means appropriate in the circumstances, a delay or error in the transmission of the communication or its failure to arrive does not deprive that party of the right to rely on the communication”. The CISG itself sets forth a different regime (necessity of receipt) in various provisions, e.g. article 79 quoted above (note 326). See also article 1:303 subs. 4 PECL: “If one party gives notice to the other because of the other’s non-performance or because such non-performance is reasonably anticipated by the first party, and the notice is properly dispatched or given, a delay or inaccuracy in the transmission of the notice or its failure to arrive does not prevent it from having effect. The notice shall have effect from the time at which it would have arrived in normal circumstances”.

<sup>359</sup> See p. 185 ad note 404.

<sup>360</sup> In this sense, article 1:303 subs. 5 PECL.

<sup>361</sup> Below p. 273 sq.

<sup>362</sup> See above p. 141 and 152 sq.

<sup>363</sup> See article 5.1.7 subs. 1 of the UNIDROIT PRINCIPLES: “Where a contract does not fix or make provision for determining the price, the parties are considered, in the absence of any indication to the contrary, to have made reference to the price generally charged at the time of the conclusion of the contract for such performance in comparable circumstances in the trade concerned or, if no such price is available, to a reasonable price”.

<sup>364</sup> See article 6:104 PECL: “Where the contract does not fix the price or the method of determining it, the parties are to be treated as having agreed on a reasonable price”.

<sup>365</sup> Article 6:106 subs. 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>366</sup> For the price, article 5.1.7 subs. 3 of the UNIDROIT PRINCIPLES sets forth that the price shall be fixed reasonably (without a new third person to be appointed; this solution can be justified by the time needed to judicially appoint a third person, so that it takes less time to have the judge empowered to fix it, by hiring, if needed for him to be properly informed about the usages in the field of business, an expert who will thus have – under control of the judge – a practical function very similar to that of the third person foreseen in the contract):

*“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”.*

<sup>367</sup> A judge is not empowered to fix an element in a way that such is unreasonable or inequitable; see above note 285.

<sup>368</sup> Article 6:106 subs. 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>369</sup> The rule (in article 6:106 subs. 2 PECL, note 368) is not conceived as absolutely mandatory, by contrast to the grossly unreasonable determination by a contract party himself (articles 6:105 PECL and 5.1.7 subs. 2 of the UNIDROIT PRINCIPLES, quoted below in note 371, are mandatory; this mandatory character can be justified by the fact that this behavior of the contract party is a severe breach of good faith and also, independently thereof, by the fact that a party is always influenced by his own interests, so that a clause that would bind the other party also in case of unreasonable determination by a contract party would involve a structurally unavoidable danger for the other party).

<sup>370</sup> One can assume (or consider equitably, see above p. 208 sq. and notes 283-285) that, in good faith, the parties would have foreseen this rule if they had considered the case where the third party makes a grossly unreasonable determination.

<sup>371</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”.* Article 5.1.7 subs. 2 of the UNIDROIT PRINCIPLES is identical as regards the meaning: *“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>372</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”.* See also article 5.1.7 subs. 4 of the UNIDROIT PRINCIPLES: *“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”.*

<sup>373</sup> The only exceptions consist in the impossibility to agree on the fact that a grossly unreasonable determination by the contract party would bind the other party (see above note 371).

<sup>374</sup> See e.g. article 5.1.6 of the UNIDROIT PRINCIPLES: *“Where the quality of performance is neither fixed by, nor determinable from, the*

*contract a party is bound to render a performance of a quality that is reasonable and not less than average in the circumstances*". See also article 6:108 PECL: *"If the contract does not specify the quality, a party must tender performance of at least average quality"*.

<sup>375</sup> Article 35 subs. 2 and 3 CISG: *"(2) Except where the parties have agreed otherwise, the goods do not conform with the contract unless they: (a) are fit for the purposes for which goods of the same description would ordinarily be used; (b) are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgement; (c) possess the qualities of goods which the seller has held out to the buyer as a sample or model; (d) are contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods. (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>376</sup> Article 5.1.4 of the UNIDROIT PRINCIPLES does not contain a presumption in favor of one of the two general categories and solely does with the consequence that either a result or best efforts are due (*"[1] To the extent that an obligation of a party involves a duty to achieve a specific result, that party is bound to achieve that result. [2] To the extent that an obligation of a party involves a duty of best efforts in the performance of an activity, that party is bound to make such efforts as would be made by a reasonable person of the same kind in the same circumstances"*).

<sup>377</sup> Article 5.1.4 subs. 2 of the UNIDROIT PRINCIPLES (quoted in note 376).

<sup>378</sup> Article 7:112 PECL and 6.1.11 of the UNIDROIT PRINCIPLES (identical): *"Each party shall bear the costs of performance of its obligations"*.

<sup>379</sup> The assignment of claims (see p. 164 sq.) can be considered as a particular situation, because the assignor has unilaterally modified the situation arising from the contract (and in such case, the obligation of assignor to bear the costs resulting from assignment can be assumed as the ordinary regime); but if it is assumed that a claim can be assigned, the supplementary costs resulting from the assignment (if not disproportionate) can be considered as a possible part of the assignee's obligations.

<sup>380</sup> The duty of cooperation (p. 158 sq.) is not an exception. Cooperation is due and its costs are to be borne by each party who is obliged to cooperate. This being said, in some cases, cooperation

leads the party obliged to cooperate to bear some costs of performance of the other party's obligation (e.g. when a state approval shall be obtained by the party residing in that state, although the obligation is the one of the other party; see in particular p. 158 ad note 289 and text of article 6.1.14 subs. 1 lit. b of the UNIDROIT PRINCIPLES).

<sup>381</sup> Article 72 CISG: *"(1) If prior to the date for performance of the contract it is clear that one of the parties will commit a fundamental breach of contract, the other party may declare the contract avoided.*

*(2) If time allows, the party intending to declare the contract avoided must give reasonable notice to the other party in order to permit him to provide adequate assurance of his performance. (3) The requirements of the preceding paragraph do not apply if the other party has declared that he will not perform his obligations".* See also article 7.3.3 of the UNIDROIT PRINCIPLES: *"Where prior to the date for performance by one of the parties it is clear that there will be a fundamental non-performance by that party, the other party may terminate the contract";* article 9:304 PECL: *"Where prior to the time for performance by a party it is clear that there will be a fundamental non-performance by it the other party may terminate the contract".*

<sup>382</sup> See explicitly article 71 CISG: *"(1) A party may suspend the performance of his obligations if, after the conclusion of the contract, it becomes apparent that the other party will not perform a substantial part of his obligations as a result of: (a) a serious deficiency in his ability to perform or in his creditworthiness; or (b) his conduct in preparing to perform or in performing the contract. (2) If the seller has already dispatched the goods before the grounds described in the preceding paragraph become evident, he may prevent the handing over of the goods to the buyer even though the buyer holds a document which entitles him to obtain them. The present paragraph relates only to the rights in the goods as between the buyer and the seller. (3) A party suspending performance, whether before or after dispatch of the goods, must immediately give notice of the suspension to the other party and must continue with performance if the other party provides adequate assurance of his performance".*

<sup>383</sup> One must be careful in deciding whether there is anticipatory non-performance. Admitting this too easily can lead a debtor in slight difficulties to a total disruption of his activities and bankruptcy: if all contractual partners require assurance of performance before the moment on which performance is due, no company can survive!

<sup>384</sup> See article 7:108 subs. 1 and 2 PECL: *"(1) The parties may agree that payment shall be made only in a specified currency. (2) In the*

*absence of such agreement, a sum of money expressed in a currency other than that of the place where payment is due may be paid in the currency of that place according to the rate of exchange prevailing there at the time when payment is due". Article 6.1.9 subs. 1 and 3 of the UNIDROIT PRINCIPLES: "(1) If a monetary obligation is expressed in a currency other than that of the place for payment, it may be paid by the obligor in the currency of the place for payment unless (a) that currency is not freely convertible; or (b) the parties have agreed that payment should be made only in the currency in which the monetary obligation is expressed. [...] (3) Payment in the currency of the place for payment is to be made according to the applicable rate of exchange prevailing there when payment is due".*

<sup>385</sup> See p. 145 ad note 389.

<sup>386</sup> Article 6.1.9 subs. 4: of the UNIDROIT PRINCIPLES: "*However, if the obligor has not paid at the time when payment is due, the obligee may require payment according to the applicable rate of exchange prevailing either when payment is due or at the time of actual payment*". — The restriction foreseen in article 7:108 subs. 3 PECL ("*If, in a case falling within the preceding paragraph, the debtor has not paid at the time when payment is due, the creditor may require payment in the currency of the place where payment is due according to the rate of exchange prevailing there either at the time when payment is due or at the time of actual payment*") is not always justified: even if the payment was due in a specific currency, the creditor might have had the intention to exchange the liquidities received.

<sup>387</sup> These expressions are less suitable than "termination". "Avoidance" (although used by the CISG) is more appropriate, as an equivalent of "cancellation", to refer to the elimination of a contract because of an initially vitiated element.

<sup>388</sup> Article 49 subs. 1 lit. a CISG: "*The buyer may declare the contract avoided: (a) if the failure by the seller to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract*". Article 64 subs. 1 lit. a CISG: "*The seller may declare the contract avoided: (a) if the failure by the buyer to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract*". Article 7.3.1 subs. 1 of the UNIDROIT PRINCIPLES: "*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*". Article 9:301 subs. 1 PECL: "*A party may terminate the contract if the other party's non-performance is fundamental*".

<sup>389</sup> See article 7.3.1, subs. 2 lit. b of the UNIDROIT PRINCIPLES (quoted below note 391) and article 8:103 lit. b PECL: “A non-performance of an obligation is fundamental to the contract if: (a) strict compliance with the obligation is of the essence of the contract”.

<sup>390</sup> See articles 48 subs. 1 and 63 subs. 1 CISG (quoted below in note 394). Article 7.1.5 subs. 3, 1<sup>st</sup> and 2<sup>nd</sup> sentences of the UNIDROIT PRINCIPLES: “Where in a case of delay in performance which is not fundamental the aggrieved party has given notice allowing an additional period of time of reasonable length, it may terminate the contract at the end of that period. If the additional period allowed is not of reasonable length it shall be extended to a reasonable length”. See also article 8:106 subs. 3, 3<sup>rd</sup> sentence, PECL: “If the period stated is too short, the aggrieved party may terminate, or, as the case may be, the contract shall terminate automatically, only after a reasonable period from the time of the notice”.

<sup>391</sup> Article 49 subs. 1 lit. b CISG: “The buyer may declare the contract avoided: [...] (b) in case of non-delivery, if the seller does not deliver the goods within the additional period of time fixed by the buyer in accordance with paragraph (1) of article 47 or declares that he will not deliver within the period so fixed”; regarding buyer’s failure, article 64 subs. 1 CISG: “The seller may declare the contract avoided: [...] (b) if the buyer does not, within the additional period of time fixed by the seller in accordance with paragraph (1) of article 63, perform his obligation to pay the price or take delivery of the goods, or if he declares that he will not do so within the period so fixed”. See also article 7.3.1 subs. 3 of the UNIDROIT PRINCIPLES: “In the case of delay the aggrieved party may also terminate the contract if the other party fails to perform before the time allowed it under Article 7.1.5 has expired”. Article 8:106 subs. 3, 1<sup>st</sup> sentence, PECL: “If in a case of delay in performance which is not fundamental the aggrieved party has given a notice fixing an additional period of time of reasonable length, it may terminate the contract at the end of the period of notice” (the rule is reminded in article 9:301 subs. 2 PECL).

<sup>392</sup> See e.g. the idea expressed in article 49 subs. 1 lit. b, 2<sup>nd</sup> hypothesis, and 64 subs. 1 lit. b, 2<sup>nd</sup> hypothesis, CISG (quoted above in note 391, though for the question whether the creditor shall wait until the end of the grace period without notifying).

<sup>393</sup> See article 8:103 lit. c PECL: “A non-performance of an obligation is fundamental to the contract if: [...] (c) the non-performance is intentional and gives the aggrieved party reason to believe that it cannot rely on the other party's future performance”. See also Article 7.3.1 subs. 2 of the UNIDROIT PRINCIPLES: “In determining whether a

*failure to perform an obligation amounts to a fundamental non-performance regard shall be had, in particular, to whether (a) 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 such result; (b) strict compliance with the obligation which has not been performed is of essence under the contract; (c) the non-performance is intentional or reckless; (d) the non-performance gives the aggrieved party reason to believe that it cannot rely on the other party's future performance; (e) the non-performing party will suffer disproportionate loss as a result of the preparation or performance if the contract is terminated".*

<sup>394</sup> Article 8:106 subs. 1 PECL: "*In any case of non-performance the aggrieved party may by notice to the other party allow an additional period of time for performance*". See also article 7.1.5 subs. 1 of the UNIDROIT PRINCIPLES (in these principles, due to subs. 3, 1<sup>st</sup> sentence, when the delay is *not* a fundamental breach, the time-limit does not need to be reasonable: see above in note 390). See also articles 47 subs. 1 and 63 subs. 1 CISG: "*The buyer may fix an additional period of time of reasonable length for performance by the seller of his obligations*"; "*The seller may fix an additional period of time of reasonable length for performance by the buyer of his obligations*".

<sup>395</sup> This does not preclude the aggrieved party to claim damages for late delivery. See on the whole question e.g. article 47 subs. 2 CISG: "*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*"; article 63 subs. 2 CISG: "*Unless the seller has received notice from the buyer that he will not perform within the period so fixed, the seller may not, during that period, resort to any remedy for breach of contract. However, the seller is not deprived thereby of any right he may have to claim damages for delay in performance*". Article 8:106 subs. 2, 1<sup>st</sup> sentence PECL: "*During the additional period the aggrieved party may withhold performance of its own reciprocal obligations and may claim damages, but it may not resort to any other remedy*". Article 7.1.5 subs. 2, 1<sup>st</sup> sentence of the UNIDROIT PRINCIPLES: "*During the additional period the aggrieved party may withhold performance of its own reciprocal obligations and may claim damages but may not resort to any other remedy*".

<sup>396</sup> See the hypotheses of article 49 subs. 1 lit. b, 2<sup>nd</sup> hypothesis, and 64 subs. 1 lit. b, 2<sup>nd</sup> hypothesis, CISG (quoted above in note 391, after underlined parts of sentences). Article 7.1.5 subs. 2, 2<sup>nd</sup> sentence, 1<sup>st</sup>

part, of the UNIDROIT PRINCIPLES: “If [the aggrieved party] receives notice from the other party that the latter will not perform within that period, or if upon expiry of that period due performance has not been made, the aggrieved party may resort to any of the remedies that may be available under this Chapter”.

<sup>397</sup> See above section 4.9 (p. 174 sq.).

<sup>398</sup> Article 26 CISG: “A declaration of avoidance of the contract is effective only if made by notice to the other party”. Article 7.3.2 subs. 1 of the UNIDROIT PRINCIPLES: “The right of a party to terminate the contract is exercised by notice to the other party”. Article 9:303 subs. 1 PECL: “A party’s right to terminate the contract is to be exercised by notice to the other party”. Regarding the concept of notice, which shall be received by the addressee to be effective, see pt. 4.9 above 174.

<sup>399</sup> Article 7.1.5 subs. 3, 3<sup>rd</sup> sentence of the UNIDROIT PRINCIPLES: “The aggrieved party may in its notice provide that if the other party fails to perform within the period allowed by the notice the contract shall automatically terminate”. Identical, article 8:106 subs. 2, 2<sup>nd</sup> sentence PECL: “The aggrieved party may in its notice provide that if the other party does not perform within the period fixed by the notice the contract shall terminate automatically”.

<sup>400</sup> Article 9:303 subs. 2 PECL: “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”. Article 7.3.2 subs. 2 of the UNIDROIT PRINCIPLES is more complex in this regard, as well as, also for the reason mentioned in note 411, article 49 subs. 2 CISG (“However, in cases where the seller has delivered the goods, the buyer loses the right to declare the contract avoided unless he does so: [a] in respect of late delivery, within a reasonable time after he has become aware that delivery has been made; [b] in respect of any breach other than late delivery, within a reasonable time: [i] after he knew or ought to have known of the breach; [ii] after the expiration of any additional period of time fixed by the buyer in accordance with paragraph [1] of article 47, or after the seller has declared that he will not perform his obligations within such an additional period; or [iii] after the expiration of any additional period of time indicated by the seller in accordance with paragraph (2) of article 48, or after the buyer has declared that he will not accept performance”).

<sup>401</sup> Or immediate written communication (e-mail or facsimile) confirmed by registered mail. See also above section 4.9, p. 175 sq.

<sup>402</sup> See above p. 23 sq.

<sup>403</sup> See above p. 17 (“contracts in politically sensitive fields”).

<sup>404</sup> See above p. 176 ad note 359.

<sup>405</sup> Article 7.3.5 subs. 1 of the UNIDROIT PRINCIPLES is accurately formulated: “*Termination of the contract releases both parties from their obligation to effect and to receive future performance*”. Article 81 subs. 1, 1<sup>st</sup> sentence CISG, “*Avoidance of the contract releases both parties from their obligations under it, subject to any damages which may be due*”, expresses too generally that the parties are “released from their obligations”; subs. 2 brings the necessary precisions. Article 9:305 subs. 1 PECL, “*Termination of the contract releases both parties from their obligation to effect and to receive future performance, but, subject to Articles 9:306 to 9:308, does not affect the rights and liabilities that have accrued up to the time of termination*”, which twice specifies that termination is effective about “future” performance and does normally not affect what has been done, rightfully points out that it would be artificial to believe that termination could entirely eliminate the actual effects of what has been performed.

<sup>406</sup> These situations are those where a real “*specific performance*” (fulfillment *in nature*) is possible.

<sup>407</sup> See e.g. article 7.2.4 of the UNIDROIT PRINCIPLES: “(1) *Where the court orders a party to perform, it may also direct that this party pay a penalty if it does not comply with the order. (2) The penalty shall be paid to the aggrieved party unless mandatory provisions of the law of the forum provide otherwise. Payment of the penalty to the aggrieved party does not exclude any claim for damages*”.

<sup>408</sup> See article 7.2.5 subs. 1 of the UNIDROIT PRINCIPLES: “*An aggrieved party who has required performance of a non-monetary obligation and who has not received performance within a period fixed or otherwise within a reasonable period of time may invoke any other remedy*”.

<sup>409</sup> Article 81 subs. 2, 1<sup>st</sup> sentence CISG: “*A party who has performed the contract either wholly or in part may claim restitution from the other party of whatever the first party has supplied or paid under the contract*”. Article 7.3.6 subs. 1 of the UNIDROIT PRINCIPLES: “*On termination of a contract to be performed at one time either party may claim restitution of whatever it has supplied under the contract, provided that such party concurrently makes restitution of whatever it has received under the contract*”.

<sup>410</sup> Article 84 subs. 1 CISG: “*If the seller is bound to refund the price, he must also pay interest on it, from the date on which the price was*

*paid*". The UNIDROIT PRINCIPLES and the PECL rather approach the question of interests from the point of view of compensation.

<sup>411</sup> Whereas CISG and the UNIDROIT PRINCIPLES (see above note 409) are formulated so that, in case of termination, they allow restitution as a matter of principle, the PECL explicitly subordinates restitution of property to the non-receipt of payment or of counter-performance (article 9:308: "*On termination of the contract a party who has supplied property which can be returned and for which it has not received payment or other counter-performance may recover the property*"). This idea derives from the fact that, *to the extent that* the exchange took place as agreed (what does not hinder termination for the future), the restitutions shall not take place (because, in reality, the past cannot be eliminated in a totally satisfactory and equitable way; see ROUILLER, *Droit suisse des obligations et Principes du droit européen des contrats*, 2007, p. 742; restitution shall be done to correct an imbalance). The quoted provisions of CISG and UNIDROIT PRINCIPLES are not very different, because they foresee restitution of property for the cases of contracts that are fulfilled "at one time" (see the exact text of article 7.3.6 for the UNIDROIT PRINCIPLES; and on its side, CISG is conceived for one-off sales as a rule – except in particular provisions like article 73 CISG; besides, even the CISG tendentially shows a reluctance to admit termination ["avoidance"] and restitutions, as article 49 subs. 2 CISG shows, which suppresses the right to avoid the contract in many cases where goods have been delivered; see text above in note 400 *in fine*).

<sup>412</sup> Article 84 subs. 2 CISG: "*The buyer must account to the seller for all benefits which he has derived from the goods or part of them: (a) if he must make restitution of the goods or part of them; or (b) if it is impossible for him to make restitution of all or part of the goods or to make restitution of all or part of the goods substantially in the condition in which he received them, but he has nevertheless declared the contract avoided or required the seller to deliver substitute goods*".

<sup>413</sup> Article 7.3.6 subs. 4 of the UNIDROIT PRINCIPLES: "*Compensation may be claimed for expenses reasonably required to preserve or maintain the performance received*". Article 85 subs. 1 and 2 (1<sup>st</sup> sentence) CISG: "*(1) If the buyer has received the goods and intends to exercise any right under the contract or this Convention to reject them, he must take such steps to preserve them as are reasonable in the circumstances. He is entitled to retain them until he has been reimbursed his reasonable expenses by the seller. (2) If goods dispatched to the buyer have been placed at his disposal at their destination and he exercises the right to reject them, he must take*

*possession of them on behalf of the seller, provided that this can be done without payment of the price and without unreasonable inconvenience or unreasonable expense. [...]*

<sup>414</sup> Article 82 subs. 1 CISG: *“The buyer loses the right to declare the contract avoided or to require the seller to deliver substitute goods if it is impossible for him to make restitution of the goods substantially in the condition in which he received them”*.

<sup>415</sup> Article 82 subs. 2 CISG: *“The preceding paragraph does not apply: (a) if the impossibility of making restitution of the goods or of making restitution of the goods substantially in the condition in which the buyer received them is not due to his act or omission; (b) if the goods or part of the goods have perished or deteriorated as a result of the examination provided for in article 38; or (c) if the goods or part of the goods have been sold in the normal course of business or have been consumed or transformed by the buyer in the course of normal use before he discovered or ought to have discovered the lack of conformity”*.

<sup>416</sup> Article 9:309 PECL (*“Recovery for Performance that Cannot be Returned”*): *“On termination of the contract a party who has rendered a performance which cannot be returned and for which it has not received payment or other counter-performance may recover a reasonable amount for the value of the performance to the other party”*. Article 7.3.6 subs. 2 of the UNIDROIT PRINCIPLES reads: *“If restitution in kind is not possible or appropriate, an allowance has to be made in money whenever reasonable”*.

<sup>417</sup> The questionable rule of article 7.3.6 subs. 3 of the UNIDROIT PRINCIPLES (*“The recipient of the performance does not have to make an allowance in money if the impossibility to make restitution in kind is attributable to the other party”*) is, in our opinion, due in reality to the practical difficulties of restitution in (non-contractually determined) value; the rule allows to eliminate these difficulties by refusing restitution at all! On the difficulties of this evaluation in general and their (sometimes perturbing) influence on the termination discussion, see ROUILLER, *Droit suisse des obligations et Principes du droit européen des contrats* (2007), p. 742-750.

<sup>418</sup> See above section 4.7, p. 165 sq.; see also articles 7.4.1 of the UNIDROIT PRINCIPLES, 9:501 subs. 1 PECL and 79 CISG (see note 318).

<sup>419</sup> In the texts often quoted in this chapter, article 9:502, 1<sup>st</sup> sentence PECL, offers the most enlightening formulation: *“The general measure of damages is such sum as will put the aggrieved party as nearly as possible into the position in which it would have been if the contract had been duly performed”*. The CISG and Unidroit Principles simply

mention the “consequence of the breach” (see below note 420) – this is the same, but less explanatory.

<sup>420</sup> Article 9:502, 2<sup>nd</sup> sentence PECL: *“Such damages cover the loss which the aggrieved party has suffered and the gain of which it has been deprived”*. Article 74, 1<sup>st</sup> sentence, CISG: *“Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach”*. Article 7.4.2 subs. 1 of the UNIDROIT PRINCIPLES: *“The aggrieved party is entitled to full compensation for harm sustained as a result of the non-performance. Such harm includes both any loss which it suffered and any gain of which it was deprived, taking into account any gain to the aggrieved party resulting from its avoidance of cost or harm”*.

<sup>421</sup> These are not excluded for companies (article 7.4.2 subs. 2 of the UNIDROIT PRINCIPLES: *“Such harm may be non-pecuniary and includes, for instance, physical suffering or emotional distress”*). See e.g. a judgment of the Swiss Supreme Court awarding CHF 10'000 for the moral harm of a shipping company that was presented (in a fake advertisement) as being associated with rusty vessels (ATF/BGE 138 [2012] III 337, pt. 6.3.6 [p. 347]). A debated French arbitral award (rendered on 7<sup>th</sup> July 2008) has allowed the record amount of EUR 45 million for moral harm to a businessman who had entrusted a bank (Credit Lyonnais) to sell his company (Adidas): that bank sold it to an entity controlled by itself with a small profit for its client, before having this entity resell it to a real third party purchaser with a considerable margin, making so itself a profit in breach of its fiduciary duty to its client to whom it owed the entire profit of the operation.

<sup>422</sup> The precision is in the PECL, but not in the CISG and in the UNIDROIT PRINCIPLES (see below note 423).

<sup>423</sup> Article 74, 2<sup>nd</sup> sentence CISG: *“Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract”*. Article 9:305 PECL: *“The non-performing party is liable only for loss which it foresaw or could reasonably have foreseen at the time of conclusion of the contract as a likely result of its non-performance, unless the nonperformance was intentional or grossly negligent”*. In our opinion, article 7.4.4 of the UNIDROIT PRINCIPLES (*“The non-performing party is liable only for harm which it foresaw or could reasonably have foreseen at the time of the conclusion of the contract as being likely to result from its non-performance”*) sets a slightly supplementary criterion, since likeliness is more than foreseeability.

<sup>424</sup> Article 9:304 PECL: *“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”*. The rule is contained in article 7.4.7 of the UNIDROIT PRINCIPLES (*“Where the harm is due in part to an act or omission of the aggrieved party or to another event for 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”*), but the reduction of compensation if the harm is due to “an event for which the aggrieved party bears the risk” is in our opinion inappropriate; the legitimate protective function of the non-performing party against the obligation of having inappropriately to compensate losses is satisfactorily played by the criterion of *foreseeability*.

<sup>425</sup> Article 77 CISG: *“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”*. Article 9:505 subs. 1 PECL: *“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”*. Article 7.4.8 subs. 1 of the UNIDROIT PRINCIPLES: *“The non-performing party is not liable for harm suffered by the aggrieved party to the extent that the harm could have been reduced by the latter party’s taking reasonable steps”*.

<sup>426</sup> Article 9:505 subs. 2 PECL: *“The aggrieved party is entitled to recover any expenses reasonably incurred in attempting to reduce the loss”*. Article 7.4.8 subs. 2 of the UNIDROIT PRINCIPLES: *“The aggrieved party is entitled to recover any expenses reasonably incurred in attempting to reduce the harm”*. Article 77 CISG does not explicitly contain this rule, but it can be assumed as a necessary coherence. See in this regard ROUILLER, *Droit suisse des obligations et Principes du droit européen des contrats* (2007), p. 772-779; Annick ACHTARI, *Le devoir du lésé de minimiser son dommage : étude en droit des obligations* (2008).

<sup>427</sup> Article 9:506 PECL: *“Where the aggrieved party has terminated the contract and has made a substitute transaction within a reasonable time and in a reasonable manner, it may recover the difference between the contract price and the price of the substitute transaction as well as damages for any further loss so far as these are recoverable under this Section”*. Article 7.4.5 of the UNIDROIT PRINCIPLES (*“Proof of*

*harm in case of replacement transaction: Where the aggrieved party has terminated the contract and has made a replacement transaction within a reasonable time and in a reasonable manner it may recover the difference between the contract price and the price of the replacement transaction as well as damages for any further harm*) is identical, except that it uses the expression “replacement transaction”. See also article 75 CISG: “If the contract is avoided and if, in a reasonable manner and within a reasonable time after avoidance, the buyer has bought goods in replacement or the seller has resold the goods, the party claiming damages may recover the difference between the contract price and the price in the substitute transaction as well as any further damages recoverable under article 74”.

<sup>428</sup> For a definition of current price, see article 7.4.6 subs. 2 of the UNIDROIT PRINCIPLES: “Current price is the price generally charged for goods delivered or services rendered in comparable circumstances at the place where the contract should have been performed or, if there is no current price at that place, the current price at such other place that appears reasonable to take as a reference”. Specifically for goods, article 76 subs. 2 CISG: “For the purposes of the preceding paragraph, the current price is the price prevailing at the place where delivery of the goods should have been made or, if there is no current price at that place, the price at such other place as serves as a reasonable substitute, making due allowance for differences in the cost of transporting the goods”.

<sup>429</sup> Article 9:507 PECL: “Where the aggrieved party has terminated the contract and has not made a substitute transaction but there is a current price for the performance contracted for, it may recover the difference between the contract price and the price current at the time the contract is terminated as well as damages for any further loss so far as these are recoverable under this Section”. Article 7.4.6 subs. 1 of the UNIDROIT PRINCIPLES (“Proof of harm by current price”): “Where the aggrieved party has terminated the contract and has not made a replacement transaction but there is a current price for the performance contracted for, it may recover the difference between the contract price and the price current at the time the contract is terminated as well as damages for any further harm”. Article 76 subs. 1 CISG: “If the contract is avoided and there is a current price for the goods, the party claiming damages may, if he has not made a purchase or resale under article 75, recover the difference between the price fixed by the contract and the current price at the time of avoidance as well as any further damages recoverable under article 74. If, however, the party claiming damages has avoided the contract

*after taking over the goods, the current price at the time of such taking over shall be applied instead of the current price at the time of avoidance”.*

<sup>430</sup> Articles 78 CISG (“*If a party fails to pay the price or any other sum that is in arrears, the other party is entitled to interest on it, without prejudice to any claim for damages recoverable under article 74*”), 7.4.9 of the UNIDROIT PRINCIPLES and 9:508 PECL all reserve a larger compensation if a greater harm is proven.

<sup>431</sup> Article 7.4.9 of the UNIDROIT PRINCIPLES: “*Unless otherwise agreed, interest on damages for non-performance of non-monetary obligations accrues as from the time of non-performance*”.

<sup>432</sup> See in this regard article 7.4.13 of the UNIDROIT PRINCIPLES: “(1) *Where the contract provides that a party who does not perform is to pay a specified sum to the aggrieved party for such non-performance, the aggrieved party is entitled to that sum irrespective of its actual harm. (2) However, notwithstanding any agreement to the contrary the specified sum may be reduced to a reasonable amount where it is grossly excessive in relation to the harm resulting from the non-performance and to the other circumstances*”.

<sup>433</sup> See e.g. article 7.4.3 subs. 3 of the UNIDROIT PRINCIPLES: “*Where the amount of damages cannot be established with a sufficient degree of certainty, the assessment is at the discretion of the court*”.

<sup>434</sup> See e.g. article 7.4.3 subs. 2 of the UNIDROIT PRINCIPLES (“*Compensation may be due for the loss of a chance in proportion to the probability of its occurrence*”). This doctrine is applied in French law (“*perte d’une chance*”); in spite of its worldwide recognition by legal scholars of all origins, other legal systems are more reluctant (e.g. the Swiss courts).

<sup>435</sup> The courts might tend to be careful and, lacking certainty of damage, renounce to award damages because losses are not proven. It must be taken into account that uncertainty is consubstantial to compensation, since it consists in a comparison between an actual situation that is not always possible to identify exactly in its entirety and a hypothetical situation. When the breach is certain, the judges shall not refuse awarding damages because of uncertainty of losses (except when the claimant is really negligent); otherwise, they substantially deprive of its reality the binding force of contracts.

<sup>436</sup> Article 9:305 subs. 2 PECL: “*Termination does not affect any provision of the contract for the settlement of disputes or any other provision which is to operate even after termination*”; article 7.3.5 subs. 3 of the UNIDROIT PRINCIPLES: “*Termination does not affect any provision in the contract for the settlement of disputes or any other*

*term of the contract which is to operate even after termination*". Formulated in a slightly narrower way, article 81 subs. 1, 2<sup>nd</sup> sentence, CISG: "Avoidance does not affect any provision of the contract for the settlement of disputes or any other provision of the contract governing the rights and obligations of the parties consequent upon the avoidance of the contract".

<sup>437</sup> See explicitly the provisions quoted in note 436.

<sup>438</sup> See the developments in ROUILLER, *Droit suisse des obligations et Principes du droit européen des contrats* (2007), p. 733-737.

<sup>439</sup> It can be illustrated with the gowns needed for a graduation ceremony: if 100 students graduate and are expected to be present, a delivery of 85 gowns is useless, because it cannot be expected from the university to deprive 15 students from wearing a gown. It is so at least if the partial delivery occurs shortly before the ceremony, since in such case, it may be impossible for the university to find 15 similar gowns. The university may reasonably make the choice of renouncing to anybody wearing gowns and thus legitimately consider the breach as fundamental.

<sup>440</sup> Article 51 CISG: "(1) *If the seller delivers only a part of the goods or if only a part of the goods delivered is in conformity with the contract, articles 46 to 50 apply in respect of the part which is missing or which does not conform. (2) The buyer may declare the contract avoided in its entirety only if the failure to make delivery completely or in conformity with the contract amounts to a fundamental breach of the contract*". 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>441</sup> See article 9:302, 1<sup>st</sup> sentence PECL, quoted in note 440.

<sup>442</sup> See article 51 subs. 1 CISG, quoted in note 440; the right to terminate, foreseen in article 49 CISG (cf. above note 388), is included in the rights that can "*apply in respect of the part which is missing*".

<sup>443</sup> At least in some understanding: see below the issue addressed in note 447.

<sup>444</sup> If one takes the criterion of article 25 CISG quoted in note 304, the question is whether the non-performance of one installment "*substantially deprives [the creditor] of what he is entitled to expect under the contract*" as a whole.

<sup>445</sup> Article 73 subs. 1 CISG: “*In the case of a contract for delivery of goods by instalments, if the failure of one party to perform any of his obligations in respect of any instalment constitutes a fundamental breach of contract with respect to that instalment, the other party may declare the contract avoided with respect to that instalment*”.

<sup>446</sup> See article 73 subs. 2 CISG: “*If one party’s failure to perform any of his obligations in respect of any instalment gives the other party good grounds to conclude that a fundamental breach of contract will occur with respect to future instalments, he may declare the contract avoided for the future, provided that he does so within a reasonable time*”.

<sup>447</sup> Whether non-fulfillment of a minor point can legally *hinder* the aggrieved party to terminate (and not simply lead him for practical reasons to renounce to termination), in spite of grace period set and unsuccessfully elapsed, is highly delicate. The idea can be supported under the point of view of proportionality (see e.g. article 7.3.1 subs. 2 lit. e of the UNIDROIT PRINCIPLES, quoted above in note 393). However, it is questionable from the point of view of private autonomy and of the justification of the binding force of contracts (see ROUILLER, *Droit suisse des obligations et Principes du droit européen des contrats* [2007], p. 664-668; this seems unchallengeable at least for all obligations resulting from explicit clauses). The parties are free to agree that some (or all) of their obligations do not, in case of breach, entitle the aggrieved party to terminate (see e.g. above p. 184, “particular clauses prevail”).

<sup>448</sup> See above p. 189 ad notes 428 sq.

<sup>449</sup> This would be an *ex post facto* law which would violate in most cases the protection of property guaranteed constitutionally and internationally (see article 1 of the Protocol of 20<sup>th</sup> March 1952 to the European Convention of Human Rights).

<sup>450</sup> See above section 4.7, p. 165 sq. (ad note 321).

<sup>451</sup> See article 3.2.5 of the UNIDROIT PRINCIPLES: “*A party may avoid the contract when it has been led to conclude the contract by the other party’s fraudulent representation, including language or practices, or fraudulent non-disclosure of circumstances which, according to reasonable commercial standards of fair dealing, the latter party should have disclosed*”. See also article 4.107 subs. 1 (quoted below in note 458 and subs. 2 PECL: “*A party’s representation or non-disclosure is fraudulent if it was intended to deceive*”).

<sup>452</sup> Regarding the criminal fraud, see above p. 62 sq.

<sup>453</sup> See article 3.1.12 subs. 1 of the UNIDROIT PRINCIPLES: “*Notice of avoidance shall be given within a reasonable time, having regard to*

*the circumstances, after the avoiding party knew or could not have been unaware of the relevant facts or became capable of acting freely*". Nearly identical, article 4:113 subs. 1 PECL: *"Notice of avoidance must be given within a reasonable time, with due regard to the circumstances, after the avoiding party knew or ought to have known of the relevant facts or became capable of acting freely"*.

<sup>454</sup> Article 3.2.14 (*"Avoidance takes effect retroactively"*) and 3.2.15 subs. 1 of the UNIDROIT PRINCIPLES: *"On avoidance either party may claim restitution of whatever it has supplied under the contract, or the part of it avoided, provided that the party concurrently makes restitution of whatever it has received under the contract, or the part of it avoided"*. See also article 4:115 PECL: *"On avoidance either party may claim restitution of whatever he has supplied under the contract or the part of it avoided, provided he makes concurrent restitution of whatever he has received under the contract or the part of it avoided. If restitution cannot be made in kind for any reason, a reasonable sum must be paid for what has been received"*.

<sup>455</sup> Article 3.2.15 subs. 2-4 of the UNIDROIT PRINCIPLES: *"(2) If restitution in kind is not possible or appropriate, an allowance has to be made in money whenever reasonable. (3) The recipient of the performance does not have to make an allowance in money if the impossibility to make restitution in kind is attributable to the other party. (4) Compensation may be claimed for expenses reasonably required to preserve or maintain the performance received"*.

<sup>456</sup> See article 4.1.17 subs. 1 PECL: *"A party who avoids a contract under this Chapter may recover from the other party damages so as to put the avoiding party as nearly as possible into the same position as if it had not concluded the contract, provided that the other party knew or ought to have known of the mistake, fraud, threat or taking of excessive benefit or unfair advantage"*. See also article 3.2.16 of the UNIDROIT PRINCIPLES quoted below.

<sup>457</sup> Article 3.2.16 of the UNIDROIT PRINCIPLES says: *"Irrespective of whether or not the contract has been avoided, the party who knew or ought to have known of the ground for avoidance is liable for damages so as to put the other party in the same position in which it would have been if it had not concluded the contract"*. See also article 4.1.17 subs. 2 PECL: *"If a party has the right to avoid a contract under this Chapter, but does not exercise its right or has lost its right under the provisions of Articles 4:113 or 4:114, it may recover, subject to paragraph (1), damages limited to the loss caused to it by the mistake, fraud, threat or taking of excessive benefit or unfair advantage. The*

*same measure of damages shall apply when the party was misled by incorrect information in the sense of Article 4:106”.*

<sup>458</sup> See article 3.2.5 of the UNIDROIT PRINCIPLES quoted above in note 451 and article 4.107 subs. 1 PECL: “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”.

<sup>459</sup> Article 4.107 subs. 3 PECL is a remarkable attempt to describe the relevant criteria, but those are not easy to implement (and it may be considered that they are tendentially too far-reaching in favor of a duty of disclosure): “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>460</sup> Article 3.2.13 of the UNIDROIT PRINCIPLES: “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”. See also article 4:116 PECL (nearly literally identical): “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>461</sup> This is usually admitted only in the case of mistake (see e.g. article 3.2.10 of the UNIDROIT PRINCIPLES; below note 475). Indeed, in the situation of intentional misrepresentation, there is also a general problem of trust: the deceived party has *per se* a legitimate ground for refusing any further relationship with the person who fraudulently misled him.

<sup>462</sup> See article 4:114 PECL: “If the party who is entitled to avoid a contract confirms it, expressly or impliedly, after it knows of the ground for avoidance, or becomes capable of acting freely, avoidance of the contract is excluded”. See also article 3.2.9 of the UNIDROIT PRINCIPLES: “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>463</sup> It violates good faith to request fulfillment with the idea of then cancelling the contract (after having received performance).

<sup>464</sup> Article 3.2.8 subs. 2 of the UNIDROIT PRINCIPLES also mentions the possibility to cancel if the other party has not acted in reliance on the contract at the moment of cancellation: *“Where fraud, threat or gross disparity is imputable to a third person for whose acts the other party is not responsible, the contract may be avoided if that party knew or ought to have known of the fraud, threat or disparity, or has not at the time of avoidance reasonably acted in reliance on the contract”*.

<sup>465</sup> For criminal extortion, see above p. 65 sq.

<sup>466</sup> Article 3.2.6 of the UNIDROIT PRINCIPLES: *“A party may avoid the contract when it has been led to conclude the contract by the other party’s unjustified threat which, having regard to the circumstances, is so imminent and serious as to leave the first party no reasonable alternative. In particular, a threat is unjustified if the act or omission with which a party has been threatened is wrongful in itself, or it is wrongful to use it as a means to obtain the conclusion of the contract”*. Article 4:108 PECL: *“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>467</sup> P. 195 sq. ad notes 453 sq.

<sup>468</sup> See articles 3.1.12 subs. 1 of the UNIDROIT PRINCIPLES and 4:113 subs. 1 PECL quoted in note 453.

<sup>469</sup> P. 195 ad notes 456 sq.

<sup>470</sup> As defined by article 3.2.1 of the UNIDROIT PRINCIPLES: *“Mistake is an erroneous assumption relating to facts or to law existing when the contract was concluded”*.

<sup>471</sup> The most comprehensive study of the different systems is probably Ernst KRAMER’s worldwide study: *Der Irrtum beim Vertragsschluss: eine weltweite rechtsvergleichende Bestandsaufnahme* (1998).

<sup>472</sup> See above p. 195 sq. ad notes 453 sq.

<sup>473</sup> See for example article 3.2.16 of the UNIDROIT PRINCIPLES (quoted above in note 457).

<sup>474</sup> See article 4:106 PECL: *“A party who has concluded a contract relying on incorrect information given it by the other party may recover damages in accordance with Article 4:117(2) and (3) even if the information does not give rise to a right to avoid the contract on the ground of mistake under Article 4:103, unless the party who gave the information had reason to believe that the information was correct”*.

<sup>475</sup> Article 3.2.10 of the UNIDROIT PRINCIPLES: *“(1) If a party is entitled to avoid the contract for mistake but the other party declares itself willing to perform or performs the contract as it was understood by the party entitled to avoidance, the contract is considered to have been concluded as the latter party understood it. The other party must make such a declaration or render such performance promptly after having been informed of the manner in which the party entitled to avoidance had understood the contract and before that party has reasonably acted in reliance on a notice of avoidance. (2) After such a declaration or performance the right to avoidance is lost and any earlier notice of avoidance is ineffective”*.

<sup>476</sup> The parties can also have agreed to *allot the risk of mistake* (as shown in articles 4:103 PECL or 3.2.2 of the UNIDROIT PRINCIPLES) to one of them or to both of them (typically: a contract of sale related to a painting that could be – but is not necessarily – an original can reflect the uncertainty by a price that allots the risks: either the painting is original, and the agreed price is too low; or the painting is fake, and the agreed price is too high; if the parties were aware of this uncertainty, they have both accepted the risk of whatever scenario becoming true).

<sup>477</sup> See article 4:118 PECL: *“(1) Remedies for fraud, threats and excessive benefit or unfair advantage-taking, and the right to avoid an unfair term which has not been individually negotiated, cannot be excluded or restricted. (2) Remedies for mistake and incorrect information may be excluded or restricted unless the exclusion or restriction is contrary to good faith and fair dealing”*.

<sup>478</sup> See the proposals in comparative law in ROUILLER, *Der widerrechtliche Vertrag* (2002), p. 536-541. See also article 15:104 PECL: *“(1) When a contract is rendered ineffective under Articles 15:101 or 15:102, either party may claim restitution of whatever that party has supplied under the contract, provided that, where appropriate, concurrent restitution is made of whatever has been received. (2) When considering whether to grant restitution under paragraph (1), and what concurrent restitution, if any, would be appropriate, regard must be had to the factors referred to in Article 15:102 (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. (4) If restitution cannot be made in kind for any reason, a reasonable sum must be paid for what has been received”*.

<sup>479</sup> See article 15:105 PECL: *“(1) A party to a contract which is rendered ineffective under Articles 15:101 or 15:102 may recover from the other party damages putting the first party as nearly as possible into the*

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*same position as if the contract had not been concluded, provided that the other party knew or ought to have known of the reason for the ineffectiveness. (2) When considering whether to award damages under paragraph (1), regard must be had to the factors referred to in Article 15:102(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”.*