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CHAPTER 28

COMPARATIVE CONTRACT LAW

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[†] This is the last contribution of one of the leading contract lawyers in the world. Allan Farnsworth died on 31 January 2005 while he was working on this chapter. Professor Larry T. Garvin of the Michael E. Moritz College of Law, Ohio State University, and the editors revised the essay for publication. They would like to thank Professor Muriel Fabre-Magnan of the University of Nantes and Professor Bernhard Schöb of the Free University of Brussels for their helpful comments. Sections I, II, and XI were added by the editors and Section X by Professor Garvin. The tentative conclusion under XI appears to be justified particularly in view of the fact that Allan Farnsworth was a key member of the UNIDROIT Working Group that prepared the Principles of International Commercial Contracts.

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I. THE PROMINENCE OF CONTRACTS IN COMPARATIVE LAW

The law of contract has long been one of the core subjects of comparative law. Of all areas of law, perhaps none has been subjected to comparative study as consistently, frequently, and intensely as contract law. The *International Encyclopedia of Comparative Law* devotes two out of seventeen volumes to the topic;¹ contract law takes up more than half of the subject matter analyzed in the classic work of Konrad Zweigert and Hein Kötz;² it is by far the most prominent topic in the current debates about a European private law;³ and it figures prominently in comparative law casebooks.⁴ There are, of course, several other fairly standard topics of comparative law, such as torts (delict), domestic relations, criminal law, and procedure, as well as, more recently, constitutional issues. But if there is a classical subject-matter of comparative law, that title should be awarded to the law of contract. This prominent status is due to three main reasons.

First, the origins of modern comparative law lie in the civil law world (ie in

Western Europe) of the late nineteenth and early twentieth centuries, and in that world, contracts have been widely considered the pre-eminent area of law. In part, this was due to the Roman law tradition with its emphasis on private law, especially the law of obligations and, more particularly, on contracts; note that in most of the classic civil codes, contracts hold a central position and are dealt with at greater length than virtually any other individual topic. In part, the eminent position of contracts is also due to their central role for the ordering of market relations, especially in the heyday of liberalism, and to the symbolic importance of private agreements for the ideology of individual autonomy. For many jurists in the formative age of modern comparative law, the predominance of private agreements illustrated, in Maine's famous phrase 'the movement of the progressive societies . . . from *Status* to *Contract*'.⁵

Second, modern comparative law soon began to focus particularly on the study of the similarities and differences between the civil law and the common law, and contract law turned out to be an enormously fertile field for such studies. On the one hand, the civil and the common-law approaches to contracts were similar enough to be comparable because they both centred around common topics, such as contract formation (offer and acceptance), non-performance and remedies for non-performance, interpretation, change of circumstances, mistake, deceit and duress; on the other hand, they showed sufficiently substantial differences to make such comparison interesting and worthwhile, for example, regarding the doctrines of cause and consideration, the underlying conceptions of breach, and the emphasis on specific performance versus payment of damages. These similarities and differences were largely the result of historical developments. While the traditional conceptions of contract were, at least for some time, quite different (on the civilian side the idea of agreement, in the common law the idea of promise),⁶ there was a substantial convergence especially in the later nineteenth century when the common law came under massive civilian influence.⁷ As a result of this curious combination of similarities and differences, contract law became the major topic in the classic context of comparing civil and common law. Probably the best illustration of this phenomenon is Gino Gorla's famous study *Il contratto*.⁸

Third, contract law is a favourite topic for comparative study because it is among the practically most salient areas of law, both in terms of economic importance

⁵ Henry Sumner Maine, *Ancient Law* (1861), 100 (emphasis in the original).

⁶ For details, see Max Rheinstein, *Die Struktur des vertraglichen Schuldverhältnisses im anglo-amerikanischen Recht* (1932); A. W. B. Simpson, *A History of the Common Law of Contract* (1975).

⁷ A. W. B. Simpson, 'Innovation in Nineteenth Century Contract Law', (1975) 91 *QR* 247 ff; James Gordley, *The Philosophical Origins of Modern Contract Doctrine* (1991), 134 ff; Reinhard Zimmernann, 'Der europäische Charakter des englischen Rechts', (1993) 1 *Zeitschrift für Europäisches Vertragsrecht* 43 ff.

⁸ Gino Gorla, *Il contratto* (2 vols, 1954).

¹ Arthur von Mehren (chief ed), *International Encyclopedia of Comparative Law* (vol VII, since 1971); Konrad Zweigert (chief ed), *International Encyclopedia of Comparative Law* (vol VIII, since 1972). Neither of the two volumes, the one relating to contracts in general, the other to specific contracts, has been completed. So far, seventeen chapters consisting of more than 1,000 pages have been published.

² Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law* (trans Tony Weir, 3rd edn, 1998), part II, 323–708, of which pp 323–536 are devoted to contract law.

³ See Chapter 16 in this *Handbook*.

⁴ See eg Ingeborg Schwenzer and Markus Müller-Chen, *Rechtsvergleichung* (1996), 1–185; Arthur von Mehren and James Gordley, *An Introduction to the Comparative Study of Private Law: Readings, Cases, Materials* (2006), 413–551; cf also Hugh Beale, Arthur Hartkamp, Hein Kötz, and Denis Tallon (general eds), *Cases, Materials and Text on Contract Law* (2002).

and in terms of the realities of international negotiation and litigation. Since international trade, and economic relations more generally, depend mainly on private contracts, understanding the similarities and differences among the various national legal systems is a matter of immediate practical relevance. Thus, law and policy makers, the bench and the bar, and the international business community have a strong interest in understanding contract law in a transboundary context and are often avid consumers of its comparative study. This, in turn, provides incentives (and promises rewards) for comparatists addressing contract law issues.

II. APPROACHES TO COMPARATIVE CONTRACT LAW

Aside from occasional works on the historical background of modern contract law,⁹ comparative studies in this area can be assigned to four main groups. Three are more specifically defined with regard to their approaches and agendas while a fourth may be considered a residual category.

One specific approach is the search for commonalities among the contract laws of various legal systems. The original project of this type had a global scope: in the 1960s, Rudolf Schlesinger at the Cornell Law School organized a large-scale study purporting to identify a 'common core' of rules on contract formation shared by most developed legal systems in the world. While its actual results, eventually published in two massive volumes,¹⁰ are considered scarcely relevant today, the approach was pioneering. Its major successor is an initiative limited to the laws of Europe: in 1994, scholars at the University of Trento, Italy, launched the search for a 'Common Core of European Private Law'. While this so-called Trento Project encompasses other areas of private law as well, it has generated several volumes focusing particularly on (European) contract law. Each work is gauging the existence of a 'common core' in a specific context.¹¹ A related, though quite different, undertaking is the first treatise on European contract law: Hein Kötz's

ground-breaking *Europäisches Vertragsrecht* describes and analyzes the subject along the lines of common problems and themes.¹²

It is only a small step from the search for a 'common core' to agendas of contract law harmonization and unification. Thus, this second branch of comparative contract law often builds on the search for commonalities. Yet, it also goes much further and seeks actively to establish compromises bridging the gap between the various systems' concepts and rules. Efforts to harmonize or even unify contract law are driven less by academic interest than by the practical (real or perceived) needs of the business community for internationally uniform contract rules. These efforts have a fairly long and chequered history, especially with regard to the law of sales. They go back at least to the work of Ernst Rabel in the first half of the twentieth century. Rabel pioneered the establishment of an internationally uniform sales law in his two-volume survey *Das Recht des Warenkaufs* (The Law of the Sale of Goods), published in 1936 and 1958 respectively.¹³ In subsequent decades, various attempts to unify sales law through international conventions drafted by the Hague Conference of Private International Law engendered little success. Yet, Rabel's belated triumph came with the adoption of the United Nations Convention on the International Sale of Goods (CISG) in Vienna in 1980. The Convention has been ratified by more than sixty countries throughout the world and is undoubtedly the greatest success of international contract law unification to date.¹⁴ Most other efforts in this area have resulted in so-called soft-law, that is, statement-like 'principles'. On a worldwide scale, the UNIDROIT Principles of International Commercial Contracts (1994, amended 2004),¹⁵ drafted at the International Institute for the Unification of Private Law in Rome, lack legislative force but are used increasingly in international commercial arbitration. In the European context, the most noteworthy success is the publication of the Principles of European Contract Law, drafted by a Commission on European Contract Law led by Ole Lando.¹⁶ The Principles of this so-called Lando Commission have generated enormous scholarly interest and may serve as the blueprint for future legislation on European contract law. In addition, several other unification projects are currently under way.¹⁷

¹² Hein Kötz, *Europäisches Vertragsrecht* (vol I, 1996; English trans under the title *European Contract Law* by Tony Weir, vol I, 1997).

¹³ Ernst Rabel, *Das Recht des Warenkaufs* (vol I, 1936; vol II, 1958).

¹⁴ For details, see Chapter 29 in this *Handbook*.

¹⁵ UNIDROIT (ed), *Unidroit Principles of International Commercial Contracts 2004* (2004); for comment, see Michael Joachim Bonell, 'Unidroit Principles 2004—The New Edition of the Principles of International Commercial Contracts adopted by the International Institute for the Unification of Private Law', (2004) *Uniform LR 5 ff*; Reinhard Zimmermann, 'Die Unidroit-Grundregeln der internationalen Handelsverträge 2004 in vergleichender Perspektive', (2005) 13 *Zeitschrift für Europäisches Privatrecht* 264 ff.

¹⁶ Ole Lando and Hugh Beale (eds), *Principles of European Contract Law* (parts I and II, 1999); Ole Lando, Eric Clive, André Prüm, and Reinhard Zimmermann (eds), *Principles of European Contract Law* (part III, 2003).

¹⁷ For details, see Chapters 16 and 29 in this *Handbook*.

⁹ See eg Reinhard Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (1990; paperback edn 1996), 34–833; Gordley, *Philosophical Origins* (n 7).

¹⁰ Rudolf Schlesinger, *Formation of Contracts: A Study of the Common Core of Legal Systems* (2 vols, 1968).

¹¹ Reinhard Zimmermann and Simon Whittaker (eds), *Good Faith in European Contract Law* (2000); James Gordley (ed), *The Enforceability of Promises in European Contract Law* (2001); Ruth Seton-Green (ed), *Mistake, Fraud and Duties to Inform in European Contract Law* (2005).

A third major branch of comparative contract law is the study of the influence exercised by one country's (or tradition's) contract law on other legal systems. This approach is part of the comparative law genre focusing on legal transplants which is addressed in a separate chapter of this *Handbook*. Like comparative contract law generally, the tracing of transboundary influence has occurred mainly in the civil versus common-law context. It is widely known among comparatists today that civilian contract doctrine exercised considerable influence on the common law world. This is true not only for earlier English borrowings from Roman law but, as especially Brian Simpson has shown,¹⁸ it is even more remarkable in the late nineteenth century when French and German doctrine had a significant impact on English contract law. In a similar vein, Stefan Riesenfeld has described the migration of certain German ideas to the United States in the early twentieth century.¹⁹ Around the middle of the last century, several German and Austrian émigré scholars, notably Friedrich Kessler, exercised considerable influence on American contract law as well.²⁰ From a more current perspective, there is also the (still largely unexplored) question of the reverse influence of common-law contract types (such as leasing or factoring) and, more visibly, prolix drafting styles, on a worldwide level.

Beyond these three, fairly specific, approaches comparative contract law has traditionally consisted mainly in the general study of doctrinal similarities and differences between various legal systems, again largely with regard to the civil and the common law. In this, quasi-residual, category, some scholars have focused on individual topics,²¹ others have sought to cut across a broader spectrum.²² Their goal has been mainly to show how similar problems can be handled in different ways; how different approaches often lead to similar outcomes (or vice versa); and, occasionally, how comparing contract law leads to a better understanding of one's own regime and provides ideas for law reform.

The present chapter follows essentially the fourth, more general, approach and provides an overview of major issues in the civil versus common-law context. It focuses on general contract law, as opposed to specific contracts, and thus reflects the current state of international debate. Apart, of course, from the contract of sale which also always serves as the paradigm for debates on issues of general

¹⁸ Simpson, (1975) 91 *IQR* 247 ff; see also above, n 7.

¹⁹ Stefan Riesenfeld, 'The Impact of German Legal Ideas and Institutions on Legal Thought and Institutions in the United States', in Matthias Reimann (ed.), *The Reception of Continental Ideas in the Common Law World 1820–1920* (1993), especially at 92 ff.

²⁰ Jutta Klapisch, *Der Einfluss der deutschen und österreichischen Emigranten auf contracts of adhesion und bargaining in good faith im US-amerikanischen Recht* (1991).

²¹ A well-known example is Basil Markesinis, 'Cause and Consideration: A Study in Parallel', (1978) 57 *Cambridge LJ* 53 ff.

²² See eg Donald Harris and Dennis Tallon, *Contract Law Today: Anglo-French Comparisons* (1989); P. D. V. Marash, *Comparative Contract Law: England, France, Germany* (1994); a broader range of issues is covered in the Symposium, 'Contract Law in a Changing World', (1992) 40 *ALJCL* 541 ff.

contract law, comparative discussion of specific types of contracts has remained very limited.²³

III. INTERNATIONAL COMMERCIAL CONTRACTS

Exchange is the mainspring of any economic system that relies on free enterprise. Such a system allocates resources largely by exchanges arranged by bargaining between private parties. In these exchanges each party gives something to the other party and receives something in return in order to maximize its own economic advantage on terms tolerable to the other. Because of differences in value judgments and because of the division of labour, it is usually possible for each to gain.²⁴ Many of the most important of these exchanges are between commercial parties.

Others, however, involve consumers, friends, or family members. Although contract law governs the enforceability of their promises, that law is not unitary. When major efforts have been mounted to provide uniform rules for international contracts, they have tended to limit their reach to commercial contracts. Thus the widely adopted United Nations Convention on Contracts for the International Sale of Goods does not apply to consumer contracts, nor do the UNIDROIT Principles for International Commercial Contracts.²⁵ The discussion that follows will also emphasize commercial contracts.

Sophisticated systems governing such commercial contracts are found in a wide variety of legal systems around the world. Because of space constraints, this chapter will focus on the one hand on civilian systems, notably the Romanistic systems epitomized by France, together with the Germanic systems typified by Germany, and on the other hand common law systems, particularly those of England and the United States. Many civilian systems, including those just mentioned, recognize a distinction between 'commercial' contracts on the one hand and 'civil', or non-commercial, contracts on the other. In those systems, important practical

²³ But see eg Werner Lorenz, 'Contracts for Work on Goods and Building Contracts', in *International Encyclopedia of Comparative Law* (vol VIII, ch 8, 1980) and William B. Fisch, 'Professional Services', in *International Encyclopedia of Comparative Law* (vol VIII, ch 9, 1999).

²⁴ Cf also Arthur von Mehren, 'A General View of Contract', in *International Encyclopedia of Comparative Law* (vol VII, ch 1, 1982); James Gordley, 'Contract in Pre-Commercial Societies and in Western History', in *International Encyclopedia of Comparative Law* (vol VII, ch 2, 1997).

²⁵ See Art 2(a) CISG; on which see Peter Schlechtriem, in Peter Schlechtriem and Ingeborg Schwenzer (eds), *Commentary on the UN Convention on the International Sale of Goods (CISG)* (2nd edn, 2005), Art 2, nn 5 ff; Preamble to PICC and comment 2 in UNIDROIT (n 15), 2 f.

consequences turn on whether a transaction is classified as commercial or civil. Rules for civil contracts are found in a civil code while special rules for commercial contracts are often found in a commercial code. In Germanic systems, the criterion for classification is subjective and depends on the quality of the parties as 'merchants' or 'mercantile enterprises'. In systems influenced by the French, the criterion for classification is objective and depends on whether the transaction involves a 'mercantile act'. No formal distinction between commercial and civil law exists in common-law systems. In the United States, the Uniform Commercial Code is not limited to commercial transactions, although it contains some special rules for contracts for the sale of goods involving parties designated as 'merchants' and for consumer leases of goods.²⁶ Even within the civilian systems the distinction between 'commercial' and 'civil' contracts has been criticized for some time. Much more important in modern discussions about contract law, and its integrity, is the related issue of consumer protection. Particularly in Europe, a great number of statutes in the area of consumer contract law, often based on EC Directives, have been passed in piecemeal fashion and the question has thus arisen how to resolve this unsatisfactory state of affairs. Some countries (among them France and Austria) have enacted consumer codes whereas others (among them the Netherlands and Germany) have attempted to integrate their consumer legislation into the general civil code. The question is hotly debated on both a national and European level, the answer depending largely on whether general contract law and consumer contract law are seen as serving the same, or different, aims.²⁷ This issue cannot be pursued here.

The discussion that follows concentrates on aspects of contracts relevant to international transactions. These are, for the most part, transactions in which promises are exchanged for other promises. From the standpoint of contract law, the decision to enforce such exchanges of promises, even before any performance by either party, opened a Pandora's box of problems. The questions that will be explored here are these: First, what basis or bases are recognized as justifying the enforceability of a promise and what are the conditions of enforceability? Second, how is it to be determined whether the parties have reached agreement? Third, how does the scope of a party's obligations under a contract determined? Fourth, how does the law ensure that the exchange of promises will be followed by performance of those promises? Fifth, when will changed circumstances be taken into account in determining the parties' obligations? Sixth, in the event of one party's non-performance, what remedies are available to the other party? And seventh, how do these promises affect the rights of third parties?

²⁶ For a detailed discussion, see Denis Tallon, 'Civil Law and Commercial Law', in *International Encyclopedia of Comparative Law* (vol. VIII, ch 2, 1983), and see Francesco Galgano, 'Diritto civile e diritto commerciale', in *idem* (ed), *Atlante di diritto privato comparato* (1992), 35 ff.

²⁷ For a discussion, see, most recently, Reinhard Zimmermann, 'Consumer Contract Law and General Contract Law: The German Experience', (2005) 58 *Current Legal Problems* 415 ff.

IV. BASES FOR ENFORCEMENT

1. Historical Background in Roman Law

No legal system has ever been reckless enough to make all promises enforceable. One can, however, approach the question of enforceability from two opposite extremes—by assuming that promises are generally enforceable, subject to certain exceptions, or by assuming that promises are generally unenforceable, similarly subject to certain exceptions. Both civil-law and common-law courts have made this latter assumption.

With the development of competitive markets and the specialization of labour, it became essential to provide a general basis for the enforcement of promises, even before any performance by either party. Such transactions were a far cry from the simple credit transaction such as loan of money or sale of goods, for the primitive mind saw the resulting debt as recoverable not because of the debtor's promise to pay but because the debtor would otherwise be unjustly enriched.

The notion that a promise itself may give rise to an enforceable duty was an achievement of Roman law. But since the human mind is slow to generalize, it is not surprising that the history of contract law in Roman times is the account of the development of a number of discrete categories of promises that would be enforced, rather than the story of the creation of a general basis for enforcing promises.

'Consensual' contracts afforded a legal basis for enforcing purely exchanges of promises, even before any performance by either party, but in keeping with the pattern of evolution through the growth of exceptions, they were limited to four important types of contracts—sale, hire, partnership, and mandate.²⁸ In addition, unilateral promises were enforceable, provided a strict form of words was used.²⁹ Even as late as the time of Justinian in the sixth century, the most important expansion beyond the categories of classical Roman law was to recognize yet another category known as 'innominate' contracts.³⁰ Unlike consensual contracts, they were not confined to specified classes of transactions. But they were severely limited because they did not cover exchanges of promises even before any performance by either party, for they were binding only when one of the parties had completed performance. The development of a general basis for enforcing

²⁸ For details, see Zimmermann (n 9), 230 ff.

²⁹ On the Roman *stipulatio*, see Zimmermann (n 9), 68 ff. Apart from that four types of 'real' contracts were recognized (loan for use, loan for consumption, pledge, and deposit); in these cases, obligations only arose with the handing over of whatever object the contract was about; see Zimmermann (n 9), 153 ff.

³⁰ For details of the development, see Zimmermann (n 9), 532 ff; cf also 511 ff.

promises—the foundation of a general theory of contract—was therefore left to the great modern legal systems that arose in Europe during the Middle Ages: the common-law system that grew up in England and the civil-law systems that emerged on the European continent.

2. Common-Law and Civilian Solutions

Because the influence of Roman law in England had faded with the breakup of the Roman political system, the common law began at a less advanced stage than that attained by Roman law. English courts therefore painfully constructed such a basis beginning in the Middle Ages. That they succeeded in doing so was all the more remarkable in view of the fact that, when they began, the English law of contracts was little more advanced than that of many primitive societies. Like Roman law, they created categories of actionable promises.³¹ One of the most important of these, the action of debt, was no better suited than were the innominate contracts of Roman law to exchanges before any performance by either party, because the action of debt also required that the promisee had actually performed. It was only at the end of the sixteenth century that, goaded by competition from the ecclesiastical courts, the common-law courts were prepared to enforce exchanges of unexecuted promises.³²

The basis of enforcement developed by common-law courts came to be known as the ‘doctrine of consideration’. At first, the word *consideration* had been used without technical significance, but during the sixteenth century it came to be a word of art that expressed the sum of the conditions necessary for an action for breach of contract. The word thus came to be used to identify those promises that in the eyes of the common law were important enough to society to justify legal sanctions for their enforcement. It was, not surprisingly, neither a simple nor a logical test.³³

Conventional learning is that a promisor’s mere promise to do something is not enforceable unless supported by consideration. The essence of consideration came to be an exchange in which a promise was made in order to obtain something—often called a *quid pro quo*—in return. What the promisee could give might be either a promise or a performance. It was often said that the consideration could be either a benefit to the promisor or a detriment to the promisee, which remains

the general approach in England.³⁴ The Restatement of Contracts abandoned the historical requirement of a benefit or a detriment and in its place formulated a ‘bargain’ test, now widely accepted in the United States. Under this test, consideration must be something, either a promise or a performance, that is bargained for, that is, sought by the promisor in exchange for the promise and given by the promisee in exchange for the promise.³⁵

The requirement of consideration took care of the bulk of economically vital commercial agreements, and found easy acceptance in a society entering a commercial age. In view of the difficulty that other societies have had in developing a general basis for enforcing promises, it is perhaps less remarkable that the basis developed by the common law is logically flawed than that the common law succeeded in developing any basis at all.

The doctrine of consideration is not a device for policing contracts to assure that they are fair to both parties. Consideration does not have to be ‘adequate’ or ‘sufficient’, though those adjectives are sometimes added by courts.³⁶ Nor does the consideration have to be substantial in value, though marked disparity in value may signal the absence of bargain—of merely ‘nominal’ consideration. Furthermore, the requirement of an actual bargain is not taken so seriously as to exclude routine transactions concluded on the basis of standardized agreements to which one party simply adheres without any real negotiation of terms.

One commercially significant area affected by consideration is contract modification. Under the pre-existing duty rule, a modification to a contract must itself be supported by consideration to be binding. The rule persists in common-law nations, though it has been limited by statute and by various judicial incursions, particularly in the United States.³⁷

In the United States, spurred by the Restatement of Contracts, the doctrine of ‘promissory estoppel’ developed during the twentieth century as an alternative to the doctrine of consideration as a basis for enforcing promises. Under the doctrine of consideration, the promisee’s unsolicited reliance is not consideration because it is not bargained for. Under the doctrine of promissory estoppel, however, the promisee’s unsolicited reliance on a promise may preclude the promisor from asserting the absence of consideration for the promise if the promisor should have reasonably expected such reliance. The doctrine has been applied not only to

³⁴ See eg *Midland Bank Trust Co Ltd v Green* [1981] AC 513; G. H. Treitel, *The Law of Contract* (ninth edn, 2003), 67 ff.

³⁵ Restatement (Second) of Contracts § 71.

³⁶ Restatement (Second) of Contracts § 79; E. Allan Farnsworth, *Farnsworth on Contracts* (vol I, 3rd edn, 2004), 124 ff. For a comparative evaluation, see Ferdinand Fromholz, *Consideration* (1997); for an analytical evaluation, see Stephen A. Smith, *Contract Theory* (2004), 215 ff.

³⁷ Perhaps the most significant incursion is § 2-209(1) UCC, which abolished the pre-existing duty rule for goods contracts. On the pre-existing duty rule, see Farnsworth (n 36, vol I) 520 ff; Fromholz (n 36), 131 ff.

³¹ For details, see Simpson (n 6), 1 ff; David Ibbetson, *A Historical Introduction to the Law of Obligations* (1999), 24 ff; Gerhard Kegel, *Vertrag und Delikt* (2002), 35 ff.

³² On the rise of the action of assumpsit, see Simpson (n 6), 199 ff; Ibbetson (n 31), 126 ff; Kegel (n 31), 51 ff.

³³ On the history of the doctrine of consideration, see Simpson (n 6), 316 ff, 375 ff; Ibbetson (n 31), 141 ff; Kegel (n 31), 66 ff; Jörg Benedict, ‘Consideration: Formalismus und Realismus im Common Law of Contract’, (2005) 69 *RabelsZ* 1 ff.

donative promises but also to other unremunerated promises. It has not yet been generalized in England as it has in the United States.³⁸

In many civil-law systems, including the Germanic, there is no requirement comparable to consideration and it is enough if a promise is made with an intention to be bound.³⁹ In French law and some related systems it is often said that for an obligation in a synallagmatic contract (a bilateral contract with reciprocal promises) to be enforceable it must have an underlying *causa* or *cause*.⁴⁰ Under such a contract, the *cause* is the reason that led a party to engage in the transaction. French courts do not engage in a subjective inquiry into the motivations of the parties, but if the performance to be rendered in return for an obligation is worthless, of no genuine importance, a court may decline to enforce the obligation on the ground that there is an absence of *cause*. This necessarily vague concept is not usually invoked by courts as a basis for insisting on equivalence in exchanges, though some recent cases suggest its potential use.⁴¹ Today, *cause* is important largely in providing a basis for enabling a court to refuse to enforce a contract if it is legally or morally offensive.⁴² In addition, donative promises in civil-law systems are enforceable, but typically require notarization as an authenticating formality.⁴³

3. Bases for Refusing Enforcement

All legal systems impose threshold conditions for the making of enforceable contracts. Thus some classes of persons, often because of youthfulness or diminished or impaired mental ability, are denied the capacity to make contracts.⁴⁴

³⁸ Restatement (Second) of Contracts § 90. For comment, see Farnsworth (n 36, vol I), 167 ff; English law does not recognize a cause of action based on promissory estoppel, instead limiting it to a purely defensive role: *Combe v Combe* [1951] 2 KB 215.

³⁹ For the historical development of the principle of *pacta sunt servanda* under the *ius commune*, see Klaus-Peter Nanz, 'Die Entstehung des allgemeinen Vertragsbegriffs im 16. bis 18. Jahrhundert' (1985); Zimmermann (n 9), 537 ff; John Barton (ed), *Towards a General Law of Contract* (1990); Kegel (n 31), 3 ff.

⁴⁰ For the historical development, see Zimmermann (n 9), 549 ff.

⁴¹ See eg Cass com, 22 October 1996, D 1997, 121. For comment, see François Terré, Philippe Simler and Yves Lequette, *Droit Civil: Les Obligations* (9th edn, 2005), no. 342.

⁴² For a comparative evaluation of cause and consideration as 'indicia of seriousness' of a promise, see Zweigert and Kötz (n 2), 388 ff; Kötz (n 12), 52 ff; P. G. Monateri, Francesco Galgano, and Guido Alpa, in Galgano (n 26), 89 ff; and see the case studies and comparative comment in James Gordley (ed), *The Enforceability of Promises in European Contract Law* (2001). Neither PECL nor PICC recognize cause or consideration; see Art 2:201 (1) PECL and Art 3:2 PICC ('... without any further requirement').

⁴³ Melvin A. Eisenberg, 'Donative Promises', (1979) 47 *University of Chicago LR* 1; John P. Dawson, *Gifts and Promises: Continental and American Law Compared* (1980); Zimmermann (n 9), 477 ff; James Gordley, *The Foundations of Private Law: Property, Tort, Contract, Unjust Enrichment* (2006), 352 ff.

⁴⁴ Zweigert and Kötz (n 2), 348 ff; Kötz (n 12), 97 ff; for the United States, see Farnsworth (n 36, vol I), 442 ff.

Furthermore, even assuming competent parties, abuse of the bargaining process by one of them may impair the enforceability of the resulting agreement. The two most common kinds of abuse are those arising from conduct that is misleading and from conduct that is coercive. Protection against these two kinds of abuse is commonly afforded by allowing the abused party to undo the transaction by avoiding it, restoring both parties to their positions before their agreement.⁴⁵

With the standardization of contract terms, courts and legislatures were faced with more subtle intrusions on the integrity of the bargaining process. The typical agreement in a routine transaction came to consist of a standard form containing terms prepared by one party and assented to by the other with little or no opportunity for negotiation. Traditional contract law, designed for a paradigmatic agreement that had been reached by two parties of equal bargaining power by a process of free negotiation, was ill-equipped to meet the challenge posed by standard terms.

Standardizing terms has obvious advantages. It renders individual negotiations unnecessary, lowering transaction costs and thereby serving the interest of both parties. Furthermore, because a judicial interpretation of one standard form serves as an interpretation of similar forms, standardization facilitates the accumulation of experience and helps to make risks calculable. Dangers are inherent in standardization, however, for it affords a means by which one party may impose terms on another unwitting or even unwilling party. The standard form is typically proffered as a take-it-or-leave-it proposition, often called a *contract of adhesion*, under which the only alternative to complete adherence is outright rejection.

The traditional concern of courts in policing contracts has been with abuse of the bargaining process rather than with the fairness of the resulting bargain. Neither consideration in common-law systems nor *cause* in French systems polices the substance of a bargain. And the doctrine of *laesio enormis*, which at one time permitted avoidance of unequal contracts in civil-law countries, has been rejected save at most for a few vestiges.⁴⁶

Courts steeped in traditional contract doctrine were therefore not receptive to the argument that a party should be relieved of an agreement on the grounds of imposition of standard terms. Nevertheless, in hard cases, courts strained to afford relief to the weaker party and, in doing so, developed several techniques. Sometimes they held that the standard terms did not become part of the contract at all, as where the terms were in small print, located on the back of a form, or

⁴⁵ Zimmermann (n 9), 651 ff; Zweigert and Kötz (n 2), 424 ff; Kötz (n 12), 196 ff; Thomas Probst, 'Defects in the Contracting Process', in *International Encyclopedia of Comparative Law* (vol XI, ch 11, III and IV, 2001); Thomas Schindler, *Rechtsgeschäftliche Entscheidungsfreiheit und Drohung* (2005); Smith (n 36), 315 ff; Arts 4:107 f PECL; Arts 3:8 f PICC.

⁴⁶ On the doctrine of *laesio enormis*, see Zimmermann (n 9), 259 ff; F. Willem Groshede, 'Iustum Pretium Redivivum?', in: F. Willem Groshede and Ewoud Hondius (eds), *International Contract Law* 2003 (2004), 69 ff; Gordley, *Foundations* (n 43), 364 ff.

incorporated by an obscure reference. Sometimes they applied rules of strict construction, finding the terms unclear or ambiguous and then interpreting them *contra proferentem* ('against the profferer'). However, none of these traditional judicial techniques was adequate, at least in theory, to protect an unfortunate person who had actual knowledge and understanding of the terms.⁴⁷

In the years following World War II, it was increasingly recognized that such judicial techniques were inadequate and that abusive clauses must be subjected to tighter legislative and judicial control. Much of the concern with standardized terms was everywhere directed at the protection of consumers, on the rationale that the consumer, presumably the weaker party, must be protected against terms favoring firms that abused their economic superiority. The result has been a plethora of legislative measures proscribing specific types of abuse or requiring clearer or earlier disclosure of especially important terms.⁴⁸

German legislation automatically invalidates standard terms of business if, contrary to the precepts of good faith, they place the other party at an unreasonable disadvantage.⁴⁹ More generally, it provides that 'surprise' clauses do not become part of the contract if they are so 'unusual that the other party could not be expected to suppose that they would be there'.⁵⁰ This legislation applies even though both parties are merchants. In addition, consumers may invoke lists of standard terms that are either proscribed or that are proscribed if they prove disproportionately harmful.⁵¹

French legislation dating from 1978 empowered the government to issue decrees prohibiting specified clauses in contracts between merchants and consumers in so far as they gave the former an unfair advantage and seemed to have been imposed on the consumer by an abuse of economic power.⁵² The commission set up to do this was inactive and in 1991 the Cour de Cassation held that it was open to the courts to do this.⁵³ *Clauses abusives* may also be invalidated under the general law of contract.

In England, following World War II, there grew up a judge-made rule that an exculpatory clause is no defense to a claim based on a 'fundamental breach of contract', for the reason that in case of such a breach the contract as a whole is at

an end and the clause disappears. However, the House of Lords closed the door on this rule in 1980.⁵⁴ In 1977, the Unfair Contract Terms Act gave judges wide power of control over unfair clauses that exclude or limit liability, particularly where consumers are involved.⁵⁵

In 1993 an additional layer of European law was added by an European Community Directive requiring member states to introduce provisions applicable to a contract that, rather than being individually negotiated, has been drafted in advance so that the consumer has had no ability to influence its substance. Courts are to be permitted to hold a clause in such a contract invalid if, contrary to the requirements of good faith, the clause causes a significant imbalance under the contract.⁵⁶ The implementing legislation varied widely.⁵⁷ German law largely remained intact, as for the most part it already regulated standard terms as strictly, or more strictly, than did the Directive. French law changed materially, now incorporating the 'black list' of unfair terms contained in the EC Directive. England, in contrast, enacted the Unfair Terms in Consumer Contracts Regulations in 1999, which run alongside the 1977 Act. As in France, the English approach largely incorporates the Directive with no amendment.⁵⁸

In the United States, the problem of abusive clauses is dealt with by the doctrine of unconscionability, which allows a court to refuse to enforce part or all of a contract should all or part of the contract be unconscionable. This doctrine is rooted in the practice of courts of Equity, which withheld equitable relief if a contract is so unfair as to shock the conscience of the court. It gained currency through its adoption in the Uniform Commercial Code, and since has become established in the common law.⁵⁹ The concept is largely undefined in the Code, but cases and commentators have filled that gap. Courts have characterized the presence of unreasonably favourable terms as substantive unconscionability and the absence of meaningful choice in determining those terms as procedural unconscionability. They weigh all elements of both substantive and procedural unconscionability and may conclude that the contract is unconscionable because

⁴⁷ For a historical account of standard terms of business, and how to police them, see Sibylle Hofier, Philipp Hellwege, and Stefan Vogenauer, in Mathias Schmoeckel, Joachim Rückert, and Reinhard Zimmermann, *Historisch-kritischer Kommentar zum BGB* (vol. II, in preparation), §§ 305–10; see also Farnsworth (n 36, vol I), 556 ff.

⁴⁸ For comparative accounts, see Zweigert and Kötz (n 2), 333 ff; Kötz (n 12), 137 ff; Karl-Heinz Neumayer, 'Contracting Subject to Standard Terms and Conditions', in *International Encyclopedia of Comparative Law* (vol VII, ch XII, 1999).

⁴⁹ § 9 AGBG (Standard Terms of Business Act) of 1976; now § 307 BGB.

⁵⁰ § 3 AGBG; now § 305 c 1 BGB.

⁵¹ §§ 10 f AGBG; now §§ 308 f BGB.

⁵² Art L 132–1 *Code de la consommation*.

⁵³ Cass 1e civ, 14 May 1991, D 1991, 449. The pertinent statute has been revised greatly in light of the EC Directive on unfair terms in consumer contracts of 1993.

⁵⁴ *Photo Production Ltd v Securitor Transport Ltd* [1980] AC 827.

⁵⁵ For details, see Treitel (n 34), 246 ff.

⁵⁶ Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, [1993] OJ L 95/93.

⁵⁷ See Jürgen Basedow, in *MünchKommBürgerliches Gesetzbuch* (vol IIa, 4th edn, 2003), Vor § 305, nn 18 ff.

⁵⁸ The Principles of European Contract Law (which do not contain provisions specifically dealing with consumer contracts) have a general provision, but no 'black list': Art 4:110 PECL. There is no equivalent in the UNIDROIT Principles of International Commercial Contracts.

⁵⁹ § 2–302 UCC; Restatement (Second) of Contracts § 208. See further Farnsworth (n 36, vol I), 577 ff.

of the overall imbalance. They have resisted applying the doctrine when there is only substantive and no procedural unconscionability.⁶⁰

In addition to refusing enforcement in order to protect the interests of one of the parties, courts sometimes refuse enforcement in order to protect the interests of the public as a whole. In all legal systems, courts reserve this power to themselves. French law brings into play the concept of *cause* on the rationale that a contract cannot be based on a *cause illicite*. A court will examine not only the reason that led a party to engage in the transaction, for example, the expectation of acquiring land in return for a price, but also the party's ulterior motive, such as operating a casino or a bordello, and determine whether this motive is offensive to law or morals.⁶¹

4. Formalities Required for Enforceability

All legal systems make some use of formalities as conditions of enforceability.⁶² Their functions may include facilitating proof and confirming seriousness of intention. Many civil-law systems, however, have no general requirement of a formality as a condition of enforcement, though a writing or other formality may be required for specific types of contracts. Thus German law requires a writing for suretyship provisions in contracts, and contracts for the sale of land must be in notarial form.⁶³ Such requirements as exist may not affect commercial transactions, as in the case of the French *Code civil*'s requirement of a writing for every non-commercial contract involving more than a trifling sum.⁶⁴ Furthermore, in systems following the French, when a formality is required the effect may be merely to limit the means of *proof*, as by witnesses, rather than to affect the *validity* of the agreement.

In contrast, a fear of false testimony regarding oral contracts prompted Britain to enact the Statute of Frauds in 1677. It provided that designated classes of

⁶⁰ For other devices policing contracts which are procedurally as well as substantively unfair (such as undue influence, or § 138 II BGB, i.e. the rule on 'usury'), see, against the general background of freedom of contract, Zweigert and Kötz (n 2), 323 ff; Kötz (n 12), 130 ff; Arthur von Mehren, 'The Formation of Contracts', in *International Encyclopedia of Comparative Law* (vol VII, ch 9, 1992), m 62 ff; Jacques du Plessis and Reinhard Zimmermann, 'The Relevance of Reverence: Undue Influence Civilian Style', (2004) 10 *Maastricht Journal of European and Comparative Law* 345 ff; Art 4:109 PECL; Art 3:10 PICC.

⁶¹ For historical and comparative discussion of illegality and immorality, see Zimmermann (n 9), 697 ff; Zweigert and Kötz (n 2), 380 ff; Kötz (n 12), 154 ff; Arts 15:101 ff PECL; this subject is not yet covered by the PICC; Farnsworth (n 36, vol II), 1 ff.

⁶² Generally, see Zimmermann (n 9), 82 ff; Zweigert and Kötz (n 2), 365 ff; Kötz (n 12), 78 ff; Arthur von Mehren, 'Formal Requirements', in *International Encyclopedia of Comparative Law* (vol VII, ch 10, 1998); Paul Brasseur, 'Le formalisme dans la formation des contrats: Approches de droit comparé', in Michel Fontaine (ed), *Le processus de formation du contrat* (2002), 605 ff.

⁶³ §§ 311 b I and 766 BGB.

⁶⁴ Art 1341 *Code civil*.

contracts were not enforceable unless evidenced by a signed writing. The most important of these classes were contracts of suretyship, contracts for the sale of an interest in land, contracts not to be performed within a year from the time of their making, and contracts for the sale of goods. Most American states adopted similar statutes covering these classes.

In 1954, after 277 years, Parliament repealed most of the Statute of Frauds, retaining only the provisions for contracts of suretyship and contracts for the sale of an interest in land.⁶⁵ There has been no widespread movement of this kind in the United States, where the Statute of Frauds retains much of its vigour and has been retained in the Uniform Commercial Code, with some amelioration, for contracts for the sale of goods. Indeed, there is a tendency to require the formality of a writing as a means of protecting unsophisticated parties such as consumers. Many American courts have shown hostility to the one-year provision, however, and have limited it radically.⁶⁶

V. REQUIREMENT OF AGREEMENT

1. Offer and Acceptance; Definiteness of the Contract

Agreement is the basis of contract, and all legal systems impose two requirements in determining whether there has been legally binding agreement. First, the parties must have manifested their *assent* to be bound, a requirement that follows from the premise that contractual liability is consensual. Second, the agreement to which they manifested their assent must be *definite* enough to be enforceable, a requirement that is implicit in the premise that contract law protects the promisee's expectation. The focus here will be on the first of these requirements, where the differences among legal systems are sharpest.

Contract law characteristically envisions the process of agreement in terms of a discrete offer by one party and an acceptance by the other.⁶⁷ Once the offer is accepted, both parties are bound by the resulting contract. A major difference among legal systems goes to the revocability of the offer before a contract has resulted from its acceptance. Revocation by the offeror after the acceptance has

⁶⁵ The Statute of Frauds for real property was revised again in 1989, this time to strengthen the formal requirements: Hugh G. Beale (general ed), *Chitty on Contracts* (29th edn, 2004, vol I), 334 ff.

⁶⁶ § 2-201 UCC. On judicial hostility to the one-year provision, see Farnsworth (n 36, vol II), 129 ff. On the Statute of Frauds in general, see Farnsworth (n 36, vol II), 101 ff.

⁶⁷ For the history of the doctrine of offer and acceptance, see Zimmermann (n 9), 559 ff; Gordley, *Origins* (n 7), 45 ff, 79 ff, 81 ff, 139 ff, 175 ff.

reached the offeree is to be distinguished from withdrawal by the offeror before the acceptance has reached the offeree, as to which the offeror is free.⁶⁸

In the common law an offer has no binding force and can be revoked at any time before acceptance. The hardship on the offeree is traditionally mitigated somewhat by the common law's 'mailbox' rule,⁶⁹ under which an offer received by mail is accepted as soon as the offeree has dispatched an acceptance. The offeree risks revocation only during the time between the arrival of offer and the dispatch of acceptance. Perhaps surprisingly, an offer is revocable even if it provides that it cannot be revoked for a stated period. This is a consequence of the doctrine of consideration, the provision for irrevocability being regarded as a promise not to revoke that is not binding if not supported by consideration. A common practice is for the offeree to pay a nominal sum as consideration, converting the offer into an irrevocable option. It is also possible that revocation of an offer may be precluded under the doctrine of promissory estoppel. Furthermore, in the United States an offeror can make an irrevocable 'firm offer' for the sale of goods under the Uniform Commercial Code.⁷⁰

In French law, too, the offeror is generally free to revoke the offer at any time, although in some circumstances revocation may be regarded as a *faute* and therefore illegitimate if it is abusive and frustrates the offeree's legitimate expectations. In such a case revocation is sanctionable in damages. This is the case where the offer fixes a period of irrevocability or where the circumstances indicate a reasonable time for irrevocability. French law is unclear as to whether an acceptance is effective on dispatch or on receipt.⁷¹

German law takes a different position, under which, absent a provision to the contrary, every offer is irrevocable during a reasonable period, even if no period has been fixed. During that period revocation is impossible and a purported revocation has no legal effect. If the offer fixes a period of irrevocability, it cannot be revoked during that period. In any case, an acceptance is effective, not when it is dispatched, but when it reaches the offeree.⁷²

⁶⁸ For comparative discussions, see Zweigert and Kötz (n 2), 356 ff; Kötz (n 12), 16 ff; Arthur von Mehren (n 60), nn 134 ff; Franco Ferrari, 'La Formazione del contratto', in Galgano (n 26), 67 ff; Catherine Delforge, 'La formation des contrats sous un angle dynamique: Reflexions comparatives', in Fontaine (n 62), 137 ff; Arts 14 ff CISG; Arts 2:201 ff PECL; Arts 2:1.1 PICC; for discussion of these international instruments, see Eva Luig, *Der internationale Vertragsschluss* (2002).

⁶⁹ Established in *Adams v Lindsell* (1818) 1 B & Ald 681, 106 ER 250; confirmed by the House of Lords in *Dunlop v Higgins* (1848) 1 HLC 381, 9 ER 805 and adopted generally in the United States, see Restatement (Second) of Contracts § 63.

⁷⁰ § 2-205 UCC; for other approaches to converting offers into option contracts, see Restatement (Second) of Contracts § 87. English law is less accommodating; see *Chitty on Contracts* (n 65), vol I), 321 ff.

⁷¹ Terré *et al* (n 41), nos. 168 ff.

⁷² §§ 145 ff BGB. Other civil law systems differ, with a few requiring actual notice. CISG and the UNIDROIT Principles separate acceptance from revocation; an acceptance is effective only upon receipt, as in Germany, but the offer may not be revoked after the acceptance has been dispatched.

Whether an agreement is sufficiently definite to display the requisite intent to be bound likewise varies among legal systems. Certainly an agreement can prove too indefinite to enforce. Romanistic systems generally require that a contract have an *objet*, a requirement absent elsewhere.⁷³ As will be discussed, missing terms can be supplied by the courts, or are supplied legislatively.

2. Precontractual Liability

If negotiating parties sign the documents at the closing they clearly have assented to the terms contained therein. But problems arise if the negotiations fail and the documents are not signed. The resolution of disputes arising out of the failure of negotiations has assumed increasing importance. Common-law and civil-law systems have arrived at different solutions.⁷⁴

Common-law courts have traditionally accorded parties the freedom to negotiate without risk of precontractual liability. Before an offer is accepted, neither party is bound. This broad freedom of negotiation is subject to occasional exceptions if, for example, the aggrieved party has a claim in restitution for a benefit to the other party during the negotiations, has been harmed by a misrepresentation or, at least in the United States, has relied on a specific promise made by the other party during the negotiations.⁷⁵

German courts have adapted the concept of *culpa in contrahendo* (fault in contracting) developed by Rudolf von Jhering after the middle of the nineteenth century⁷⁶ and now codified in § 311 II BGB, to hold that a party that fails to observe the 'necessary *diligentia*' in negotiations commits a breach of its contractual obligations and is accountable for the other party's reliance losses. Although the mere breaking off of negotiations does not constitute such a failure, a party may be liable if it refuses without an appropriate ground to conclude a contract after conducting itself in such a way that the other party justifiably counted on a contract coming into existence.

⁷³ Arts 1108, 1129, 1591 *Code civil*; but see now the developments sketched by Bertrand Fages, 'Einige neuere Entwicklungen des französischen allgemeinen Vertragsrechts im Lichte der Grundregeln der Lando-Kommission', (2003) 11 *Zeitschrift für Europäisches Vertragsrecht* 514 ff. For a comparative discussion, see Kötz (n 12), 42 ff; cf also Art 2:103 PECL.

⁷⁴ See Arthur von Mehren (n 60), nn 112 ff; Kötz (n 12), 34 ff; Gordley, *Foundations* (n 43), 297 ff; Zimmermann and Whittaker (n 11), 171 ff; Bertrand de Coninck, 'Le droit commun de la rupture des négociations précontractuelles', in Fontaine (n 62), 15 ff; Ewoud Hondius, 'Pre-Contractual Liability', in F. Willem Groshede and Ewoud Hondius (n 46), 5 ff; Arts 2:301 ff PECL; Arts 2:1.15 PICC.

⁷⁵ Farnsworth (n 36), vol I), 391 ff.

⁷⁶ Rudolf von Jhering, 'Culpa in contrahendo, oder Schadensersatz bei nichtigen oder nicht zur Perfektion gelangten Verträgen', (1861) 4 *Jherings Jahrbücher für die Dogmatik des bürgerlichen Rechts* 16 ff.

Early in the twentieth century, a French scholar, Raymond Saleilles, advanced the view that after parties have entered into negotiations both must act in good faith and neither can break off the negotiations 'arbitrarily' without compensating the other for its reliance.⁷⁷ French courts have imposed liability on a theory of tort, the wrong being viewed as an *abus de droit* for which bad faith even without malice will suffice. Bad faith may be found where a party has negotiated with no serious intention to contract or where a party breaks off negotiations abruptly and without justification.

Legal systems also differ as to the enforceability of an explicit agreement by the parties to negotiate in good faith. Such agreements are clearly enforceable in civil-law systems. However, English courts have been adamant in refusing to enforce such agreements⁷⁸ on two grounds: first, that the scope of such an obligation is too indefinite to be enforceable; and, second, that there is no way to calculate expectation damages for breach of such an obligation because there is no way to determine the terms of the contract that might have been reached. Many courts in the United States have rejected these arguments and have enforced agreements to negotiate, at least where they have been concluded after some significant terms have been agreed upon. In answer to the second argument, these courts have calculated damages not on the basis of lost expectation but on the basis of reliance, sometimes including lost opportunities to conclude other contracts. In answer to the argument of indefiniteness, the same courts have concluded that at the very least it is a breach of the obligation to negotiate in good faith if a party simply refuses to abide by a term on which agreement has been reached unless the other party makes a concession on some matter yet to be negotiated.⁷⁹

VI. THE CONTENT OF THE CONTRACT

1. Introduction

Most of what we usually think of as 'contract law' consists of a legal framework within which parties may create their own rights and duties by agreement. Developed societies confer upon contracting parties wide power to shape their

relationships under the principle of party autonomy or 'freedom of contract', and many contract disputes relate not to this legal framework but rather to the rights and duties that the parties themselves have created. Such controversies over the 'interpretation' or 'construction' of the contract⁸⁰ represent a substantial fraction of all contract disputes.

Before a party can be charged with a breach, the scope of that party's obligation must be determined. To begin with, a court will look at the language of the contract itself. In addition a court will look to terms implied in law, terms that are read into contract—sometimes on the basis of statute and sometimes as a matter of judicial discretion—in order to fill gaps in the language of the contract.⁸¹ With rare exceptions for fields such as insurance law and consumer protection law, these rules are not mandatory, that is, not impervious to the parties' attempts to change them; instead, the parties are free to contract out of them. In the United States, such rules are commonly known as *default* rules, in Germany as *dispositives Recht*, and in France as *lois supplétives*.

Most civil-law systems know a default rule of great importance and widespread impact that requires a contracting party to behave according to good faith, or what is in German *Treu und Glauben* and in French *bonne foi*.⁸² The common law is traditionally known no such default rule. English courts have been adamant in refusing to accept such a vague restraint on the behaviour of a contracting party, though they sometimes achieve the same ends by fashioning more specific rules.⁸³ In the United States, a remarkable exception in the common-law world, courts generally recognize a default rule that requires a contracting party to behave according to *good faith and fair dealing*, a vague standard that may, nevertheless, be less broad than its civil-law counterpart.⁸⁴ Yet, many American courts do not allow an independent cause of action for lack of good faith, except in cases of bad faith denial of an insurance claim which may be actionable in tort.

⁸⁰ On which see Zimmermann (n 9), 621 ff; Zweigert and Kötz (n 2), 400 ff; Kötz (n 12), 106 ff; Arts 5:101, PECL; Arts 4:1 ff PICC.

⁸¹ For example, in England many default terms are supplied by the Sale of Goods Act of 1979 and the Supply of Goods and Services Act of 1982, though the courts readily fill in remaining gaps. On implied terms in English law in comparative perspective, see Martin Schmidt-Kessel, 'Implied Terms—Auf der Suche nach dem Funktionsäquivalent', (1997) 96 *Zeitschrift für Vergleichende Rechtswissenschaft* 101 ff; Wolfgang Grobecker, *Implied Terms und Treu und Glauben* (1998); and see Smith (n 36), 280 ff.

⁸² For comparative analysis, see Jack Beatson and Daniel Friedmann (eds), *Good Faith and Fault in Contract Law* (1995); Hein Kötz, 'Towards a European Civil Code: The Duty of Good Faith', in *The Law of Obligations: Essays in Celebration of John Fleming* (1998), 243 ff; Martijn Hesselink, *De redelijkheid en billijkheid in het Europese privaatrecht—Good Faith in European Private Law* (1999); Zimmermann and Whittaker (n 11), 7 ff.

⁸³ *Interfoto Picture Library Ltd v Stilleto Visual Programmes Ltd* [1989] 1 QB 433.

⁸⁴ See Robert S. Summers, 'The Conceptualisation of Good Faith in American Contract Law: A General Account', in Zimmermann and Whittaker (n 11), 118 ff; Steven J. Burton and Eric G. Andersen, *Contractual Good Faith* (1995); cf also the explicit reference to good faith in § 1-203 UCC and Restatement (Second) of Contracts § 205.

⁷⁷ Raymond Saleilles, 'De la responsabilité précontractuelle', (1907) 6 *Revue Trimestrielle de Droit Civil* 697, 717 ff.

⁷⁸ See the references in Treitel (n 34), 59 ff.

⁷⁹ Farnsworth (n 36, vol I), 391 ff; *idem*, 'Precontractual Liability and Preliminary Agreements: Fair Dealing and Failed Negotiations', (1987) 87 *Columbia LR* 217, 264 ff.

A vexing related problem is how to determine the terms of a contract when the offer and acceptance differ. The classic answer makes a non-conforming acceptance a rejection and counter-offer.⁸⁵ Especially for contracts created by the exchange of standard forms, this proves impracticable. French and German case law has tended to place the terms of the parties at parity, allowing formation and replacing terms in conflict with default terms.⁸⁶ English law normally treats the differing forms as creating no contract until one party expressly assents or until performance. In the latter case the final document provides the terms of the contract.⁸⁷ American law depends upon the context. At common law, the answer is very much along English lines. For the sale of goods, the Uniform Commercial Code provides a somewhat muddy answer that variously yields something like French and German law or something like a first-shot rule, subject to a materiality test.⁸⁸

2. Integrity of the Writing

Common-law systems show great respect for the integrity of written contracts. After lengthy negotiations, contracting parties often reduce part or all of their agreement to writing in order to provide trustworthy evidence of the agreement and avoid reliance on uncertain memory. If litigation ensues, however, one party may seek to introduce evidence of the earlier negotiations in an effort to show that the terms of the agreement are different than those shown in the writing. Faced with such a possibility, the parties may prefer to facilitate the resolution of disputes by excluding from the scope of their agreement those matters not reflected in the writing.

In common-law systems, the integrity of the writing is assured by the 'parol evidence rule', a rule with little counterpart in civil-law systems.⁸⁹ This rule may bar the use of extrinsic evidence—evidence outside the writing—to contradict and perhaps even to supplement the writing. The name of the rule is misleading, for it is not limited to oral (or 'parol') negotiations and may exclude such writings as letters, telegrams, memoranda, and preliminary drafts. Nor is it a rule of 'evidence' but one of substantive law.

⁸⁵ See eg § 150 II BGB. This 'mirror-image' rule has been softened somewhat in many legal systems to allow for contract formation where the offer and acceptance differ immaterially.

⁸⁶ For comparative accounts, see Kötz (n 12), 32 ff; von Mehren (n 60), nn 157 ff; Catherine Delorège, 'Le conflit né de la confrontation de conditions générales contractuelles et son incidence sur la formation des contrats', in Fontaine (n 62), 479 ff; Ernst A. Kramer, 'Battle of the Forms': Eine rechtsvergleichende Skizze mit Blick auf das schweizerische Recht', in *Gauch's Welt. Recht. Vertragsrecht und Baurecht. Festschrift für Peter Gauch* (2004), 493 ff; and see Art 2:209 PECL; Art 2.1.22 PICC.

⁸⁷ *Bulter Machine Tool Co Ltd v Ex-Cell-O Corp (England) Ltd* [1979] 1 WLR 401.

⁸⁸ § 2-207 UCC.

⁸⁹ Though French law, in Art 1341 *Code civil*, provides that parol may not vary or contradict certain writings. This provision has been relaxed judicially.

The rule is intended to give legal effect to the parties' intention to make their writing at least a final and perhaps also a complete expression of their agreement. If the parties had such an intention, the agreement is said to be *integrated* and the rule applies. If they intended the writing to be a final expression of the terms it contains, but not a complete expression of all the terms agreed upon—some terms remaining unwritten—the agreement is said to be *partially integrated* and terms remaining unwritten or negotiations is admissible to supplement the evidence of prior agreements or negotiations is admissible to supplement the writing though not to contradict it. If the parties intended the writing to be a complete expression of all the terms agreed upon, as well as a final expression of the terms it contains, the agreement is *completely integrated* and not even evidence of 'a consistent additional term' is admissible to supplement the writing. These preclusions, however, generally do not extend to usage or course of dealing.⁹⁰

In order to make it clear that a contract is completely integrated, agreements in common-law countries often contain what is commonly known as a 'merger clause', which merges prior negotiations into the writing by reciting that the writing contains the entire agreement. Courts have generally given effect to such clauses.⁹¹

When the interpretation of the language of a writing is in issue, an adjunct to the parol evidence rule known as the 'plain meaning rule' may protect the integrity of the writing. In determining the meaning of contract, courts in all legal systems generally consider themselves free to look to all the relevant circumstances, including evidence of prior negotiations, even if it shows that both parties attached to the contract language a meaning different from the one that would ordinarily be given to it. Under the plain meaning rule, however, a court may refuse to consider evidence of prior negotiations to interpret contract language in a completely integrated writing that the court considers unambiguous on its face. The essence of this rule is that there are some instances in which the meaning of language, when taken in context, is so clear that evidence of prior negotiations ought not to be used in its interpretation. Civil-law jurisdictions are less wedded to plain meaning.⁹²

⁹⁰ Restatement (Second) of Contracts § 213; Farnsworth (n 36, vol II), 219 ff; *Chitty on Contracts* (n 65, vol I), 752 ff.

⁹¹ cf also Art 2:305 PECL; Art 2.1.17 PICC.

⁹² See Art 1:56 *Code civil*; § 133 BGB; and see Stefan Vogenauer, in Mathias Schmoekel, Joachim Rückert, and Reinhard Zimmermann, *Historisch-kritischer Kommentar zum BGB* (vol I, 2003), §§ 133-157.

VII. PERFORMANCE AND BREACH

Legal systems show a wide variety of approaches with respect to the rights of a party that claims that the other party is in breach of contract. Two distinct questions may be posed. First, how is a court to determine whether there has been a breach of contract? Second, if there has been a breach, how is a court to determine whether that breach is serious enough to justify the aggrieved party in ending the contractual relationship?

1. Determining Whether There Has Been a Breach

As to the first question, there is an important difference between common-law and civil-law systems.⁹³ In common-law systems, the norm is that of strict performance. A party is expected to perform in accordance with the letter of the contract, and a failure to do so is actionable, without regard to the fault of the non-performing party. Furthermore, a failure to render strict performance is of itself actionable, with no requirement that the aggrieved party give any notice or make any protest.

Here civil-law systems often differ in two significant respects from their common-law counterparts. First, in some civil-law systems, notably those based on German law, fault helps determine whether there has been breach. In principle, a party can avoid liability for breach by proving that it used reasonable care under the circumstances; thus under German law, delay is not a breach unless the delay is due to some fact or behaviour on the part of the obligor for which the obligor is 'responsible'.⁹⁴ Second, unlike the common law, many civil-law systems are not unitary. The German system, for example, divides breaches into the categories of impossibility and delay, with a residual category of 'positive breach of contract'.⁹⁵

⁹³ For comparative discussions, see Zweigert and Kötz (n 2), 486 ff; G. H. Treitel, *Remedies for Breach of Contract: A Comparative Account* (1988); Gareth H. Jones and Peter Schlechtriem, 'Breach of Contract (Deficiencies in a Party's Performance)', in *International Encyclopedia of Comparative Law* (vol VII, ch 15, 1999); for an analytical discussion of the common law approach, see Smith (n 36), 376 ff.

⁹⁴ For comparative discussion of the relevance of fault, see Treitel, *Remedies* (n 93), 7 ff; Jones and Schlechtriem (n 93), nn 203 ff. International instruments such as CISG, PECL, and PICC do not base liability for breach of contract on fault. German law, however, has retained the fault criterion (even if only for the claim for damages) also under the new regime introduced as a result of the Modernization of the Law of Obligations Act in 2002: cf § 280 I 2 BGB.

⁹⁵ For the law before 2002, see the overview in Zweigert and Kötz (n 2), 488 ff; Zimmermann (n 9), 806 ff. The different types of breach survive as significant elements for determining the debtor's liability details even under the new law, albeit under a uniform umbrella concept of breach of duty (*Pflichtverletzung*). For details, see Reinhard Zimmermann, *The New German Law of Obligations: Historical and Comparative Perspectives* (2005), 39 ff. The international instruments adopt a unitary approach: see Arts 45 ff, 61 ff (breach of contract); Chs 8 and 9 PECL (non-performance); Ch 7 PICC (non-performance).

Impossibility of performance will also be treated differently depending on whether it is original or subsequent.⁹⁶ German law treats delayed performance as a special instance of default, and may not afford the aggrieved party the remedies for default by reason of the mere fact that the obligor failed to perform at the maturity date. The aggrieved party must make a protest (*Mahnung*) to put the other party in default and start a default period running, unless a time for performance has been fixed with reference to the calendar, or thirty days have passed after invoicing.⁹⁷ French law distinguishes between an obligation to achieve a specific result (*obligation de résultat*) and an obligation to use reasonable efforts to achieve a result (*obligation de moyens*), as would commonly be undertaken by a doctor or lawyer or a person agreeing to manage another's business. For the former the obligee need only prove non-performance, leaving the obligee to prove excuse (*cause étrangère*); for the latter the obligee must prove both non-performance and fault. In principle no claim for damages, whether for delay or non-performance, can ordinarily be brought until the other party has been put in default by a formal protest (*mise en demeure*), though this is unnecessary if, for example, there is a fixed period for performance.⁹⁸

2. Determining Whether Breach Justifies Ending Relationship

A mere breach or other failure of performance does not necessarily entitle the aggrieved party to end the contractual relationship, at least in the absence of a specific cancellation provision. A serious failure of performance, however, generally allows the aggrieved party at its election to end that relationship. Legal systems differ with respect to how serious a default is required to justify ending the contractual relationship, with respect to the extent to which the aggrieved party is entitled to use self-help in ending that relationship, and with respect to the nature of the aggrieved party's rights when the relationship is ended.⁹⁹

English courts often focus on the significance of the relevant term, holding that the term must be 'essential' in order to justify ending the contractual relationship. In dealing with contracts for the sale of goods, they distinguish between conditions

⁹⁶ §§ 283, 311 a BGB; see Zimmermann, *New German Law of Obligations* (n 95), 52 f, 62 ff.

⁹⁷ § 286 BGB. For comparative discussion, see Treitel, *Remedies* (n 93), 136 ff; CISG, PECL, and PICC do not recognize a requirement of notice.

⁹⁸ For an overview of the French system, see Zweigert and Kötz (n 2), 496 ff.

⁹⁹ For comparative discussion, see Treitel, *Remedies* (n 93), 318 ff; Axel Flessner, 'Befreiung vom Vertrag wegen Nichterfüllung', (1997) 5 *Zeitschrift für Europäisches Privatrecht* 255 ff; for the international development, see Peter Schlechtriem, 'Abstandnahme vom Vertrag', in Jürgen Basedow (ed), *Europäische Vertragsrechtsvereinheitlichung und deutsches Recht* (2000), 159 ff; Ingeborg Schwenzer, 'Rechtsbeheile und Rückabwicklungsmodelle im CISG', in den European und UNIDROIT Principles, im *Gandolf-Entwurf* und im deutschen Schuldrechtsmodernisierungsgesetz, in Peter Schlechtriem (ed), *Wandelungen des Schuldrechts* (2002), 37 ff.

and warranties. A condition is an important term, a breach of which may give a right to end the contractual relationship, while a warranty is a subsidiary term, a breach of which gives right to damages only.¹⁰⁰

This distinction is unknown in the United States where the focus is generally on the magnitude of the breach and not on the significance of the term. When the parties have exchanged promises, courts generally regard substantial performance by each party as a 'constructive' (or implied) condition of the other party's obligation to perform. If a party's non-performance is significant enough to be characterized as 'material', the non-performance at least justifies the aggrieved party in invoking the constructive condition and suspending its own performance, giving the other party a chance to cure the non-performance. If the non-performance continues without cure for a significant time, the aggrieved party is entitled to end the relationship.¹⁰¹

In common-law systems, an aggrieved party that is justified in ending the contractual relationship is entitled to declare the contract cancelled by giving notice to the other party. Of course, an aggrieved party runs the risk of overstepping the bounds of the law, for ending the contractual relationship and refusing to perform without justification is itself a material breach.

Under German law, the other party's failure to perform does not, as a rule, itself entitle an aggrieved party to end the contractual relationship. If the debtor does not perform, or does not perform properly, at the time when he has to effect performance, the creditor must generally allow the debtor a grace period. If the debtor does not perform within that period, the creditor may terminate the contract, whether or not the debtor was at fault.¹⁰² However, he is automatically released from his obligation in cases where the debtor becomes free as a result of the fact that performance has become impossible.¹⁰³

Under French law, the right to end the contractual relationship follows from the

¹⁰⁰ For details, see Treitel, *Contract* (n 34), 788 ff; for the historical background, see Reinhard Zimmermann, 'Heard Melodies are Sweet, but those Unheard are Sweeter . . .': *Conditio Tacita*, Implied Condition und die Fortbildung des europäischen Vertragsrechts', (1993) 193 *Archiv für die civilistische Praxis* 153 ff.

¹⁰¹ Farnsworth (n 36, vol II), 470 ff. For the sale of goods, any departure from 'perfect tender' allows the buyer to declare total breach. This apparently harsh rule is mitigated by a broad cure right and by exceptions for installment contracts: §§ 2-508, 2-601, 2-612 UCC.

¹⁰² § 323 BGB; for details, see Zimmermann, *New German Law of Obligations* (n 95), 66 ff. If it is kept in mind that there are exceptions to the requirement of fixing a grace period for certain cases of serious breach, the practical result will often be the same as under Arts 9:301 (1) PECL and 7:3:1 PICC. Here, termination is available in cases of fundamental breach of contract, but the creditor may elevate a non-fundamental delay of performance to a fundamental one by means of granting a grace period: Arts 8:106 (3), 9:301 (2) PECL, 7:1:5 (3) PICC; cf also Arts 47, 49, 63, 64 CISG. The notion of essential breach is defined in Arts 25 CISG and 8:103 PECL; cf also Art 7:3:1 (2) PICC and Gerhard Lubbe, 'Fundamental Breach under the CISG: A Source of Fundamentally Divergent Results', (2004) 68 *RabelsZ* 444 ff.

¹⁰³ § 326 BGB; for a comparable rule in the international instruments, see Art 9:303 (4) PECL.

view that every synallagmatic contract is regarded as concluded under a resolute condition of proper performance of the reciprocal duties. As under German law, some obligations are characterized as 'ancillary' or 'secondary' and are sanctioned only by damages. The contract is not, however, 'resolved' as a matter of law by the other party's failure to perform its undertaking, and the aggrieved party can either claim performance or put an end to the relationship.¹⁰⁴ If the aggrieved party claims the latter, self-help is severely limited, for *résolution* can be sought only in legal proceedings.¹⁰⁵ It is for the judge, who has broad discretion, to determine the gravity of the breach and order *résolution*, grant a period of grace (*délai de grâce*) during which the other party must render performance, uphold the contract, or, in the case of a contract for the sale of goods, order price reduction for defects that are not serious. There are some exceptions, and legal proceedings are not required, for example, if the contract contains an express provision for termination on occurrence of a stated event. Furthermore, if a fixed time is provided for a buyer to take delivery of goods, the seller can regard the contract as terminated if the buyer does not take delivery within that time.¹⁰⁶

Various terms are used for the aggrieved party's ending the contractual relationship: termination, cancellation, rescission, avoidance. Ending the relationship necessarily liberates the parties from their remaining obligations of performance. Like full performance, it results in the discharge of the aggrieved party.

The doctrine of anticipatory repudiation, which enables an aggrieved party to claim damages even before performance becomes due, is often regarded as an important common-law peculiarity.¹⁰⁷ If, before the time for performance of a party's obligations has arrived, that party repudiates by stating that it will not or cannot perform those obligations, the aggrieved party need not wait until the time for performance has arrived but can immediately terminate the contract and claim damages for total breach. Indeed, in the United States even insecurity as to performance allows the insecure party to demand adequate assurances of performance from the other party, suspend its own performance if it is commercially reasonable to do so, and, should the assurances not issue, declare the contract repudiated.¹⁰⁸ Anticipatory repudiation is also, however, known outside the common-law world. Thus, German law recognizes the possibility that an

¹⁰⁴ Art 1184 *Code civil*, for historical background, see Boyer, *Recherches historiques sur la résolution des contrats* (1924), II ff, 381 ff.

¹⁰⁵ The *Cour de cassation* has now, however, recognized the possibility of a unilateral, extrajudicial termination of contract in cases of serious breach: Cass 1e civ, 13 January 1998, D 1999, 197; Cass 1e civ, 20 February 2001, D 2001, 1568; and see Fages, (2003) 11 *Zeitschrift für Europäisches Privatrecht* 533 ff; Terré *et al* (n 41), nos. 643 ff.

¹⁰⁶ Art 1657 *Code civil*.

¹⁰⁷ The doctrine dates back to the decision of *Hochstetler v La Tour* (1853) 2 El & Bl 678; cf Michael Mustill, *Anticipatory Breach of Contract: The Common Law at Work*, Butterworth Lectures 1989-90 (1990), 1 ff.

¹⁰⁸ § 2-609 UCC; Restatement (Second) of Contracts § 351.

anticipatory repudiation may justify termination of the contract and/or may allow the aggrieved party to claim damages.¹⁰⁹

VIII. CHANGED CIRCUMSTANCES— SUPERVENING EVENTS

It was pointed out earlier that courts look to terms implied in law in order to fill gaps in the language of the contract. An important situation in which courts do this is when supervening events result in changed circumstances not dealt with in the parties' agreement. The implied terms used to fill such gaps are default rules, and the parties are free to contract around them. Legal systems agree that if the changed circumstances make one party's performance impossible, that party is discharged from its duty of performance, at least if the impediment is not that party's responsibility. Whether excuse will result from mere impracticability or from frustration of purpose is less uniform.¹¹⁰

In civil-law systems, the resolution of such matters is often viewed as a conflict between two polar positions—the principle of *pacta sunt servanda* (contracts are to be observed) and the doctrine of *clausula rebus sic stantibus* (a contract depends on the continuation of circumstances existing at the time of formation).¹¹¹

In the middle of the nineteenth century, French law was crystallized in a series of decisions favouring the principle of *pacta sunt servanda*.¹¹² Force majeure as an excuse is limited to an event that is unforeseeable, irresistible, and that makes performance absolutely impossible. Under the doctrine of *imprévision* of French administrative law, courts have modified contracts in the face of profound and surprising hardship in order to maintain public services and financial equilibrium.¹¹³ *Imprévision*

¹⁰⁹ See now §§ 281 II, 323 II no. 1, 323 IV BGB and Zimmermann, *New German Law of Obligations* (n 95), 75. For a detailed discussion of the legal position under the old law (ie before the reform of 2002), see Ulrich Huber, *Leistungsstörungen* (vol II, 1999), 565 ff. The problem of insecurity is dealt with in § 321 BGB (*Unsicherheitsstörung*). For French law, see Simon Whittaker, 'How does French Law Deal with Anticipatory Breach of Contract?', (1996) 45 *JCLQ* 662 ff; for comparative discussion, see F. Dawson, 'Metaphors and Anticipatory Breach of Contract', (1981) 40 *Cambridge LJ* 83 ff; Treitel, *Remedies* (n 93), 379 ff; Jones and Schlechtriem (n 93), nn 139 ff; and see Art 72 CISG, Art 9:304 PECL, Art 7:3.3 PICC.

¹¹⁰ For comparative discussion, see Zweigert and Kötz (n 2), 516 ff; Gordley, *Foundations* (n 43), 347 ff; Case 25 in Zimmermann and Whittaker (n 11), 557 ff; and see now Art 6:111 PECL, 6:2-1:3 PICC.

¹¹¹ Zimmermann (n 9), 579 ff.

¹¹² See, in particular, Cass civ, 6 March 1876, D 1976, I, 193 (*Canal de Craponne*).

¹¹³ *Conseil d'État*, 30 March 1916, D 1916, III, 25.

has lately made incursions into purely private transactions, however. This appears to be part of a more comprehensive re-orientation of French contract law under the aegis of good faith.¹¹⁴

German courts, on the other hand, accepted the principle that judges have the power within narrow bounds to release parties from their contractual obligations. This is so not only in cases of impossibility¹¹⁵ but also for what has been termed *Störung der Geschäftsgrundlage* (disappearance of the foundation of the contract). Thus it was held that a lease can be adjusted by raising rent to take account of greatly increased cost to the landlord and that debts could be revalorized to take account of the severe inflation of the early 1920s.¹¹⁶

The common law also accepts the principle that courts have a power within narrow bounds to release parties from their contractual obligations. English courts ask whether as a result of the impediment performance would be 'fundamentally different'. American courts ask whether the non-occurrence of the impediment was a 'basic assumption' on which the contract was made. In the United States the term 'impracticability' rather than 'impossibility' is used to suggest that a party may be discharged if performance becomes much more burdensome even though not absolutely impossible.¹¹⁷ Common-law courts have traditionally rejected the notion that they have any power to adapt or modify contracts in the light of supervening events. If those events satisfy the requirements of discharge, the contract is wholly discharged, though courts have been reluctant to do this if the parties could reasonably have dealt with the events expressly. English courts developed the doctrine of 'frustration of purpose', under which a party may be discharged if the other party's return performance has become so worthless as to frustrate the first party's purpose in making the contract. American courts have followed suit.¹¹⁸

¹¹⁴ See Cass com, 3 November 1992, Bull civ IV, no. 338; Cass com, 24 November 1998, Bull civ IV, no. 277; and see Fages, (2003) 11 *Zeitschrift für Europäisches Privatrecht* 519 f.

¹¹⁵ Here the claim for specific performance is excluded according to § 275 I BGB. In cases of 'practical impossibility' and 'moral impossibility' the debtor is given the right to refuse to perform (§ 275 II, III BGB). 'Practical impossibility' must be distinguished from 'economic impossibility'; for details, see Zimmermann, *New German Law of Obligations* (n 95), 43 ff.

¹¹⁶ See eg RGZ 100, 129 ff; 107, 78 ff; Bernd Rührens, *Die unbegrenzte Auslegung* (6th edn, 2005), 36 ff and 66; Klaus Luig, 'Die Kontinuität allgemeiner Rechtsgrundsätze: Das Beispiel der clausula rebus sic stantibus', in Reinhard Zimmermann, Rolf Knütel, and Jens Peter Meincke (eds), *Rechtsschritte und Privatrechtsdogmatik* (1999), 171 ff; Christian Reiter, *Vertrag und Geschäftsgrundlage im deutschen und italienischen Recht* (2002). This is a judge-made doctrine which has, however, recently been included in the code: § 313 BGB.

¹¹⁷ Farnsworth (n 36, vol II), 632 ff.

¹¹⁸ See eg *Taylor v Caldwell* (1863) 3 B & S 826; *Krell v Henry* [1903] 2 KB 740 (CA); *Restatement (Second) of Contracts* § 265; See Zimmermann, (1993) 193 *Archiv für die civilistische Praxis* 121 ff, 137 ff; G. H. Treitel, *Frustration and Force Majeure* (1994); *idem*, *Contract* (n 34), 866 ff; Martin Schmidt-Kessel, *Standards vertraglicher Haftung nach englischem Recht* (2003).

IX. REMEDIES

1. Damages

When one party breaches a contract, the central purpose of most legal systems is to put the aggrieved party in the position in which it would have been had the contract been performed. Often this is attempted by an award of money damages that, in effect, imposes a new obligation—one to pay money—for the breach of the old. The objective of money damages is to redress loss by compensating the promisee and not to deter breach by punishing the party in breach.¹¹⁹ For this reason, punitive damages are generally not available for breach of contract. An aggrieved party will often be content with an award of monetary damages, as may be the case if that party can use the money to purchase substitute goods or services elsewhere. This does not, to be sure, take account of the costs of litigating the dispute which may be necessary to get an award of damages.

2. Stipulated Damages

In some cases, the parties will want to include in their contract a provision stipulating the sums payable as damages in the event of various possible breaches. Such a provision is commonly regarded as both a ceiling and a floor for recovery. The enforceability of such stipulated damage provisions varies among legal systems.¹²⁰

Civil-law systems are generally receptive to such provisions. French law starts from a principle of literal enforcement of provisions stipulating damages. Some years ago, however, the *Code civil* was amended to allow the judge to reduce or increase stipulated damages if the clause is manifestly excessive or derisory, in order to deal with abuses in certain types of transactions.¹²¹ In German law, stipulated damage clauses are generally enforceable, but if the amount is unreasonably high the court can reduce it to a reasonable sum.¹²²

The common law takes a more restrictive approach. The most important restriction is the one denying the parties the power to stipulate in their contract a

sum of money payable as damages that is so large as to be characterized as a 'penalty'. If the stipulated sum is significantly larger than the amount required for compensation, the stipulation may have an *in terrorem* effect on the promisor that will deter breach, perhaps inefficiently, by compelling performance. Common-law courts therefore exercise a power to condemn stipulated damage provisions that depart from the compensation principle, that is, contractual clauses providing for what are called penalties rather than for what are called liquidated damages.

If a stipulated damage provision is condemned as a penalty, the remainder of the agreement stands, and the aggrieved party is remitted to conventional damages for breach of that agreement. Drawing a line between liquidated damages and penalties has proved no simple matter for common-law courts. Several factors may be relevant. The most important is that the stipulated sum must be a reasonable forecast of the presumed loss, viewed as of the time when the contract is made. A second factor is that the damages to be anticipated as resulting from the breach must be uncertain in amount or difficult to prove.¹²³

3. Specific Relief

Sometimes the aggrieved party will not find monetary damages satisfactory and will prefer specific relief. Of course if the promise of the party in breach was simply to pay a sum of money, the effect of a judgment for monetary damages is to give the aggrieved party specific relief. But it is not always easy for a court to place a monetary value on the loss occasioned by a breach. The broken promise may be one to deliver goods that have special 'sentimental' value to the aggrieved party, or it may be one that requires performance over a long period of time so that it will be difficult to forecast damages.

It is everywhere agreed that a buyer of goods must not resort to self-help to seize goods from a seller or use similar private means to coerce performance. An aggrieved party must go to court to get specific relief. Civil-law courts start with the principle that specific relief for breach of contract is generally available. Common-law courts, on the other hand, start with the principle that specific relief for breach of contract is an equitable remedy that will only be ordered when damages or other common-law remedies afford inadequate protection to the aggrieved party.¹²⁴

¹¹⁹ These damages include only foreseeable losses, though French law makes an exception in cases of fraud, for which causation is the only limit. Arts 1150 f *Code civil*. See further Zimmermann (n 9), 839 ff; Treitel, *Contract* (n 34), 965 ff; Gordley, *Foundations* (n 43), 395 ff; Smith (n 36), 409 ff; Art 74 CISG; Art 9:503 PECL; Art 7:4-4 PICC; Florian Fauts, *Die Vorhersagbarkeit des Schadens gemäß Art. 74 S. 2 UN-Kaufrecht* (CISG) (1996).

¹²⁰ Zimmermann (n 9), 95 ff; Ralf-Peter Sossna, *Die Geschichte der Begrenzung von Vertragsstrafen* (1993); Treitel, *Remedies* (n 93), 208 ff; Harriet Schelhaas, *Het boetebeding in het Europees contractrecht* (2004); Art 9:509 PECL; Art 7:4-13 PICC.

¹²¹ Art 1152 al 2 *Code civil*. ¹²² § 343 BGB.

¹²³ For details, see Treitel, *Contract* (n 34), 999 ff; *idem*, *Remedies* (n 93), 228 ff; Farnsworth (n 36, vol III), 300 ff.

¹²⁴ For historical and comparative analyses, see Zimmermann (n 9), 770 ff; Zweigert and Kötz (n 2), 470 ff; Treitel, *Remedies* (n 93), 43 ff; Gordley, *Foundations* (n 43), 388 ff; Shael Herman, 'Specific Performance: A Comparative Analysis', (2003) 7 *Edinburgh LR* 5 ff, 194 ff; and see Smith (n 36), 398 ff; Melvin A. Eisenberg, 'Actual and Virtual Specific Performance, the Theory of Efficient Breach, and the Indifference Principle in Contract Law', (2005) 23 *California LR* 975 ff.

In German law, a contracting party is entitled to demand specific relief. The law subjects this to exceptions, as where specific relief is impossible. If the obligation is to deliver movable property, enforcement involves the aid of an official who takes the property from the party in breach and gives it to the aggrieved party. If the obligation is to do an act that can be performed by another person, as in the case of a contract to build or to deliver generic goods, the aggrieved party can ask the court for authorization to have the act done at the expense of the party in breach, and if an act cannot be performed by another person, or where performance consists of forbearance, failing to comply with the court's judgment may be punished by fine and imprisonment.¹²⁵

The French and related systems also recognize in principle the availability of *exécution en nature* or what is called 'direct' execution. French law, however, proceeds in a very grudging manner in enforcing judgments of specific relief and the general availability of such relief is subject to an important exception. The *Code civil* distinguishes between obligations to transfer property (*obligations de donner*) on the one hand and obligations to do or not to do (*obligations de faire ou de ne pas faire*) on the other hand. Obligations of the former kind may be specifically enforced by having an officer of the court put the aggrieved party into possession, though otherwise state actors will not use force in support of *exécution en nature*.¹²⁶ If the obligation is to deliver generic goods, the court may authorize the purchaser to buy replacement goods at the seller's expense.¹²⁷ Under the *Code civil*, however, obligations to do or not to do are sanctioned only by damages and cannot be directly enforced, at least in the realm of personal services.¹²⁸ To help enforce promises, whether those giving rise to specific performance or merely to damages, the courts also developed the *astreinte*.¹²⁹ It usually takes the form of a judgment for performance or damages, coupled with a condemnation by which the party in breach must pay a fixed sum for each day or other period that that party remains in default. If, at the end of the period, the party in breach has still not performed, the aggrieved party may apply for a liquidation of the *astreinte* and for the issue of a further *astreinte*. The *astreinte* is not available to compel the performance of personal services, though it may be used to enforce negative injunctions. In contrast to German law, the fine is payable to the breached-against party, not to the state.¹³⁰

¹²⁵ §§ 883, 887, 888, 890 German Civil Procedure Act; and see Zweigert and Kötz (n 2), 472 ff. Treitel, *Remedies* (n 93), 51 ff.

¹²⁶ Art 826 *Code de procédure civile*.

¹²⁷ Art 1142 *Code civil* (based on the maxim of 'nemo potest praecise cogi ad factum' of the *ius commune*).

¹²⁸ Art 1144 *Code civil*.

¹²⁹ It has since been codified in Law No. 91-650 of 9 July 1991, Arts 33-7.

¹³⁰ For details of the French system, see Zweigert and Kötz (n 2), 475 ff.; Treitel, *Remedies* (n 93), 55 ff.; Oliver Remien, *Rechtsverwirklichung durch Zwangsgeld* (1992), 33 ff.

The common law takes a very different approach to specific relief, one shaped by history.¹³¹ Save for exceptional actions like replevin for goods, the law courts granted only substitutional relief, and the typical judgment declared that the plaintiff recover from the defendant a sum of money. Aside from the law courts stood a separate and parallel system of courts of Equity, presided over by a chancellor, and claimants could proceed in either law or Equity. Courts of Equity, in contrast to courts of law, granted direct relief for breach of contract in the form of an order of specific performance. In addition, they might, instead of ordering specific performance, direct a party by means of an injunction to refrain from doing a specified act. Where the performance due under the contract consists simply of forbearance, the effect of an injunction is to order specific performance. Often, however, a negative injunction is used as an indirect means of enforcing a duty to act. Decrees in Equity came to take the form of a chancellor's personal command to the defendant to do or not to do something, on pain of being held in contempt—either criminal contempt, at the instance of the judge, or civil contempt, at the instance of the plaintiff. Either could subject the defendant to imprisonment or fine—drastic remedies, which yielded significant limitations on their employ.

The most important historical limitation grew up out of the circumstance that the chancellor had originally granted equitable relief in order to remedy the deficiencies of the common law. Equitable remedies were therefore readily characterized as 'extraordinary'. When, during a long jurisdictional struggle in England between the two systems of courts, some means of accommodation was needed, an 'adequacy' test was developed to prevent the chancellor from encroaching on the powers of the common-law judges. Equity would stay its hand if the remedy at law of an award of damages at law was 'adequate' to protect the injured party.

To the 'adequacy' test was added the gloss that damages were ordinarily adequate—a gloss encouraged by a confidence that a market economy ought to enable the injured party to arrange a substitute transaction. English courts came to regard money damages as the norm and specific relief as the deviation. Only for land, which English courts regarded with particular esteem, was a general exception made. Each parcel, however ordinary, was considered 'unique', and its value was regarded as to some extent speculative. American courts act similarly, though they are more willing to consider routine transactions in land fungible and susceptible to damages, rather than specific performance.¹³² In addition, damages will not be adequate to protect the injured party's expectation if the loss caused by the breach cannot be estimated with sufficient certainty, as with contracts involving matters of taste or sentiment.¹³³ It may also be the case even concerning contracts

¹³¹ For what follows, see Rheinstein (n 6), 138 ff.; Zweigert and Kötz (n 2), 479 ff.; Treitel, *Remedies* (n 93), 63 ff.; *idem*, *Contract* (n 34), 1019 ff.; Gareth Jones and William Goodhart, *Specific Performance* (2nd edn, 1990); Rantworth (n 36, vol III), 161 ff.

¹³² See eg *Van Wagner Advertising Corp v S & M Enters*, 492 NE2d 756 (New York, 1986).

¹³³ See eg *Falcke v Gray*, 4 Drew 651 (Ch 1859); Restatement (Second) of Contracts § 360.

of a more commercial character, where an extended period for performance renders impossible the accurate forecast of damages at trial.

A second historical limitation, or group of limitations, is based on the concept that equitable relief is discretionary, allowing the chancellor to withhold relief if considerations of fairness or morality dictated. Relief is sometimes refused on the ground that it would impose on the court burdens of supervision that are disproportionate to the advantages to be gained. Because the restraints on the availability of equitable relief have traditionally been viewed as limitations on the court's jurisdiction, it has been generally supposed that the parties cannot enlarge the availability of specific performance or injunction by contract.¹³⁴

In practice, the difference between the availability of specific relief in common-law systems and in civil-law systems may not be as great as at first appears.¹³⁵ The contemporary approach in common-law nations is to compare remedies to determine which is more effective in affording suitable protection to the injured party. The concept of adequacy has thus tended to become relative, and the comparison more often leads to granting equitable relief than was historically the case. In civil-law countries, the theoretical availability of specific relief may have limited practical importance because of a preference for money damages. The buyer that fails to receive promised goods may well find it preferable to purchase substitute goods on the market and claim money damages from the seller rather than seek to compel the seller to provide the goods or ask for some other form of specific relief. Nevertheless the attitudes of civil-law and common-law systems toward specific relief remain fundamentally different.

X. RIGHTS OF THIRD PARTIES

So far the discussion has focused on the rights of the promisor and promisee. Many contracts, however, implicate the rights of others—insurance contracts most notably, but also contracts with attorneys to make wills, contracts between manufacturer and retailer to supply goods ultimately sold to consumers, and so on.

¹³⁴ Farnsworth (n 36, vol III), 181 ff.

¹³⁵ cf also the compromise solutions adopted by Arts 9:101–903 PECL; Arts 7:2.1–7:2.5 PICC; Alfred Cockrell, 'Breach of Contract', in Reinhard Zimmermann and Daniel Visser (eds), *Southern Cross: Civil Law and Common Law in South Africa* (1996), 325 ff; Eric Clive and Dale Hutchinson, 'Breach of Contract', in Reinhard Zimmermann, Daniel Visser, and Kenneth Reid (eds), *Mixed Legal Systems in Comparative Perspective* (2004), 193 ff; and see Treitel, *Remedies* (n 93), 71 ff; Art 28 CISG.

How civil-law and common-law systems deal with third-party rights and remedies is far from uniform.¹³⁶

In all systems, contracting parties may expressly grant rights to non-parties that allow the non-parties to enforce the contract. This departs from Roman law, but became necessary as the institution of insurance grew during the nineteenth century. English law lagged materially in this regard, though the Contracts (Rights of Third Parties) Act of 1999 brought England into conformity here.¹³⁷ Civil-law Third Parties) Act of 1999 brought England into conformity here.¹³⁸ Thus, for jurisdictions are also willing to extend third-party rights by implication,¹³⁹ thus, for instance, where the lease of one property provides that it cannot be used for the same purposes as another property, the proper construction of that agreement may lead to the conclusion that the lessee of the second property has a direct claim against the lessee of the first property. The same can be said of American law.¹³⁹ English law does not yet recognize implicit intent. Much the same effect can sometimes be reached through tort law, which cares less about issues of privity. In any case, the rights granted to the third party are subject to any defenses or limitations created under the original contract.¹⁴⁰

Most systems agree that the parties to a contract may modify or rescind the rights of third parties until the third party notifies the contracting parties that he accepts the right. English and American law go further by allowing reliance to yield irrevocability, while German law looks more generally at the intent of the contracting parties.¹⁴¹ Finally, there remains some difference as to the promisee's ability to enforce the promise made for the benefit of the third party. Civil-law systems and American law allow the promisee to enforce the promise specifically and to collect damages due to the third party.¹⁴² In contrast, English law remains unclear, as the recent statute was silent on this issue.

¹³⁶ For historical and comparative discussion, see Zimmermann (n 9), 34 ff; Walter Beyer, *Der Vertrag zugunsten Dritter* (1995); Zweigert and Kötz (n 2), 456 ff; Kötz (n 12), 245 ff; Hein Kötz, 'Rights of Third Parties: Third Party Beneficiaries and Assignment', in *International Encyclopedia of Comparative Law* (vol VII, ch 13, 1992), nn 2 ff (though all of these have been written before the coming into force of the Contracts (Rights of Third Parties) Act of 1999 in England); Vernon Valentine Palmer, 'Contracts in Favour of Third Persons in Europe: First Steps Toward Tomorrow's Harmonization', (2003) 11 *European Review of Private Law* 8 ff.

¹³⁷ On the Contracts (Rights of Third Parties) Act of 1999, see Robert Merkin (ed), *Privy of Contract: The Impact of the Contract (Rights of Third Parties) Act 1999* (2000); Treitel, *Contract* (n 34), 651 ff; Hans-Friedrich Müller, 'Die Einführung des Vertrages zugunsten Dritter in das englische Recht', (2003) 67 *RabelsZ* 140 ff; Robert Stevens, 'The Contracts (Rights of Third Parties) Act 1999', (2004) 120 *IQJ* 292 ff.

¹³⁸ cf also Art 6:110 (1) PECL; Art 5:2.1 PICC.

¹³⁹ Though the law of sales is unclear about questions of privity, with the Uniform Commercial Code permitting great variation among the states: § 2-318 UCC.

¹⁴⁰ Art 5:2.4 PICC.

¹⁴² Kötz, 'Rights of Third Parties' (n 136), nn 54 ff.

XI. A TENTATIVE CONCLUSION

The overview provided in this chapter has revealed a number of differences between civilian legal systems and the common law, and also between French and German law as two main exponents of the civil-law tradition and, to some extent, even between English and US-American law. The same is true of other major issues in the field of general contract law that have not been touched upon: contractual capacity,¹⁴³ mistake,¹⁴⁴ agency,¹⁴⁵ or assignment.¹⁴⁶ But the overview has also shown that there is a gradual convergence.¹⁴⁷ It is due to developments in all of the four legal systems covered in this chapter: English, US-American, French, and German law. And it has enabled scholars from around the world to elaborate an international restatement of contract law (the UNIDROIT Principles of International Commercial Contracts) and scholars from all the member states of the European Union to formulate a restatement of European contract law (the Principles of European Contract Law). These documents, in turn, may provide guidance for the future development of the national contract laws. They are discussed in some detail in Chapters 16 and 29 in this *Handbook*.

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¹⁴³ See Zweigert and Kötz (n 2), 348 ff; Kötz (n 12), 97 ff.

¹⁴⁴ Zimmermann (n 9), 583 ff; Martin J. Schermaier, *Die Bestimmung des wesentlichen Irrtums von den Glossatoren bis zum BGB* (2000); Zweigert and Kötz (n 2), 410 ff; Kötz (n 12), 171 ff; Ernst A. Kramer, *Der Irrtum beim Vertragsschluss: Eine weltweit rechtsvergleichende Bestandsaufnahme* (1998); Melvin A. Eisenberg, 'Mistake in Contract Law', (2003) 91 *California LR* 1573 ff; Ruth Seton-Green (ed), *Mistake, Fraud and Duties to Inform in European Contract Law* (2005); Gordley, *Foundations* (n 43), 397 ff; Art 4:103 PECL; Arts 3-4 f PICC.

¹⁴⁵ Zimmermann (n 9), 45 ff; Wolfram Müller-Freienfels, *Stellvertretungsregeln in Einheit und Vielfalt* (1982); Zweigert and Kötz (n 2), 431 ff; Kötz (n 12), 217 ff; Chapter 3 of PECL; Chapter 2, Section 2 of PICC.

¹⁴⁶ Zimmermann (n 9), 58 ff; Klaus Luig, *Zur Geschichte der Zessionslehre* (1966); Bruno Huwiler, *Der Begriff der Zession in der Gesetzgebung seit dem Vernunftrecht* (1975); Zweigert and Kötz (n 2), 442 ff; Kötz (n 12), 263 ff; Hein Kötz, 'Rights of Third Parties' (n 136), nn 58 ff; Chapter 11 of PECL; Chapter 9 of PICC.

¹⁴⁷ See, as far as the civil-law/common-law dichotomy is concerned, Basil Markesinis, *The Gradual Convergence: Foreign Ideas, Foreign Influences and English Law on the Eve of the 21st Century* (1994); James Gordley, 'Common Law and Civil Law: eine überholte Unterscheidung', (1993) 1 *Zeitschrift für Europäisches Privatrecht* 498 ff; Reinhard Zimmermann, 'Savigny's Legacy: Legal History, Comparative Law, and the Emergence of a European Legal Science', (1996) 112 *IQR* 576 ff.

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