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## The Impact of Harmonized European Private Law and the Acquis Communautaire on Spanish Law

Luz M. Martínez Velencoso

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**THE IMPACT OF HARMONIZED EUROPEAN  
PRIVATE LAW AND THE *ACQUIS COMMUNAUTAIRE*  
ON SPANISH LAW**

Luz M. Martínez Velencoso\*

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ABSTRACT

*Globalisation has seen the development of a body of autonomous legal rules of international trade that bridge the gap between the two main legal families (common law and civil law). These new rules focus on the function rather than on the dogmatic origin or legal tradition behind a particular norm or principle. In Europe, there are various texts that harmonize private law and which conform to this model, such as the PECL, the DCFR or the CESL.*

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\* Full Professor of Civil Law, University of Valencia, Spain. Ph.D. from Valencia University and Legum magister from Humboldt Universität Berlin. Member of the Humboldt Foundation Network. Her research and teaching interests are in comparative law, property law, contract law, land law, and law and economics. She has been a participant in the Common Core of European Private Law Project since 2003.

*Within the European Union, this process of informal and decentralized rulemaking has not yet resulted in the enactment of a European Civil Code (as even the CESL enactment has failed), but it has influenced national law (the modernization of the German BGB, the Dutch Civil Code, and the reform of the French Civil Code). This direct influence on national law constitutes one of the aims of these harmonizing legal texts as stated in the introduction to the “Draft Common Frame of Reference.”*

*In Spain, the Civil Code enacted in 1889 has not been modernized, although the Supreme Court has seen harmonized European Law as an instrument to integrate national law, especially through the construction of a new system of contractual liability (providing a unitary concept of non-performance and fundamental non-performance, rules regarding termination of contract, and change of circumstances), recognising that the solutions of the Civil Code are mostly unsuitable for the new social reality.*

*Otherwise the construction of the *acquis communautaire* has delivered a body of norms aimed at the protection of consumers (generally as the result of the transposition of EU legislation). This large volume of special regulations has been gathered together in a single “Consumer Protection Act” in Spain. In a different way, other countries such as Germany or the Netherlands have recently made the decision to incorporate consumer protection regulations into their civil codes.*

Keywords: harmonized European private law, *acquis communautaire*, modernization of European Civil Codes

## I. INTRODUCTION

The clear tendency to modify the traditional civil codes of the late 19th century and the legal principles of the 20th,<sup>1</sup> permits us to talk of a process of recodification in the 21st century. This may be

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1. It has happened not only in Europe, with the examples of the German, Dutch and French Civil Codes, but also in other countries like Japan. The Japanese Civil Code, 110 years since its enactment, is in the process of a fundamental reform, particularly in the field of the law of obligations.

due to a variety of reasons, but one of them is undoubtedly the fact that the social and economic premises of civil society upon which those codes were built have been transformed.

Another element to be considered is the existence of an increasingly harmonized body of transnational and international contract law formulated as a response to the rapid globalisation of the market economy. This has also contributed to bringing together the civil law and common law, traditionally split as two different systems.<sup>2</sup> Some of the normative frameworks that have contributed to bridging the differences inside Europe are the United Nations Convention on Contracts for the International Sale of Goods (CISG<sup>3</sup>), the UNIDROIT Principles of International Commercial Contracts, the Principles of European private law (UNIDROIT Principles), the Draft Common Frame of Reference (DCFR) and the Common European Sales Law (CESL<sup>4</sup>).

A further impetus for change has been the necessities of legal practice, as civil law courts have seen the need to create a huge collection of case-law-like norms outside the letter of the civil codes in order to make their application practicable. All of these changes indicate the necessity of both a re-examination of the Spanish Civil Code's guiding principles and a recodification process.<sup>5</sup> In 2009, the

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2. European harmonized legal texts have been a source of inspiration for national legislators around Europe. In some cases because the traditional civil codes were found to be outdated (as in Germany), in other cases because the political situation has changed, as has been the case of post-communist Eastern Europe. In relation to the latter case, see Lajos Vékás, *About Contract Law in the New Hungarian Civil Code*, in 6 EUROPEAN REVIEW OF CONTRACT LAW 95-98 (Stefan Grundmann ed., de Gruyter 2010); TADAS ZUKAS, EINFLUSS DER "UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS" UND DER "PRINCIPLES OF EUROPEAN CONTRACT LAW" AUF DIE TRANSFORMATION DES VERTRAGSRECHTS IN LITAUEN (Stämpfli 2011); Mónika Jónzon, *The Influence of European Private Law on the New Romanian Civil Code*, 3 ZEITSCHRIFT FÜR EUROPÄISCHES PRIVATRECHT 568 (2012).

3. The United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, 1489 U.N.T.S. 3 [hereinafter CISG].

4. *Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law*, COM (2011) 0635 final (Oct. 11, 2011) [hereinafter CESL].

5. This is the situation in Spain and in France, where case law has developed some rules that do not correspond with those contained in the "black letter" of the

Spanish Ministry of Justice published two proposals to reform the Spanish Civil Code (Law of Obligations) and the Commercial Code. The two proposals were elaborated by the so called *Comisión General de Codificación*,<sup>6</sup> but the modernization has not yet taken place. The Spanish Supreme Court has seen harmonized European Law as an instrument to be integrated into national law, especially through the construction of a new system of contractual liability (providing a unitary concept of non-performance and fundamental non-performance, rules regarding termination of contract, and change of circumstances), recognising that the solutions of the Civil Code are mostly unsuitable for the new social reality.

The drafters of the new acts seeking to modernize the traditional civil codes in Europe addressed a large body of norms, fragmented as a result of the transposition of European Community (EC) legislation<sup>7</sup> and created with the aim of protecting consumers. These acts have generally been left outside of each nation's civil code. These are mainly specialized statutes that regulate specific situations inside a contract where it is necessary to protect consumers. In relation to general contract terms, standard-form contracts are nowadays a common feature of commercial relationships. This type of contract does not fit well with codes that have been structured around the sanctity of the 19th century principle of party autonomy. Despite the potential benefits of standard provisions from the point of view of

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norm. For the situation in Spain, see Luz M. Martínez Velencoso, *National Courts: How Can They Keep Track?*, in COMMON EUROPEAN SALES LAW MEETS REALITY (Matthias Lehmann ed., Sellier European Law Pubs 2015). In France, one of the reasons for the enactment of Ordinance no. 2016-131, Feb. 10, 2016, reforming contract law, was that contract law had become a largely judge-made law. Since 1804, contract law has evolved very significantly outside of the Code thanks to the Court of Cassation.

6. Comisión General de Codificación, Propuesta de Anteproyecto de Ley de modernización del Derecho de obligaciones y contratos, Boletín de Información del Ministerio de Justicia (Supp. Jan. 2009) [hereinafter Spanish proposal to reform the Civil Code].

7. One characteristic of EU Contract Law is fragmentation, as it does not contain any general rules applicable to all types of contracts and all types of contracting parties, nor does it address every issue that could arise in the life cycle of a contract.

the economic analysis of the law, courts tend to treat them with great suspicion. The ability of businesses to identify the efficient allocation of risks also gives them the opportunity to exploit consumers (or adherents in general) by printing standards terms much more favourable to them than to consumers, hence imposing upon them hidden risks.<sup>8</sup> That is the reason why the Spanish Supreme Court is applying a so called control of transparency, understood as an instrument to make sure that “the consumer has real knowledge of what the financial sacrifice is and of the legal burden that is derived from the contract.”<sup>9</sup> Consequently, any clauses introduced in the contract that suffer from this lack of transparency are null and void.

## II. NEW TRENDS IN EUROPEAN CONTRACT LAW: THE SITUATION IN SPAIN

### *A. A Special Body of Norms for the Protection of Consumers*

The *acquis communautaire* is a body of norms (the result of the transposition of EC legislation) aimed at the protection of consumers that have generally been kept out of national civil codes. These specialized statutes usually deal with specific situations inside a contract where it is necessary to protect consumers (such as consumer credits, guarantees in the sale, general contract terms, etc.). The sheer volume of special regulations has complicated the application of the law to the extent that some countries, such as Spain, Austria, France, Greece, and the UK,<sup>10</sup> have opted to collect these

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8. Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 440 (2002).

9. See Spanish Supreme Court, S.T.S., Sept. 8, 2014 (RJ 2014/4660).

10. For Spain, see Real Decreto Legislativo (Royal Legislative Decree) no. 1/2007 (B.O.E. 2007, 287). For France, see CODE DE LA CONSOMMATION (Law no. 92-60, Jan. 18, 1992). For Austria, see BUNDESGESETZ (Federal Act) [B.G.], Mar. 8, 1979, establishing provisions for the protection of consumers. For Greece, see Law no. 2251/1994 on the protection of consumers. For United Kingdom, see the Consumer Rights Act 2015, an Act that consolidates existing consumer protection legislation and also gives consumers a number of new rights and remedies.

norms in a single “Consumer Protection Act” or “Consumer Code” that, while not exactly a codification of consumer rules, is effectively a compilation of them.<sup>11</sup> The concept of consumer does not appear at all in the civil code of any of these countries (provided of course that they have one), yet there is a big distinction in their contract law between special contracts concluded with consumers and ordinary contracts. In the latter, the traditional principle of freedom of contract is stronger because consumer protection norms are normally mandatory. Nevertheless, in recent decades, some countries such as Germany<sup>12</sup> and The Netherlands<sup>13</sup> have incorporated the concept of consumer into their civil codes. The matter is of significance, as the majority of contracts in Europe are consumer contracts.<sup>14</sup>

An intermediate solution was adopted in Italy and in Austria. In Italy, the Unfair Contract Terms Directive<sup>15</sup> and the Directive on certain aspects of the sale of consumer goods and associated guarantees<sup>16</sup> were implemented by inclusion in the Italian Civil Code of new provisions (arts. 1469 *bis*-1469 *sexies*, 1519 *bis*-1519 *nonies*) that basically reproduce the content of the second aforementioned

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It was enacted with the aim of providing a “modern framework of consumer rights,” at <https://perma.cc/H7QZ-3TQB>.

11. Brigitta Lurger, *The ‘Social’ Side of Contract Law and the New Principle of Regard and Fairness*, in *TOWARDS A EUROPEAN CIVIL CODE* (4th ed., Arthur S. Hartkamp et al. eds., Kluwer 2010).

12. The German Civil Code, modified in 2002, includes the EC consumer protection directives regime (e.g., for distance selling and e-commerce contract, see *BÜRGERLICHES GESETZBUCH [BGB]*, §§ 312-312f; for general contract terms, see *BGB*, §§ 305-310; and for warranties in sales contracts applicable to consumers and particulars, see *BGB*, §§ 433-445).

13. Consumer protection norms were included in the *BURGERLIJK WETBOEK [BW]* (Dutch Civil Code), by a reform in 1992 (for provisions concerning general contract terms, see arts. 6:236 *et seq.*, and for sales contract, see arts. 7:5 *et seq.*).

14. This can be seen in the high rate of citations of the European Court of Justice and European Law by national courts, see LISA CONANT, *JUSTICE CONTAINED: LAW AND POLITICS IN THE EUROPEAN UNION* 83 (Cornell U. Press 2002).

15. Council Directive 93/13/EEC, Apr. 5, 1993, Unfair Terms in Consumer Contracts.

16. Directive 1999/44/EC, of the European Parliament and of the Council, May 25, 1999 [hereinafter Directive 1999/44].

Directive without being systematically inserted in the regulation of sales contract. One may note that the Swiss Civil Code contains a section aimed at the regulation of consumer protection.<sup>17</sup> In Austria, the transposition of the Directive has been produced through the law on the reform of the law of warranties, May 8, 2001,<sup>18</sup> which has changed some precepts of the Civil Code of Austria (ABGB) and the Consumer Protection Act. For that reason, the regime of the Directive is applicable not only to consumer contracts, but also to business to business contracts.

Scandinavian countries (Denmark, Sweden, Finland, and Norway), apart from their special regulations for consumer protection in which they share a longstanding tradition, have in their respective Contract Acts a general clause that allows the judge to annul or modify unfair contracts. The scope of application of this clause is not limited to contracts between businesses and consumers, in contrast to the Italian Directive on unfair terms. Therefore, it is applicable in all cases in which there is a contractual relationship where one party is considered strong and the other weak. Indeed, this provision has been applied in several cases to contracts concluded with banks in the context of the recent financial crisis, where the weak party, the

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17. There are some consumer protection provisions in the Swiss Code of Obligations. Pursuant to the relevant provisions, an addressee of an unordered product is neither obliged to return the product nor to store it. In addition, as far as door-to-door transactions are concerned (Swiss Code of Obligations, arts. 40a *et seq.*), the consumer has the right to revoke his offer or his declaration of acceptance if the offer was made (i) at his place of work, in living accommodations or in their surroundings; (ii) in public transportation, or on public streets and places; or (iii) at a promotional function combined with an excursion or a similar event. There is no right of revocation if the consumer explicitly solicited the contract negotiations or made his declaration at a market or trade fair stand. The revocation must be declared in writing within 7 days, after having offered or accepted the contract and after having received the said information.

In the area of e-commerce, pursuant to the Swiss Code of Obligations, it is possible to conclude a purchase contract through an electronic signature. All requirements are regulated in the Swiss Federal Law on Electronic Signatures, Dec. 19, 2003.

18. *Gewährleistungsrechtsänderungsgesetz*, BGBl. I 48/2001, p. 1019. This law came into force on Jan. 1, 2002.

client of the bank (not necessarily a consumer) was not aware of the risks involved because of lack of proper information by the bank.<sup>19</sup>

Furthermore, the CESL provides rules relating to the contents and effects of unfair contract terms that could be applied in “business to business” (B2B) contracts.<sup>20</sup> Good faith and fair dealing are also recognized, for instance in B2B transactions in the CESL, where the duty of good faith covers the pre-contractual disclosure of information about the main characteristics of the goods supplied (CESL art. 23). This is also the approach in the Principles of European Contract Law (PECL), where article 4:110 gives a definition of an unfair contract term, applicable both to B2B and “business to consumer” (B2C) contracts, borrowing its language from Directive 93/13/EEC on Unfair Contract Terms in Consumer Contracts.<sup>21</sup>

A similar regulation can be found in BGB, § 307,<sup>22</sup> Dutch BW,

19. Hans Fredrik Marthinussen, *Unfair Contract Terms*, in EUROPEAN PERSPECTIVES ON THE COMMON EUROPEAN SALES LAW 93-110 (Javier Plaza Penades & Luz M. Martinez Velencoso eds., Springer 2015) [hereinafter EUROPEAN PERSPECTIVES ON THE CESL] (for an interesting analysis of case law).

20. See CESL, *supra* note 4, at section 3 chapter 8. Nevertheless, terms in B2B contracts are subject to unfairness control, but on the basis of a test less strict for the parties than the one applicable to B2C contracts.

21. PRINCIPLES OF EUROPEAN CONTRACT LAW art. 4:110 (Comm’n Eur. Cont. L. 2002) [hereinafter PECL]:

(1) A party may avoid a term which has not been individually negotiated if, contrary to the requirements of good faith and fair dealing, it causes a significant imbalance in the parties' rights and obligations arising under the contract to the detriment of that party, taking into account the nature of the performance to be rendered under the contract, all the other terms of the contract and the circumstances at the time the contract was concluded.

(2) This Article does not apply to:

(a) a term which defines the main subject matter of the contract, provided the term is in plain and intelligible language; or to  
(b) the adequacy in value of one party's obligations compared to the value of the obligations of the other party.

22. BGB § 307 states:

(1) Provisions in standard business terms are ineffective if, contrary to the requirement of good faith, they unreasonably disadvantage the other party to the contract with the user. An unreasonable disadvantage may also arise from the provision not being clear and comprehensible.

(2) An unreasonable disadvantage is, in case of doubt, to be assumed to exist if a provision

1. is not compatible with essential principles of the statutory provision from which it deviates, or

art. 6:248 (2),<sup>23</sup> and Uniform Commercial Code (UCC), § 2-302<sup>24</sup> applicable both to B2B and B2C contracts.<sup>25</sup>

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2. limits essential rights or duties inherent in the nature of the contract to such an extent that attainment of the purpose of the contract is jeopardised.

(3) Subsections (1) and (2) above, and sections 308 and 309 apply only to provisions in standard business terms on the basis of which arrangements derogating from legal provisions, or arrangements supplementing those legal provisions, are agreed. Other provisions may be ineffective under subsection (1) sentence 2 above, in conjunction with subsection (1) sentence 1 above.

JAN M. SMITS, *CONTRACT LAW—A COMPARATIVE INTRODUCTION* 150 (2d ed., Edward Elgar Publ'g 2014): “The German statute has the widest scope of application as it deals with any possibly unfair term in both B2B- and B2C-contracts.”

23. BW art. 6:248: “2. A rule, to be observed by parties as a result of their agreement, is not applicable in so far as this, given the circumstances, would be unacceptable to standards of reasonableness and fairness.”

*Cf.* Martijn W. Hesselink, *Unfair Terms in Contracts Between Businesses, in TOWARDS A EUROPEAN CONTRACT LAW* 143, 131-148 (Jules Stuyck & Reiner Schulze eds., Sellier 2011):

Most Member States review unfair terms in business to business contracts. They often do so on the basis of general contract law, i.e. legislation that does not distinguish between different categories of contracting parties, for example the general clause of Article 36 of the Scandinavian Contract Act, § 305 of the German Civil Code, and the Unfair Contract Terms Act (1977) in the United Kingdom.

Often, for instance in Germany and the Netherlands, these statutory rules were preceded by case law, on the basis of the general good faith clause, where business to business contracts were the main field of application. From that perspective, the extension of the control of content took place in the opposite direction, from B2B towards B2C contracts.

24. UNIFORM COMMERCIAL CODE § 2-302 [hereinafter UCC]:

(1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

(2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.

A definition of an unconscionable contract is that it is a contract that “no man in his senses and not under delusion would make on the one hand, and that no honest and fair man would accept on the other.” M. Neil Browne & Lauren Biksacky, *Unconscionability and the Contingent Assumptions of Contract Theory*, MICH. ST. L. REV. 216 (2013).

25. Ole Lando, *CISG and CESL: Simplicity, Fairness and Social Justice, in ENGLISH AND EUROPEAN PERSPECTIVES ON CONTRACT AND COMMERCIAL LAW: ESSAYS IN HONOUR OF HUGH BEALE* 237-250 (Louise Gullifer & Stefan Vogenauer eds., Bloomsbury Publ'g 2017).

In Spain, some recent judgments of the Supreme Court have found that a clause is unfair not only when there is an imbalance in the position of the contractual parties, but also when there is a lack of transparency. In a judgment delivered on May 9, 2013,<sup>26</sup> the Spanish Supreme Court declared “floor clauses”<sup>27</sup> to be unfair. In brief, it found that these clauses were not transparent as consumers were unable to foresee the economic and legal burden the contract would place upon them.

Some scholars, interpreting this case, argue that the “control of transparency” is applicable in a standard terms contract even when none of the parties is a consumer. Indeed, standardized contracts represent a “profound transformation of the legal dogmatic,” distinguishable from the negotiated contract.<sup>28</sup> This means that the valid-

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26. On May 9, 2013, the Civil Chamber of the Supreme Court ruled on the appeals against the judgment given by the Seville Provincial Appellate Court. The latter ruling, revoked the judgement rendered by the Commercial Court no. 2 of Seville; it rejected the claim made by the Association of Bank Users against BBVA, CAIXA GALICIA, and CAJA MAR, declaring that the “floor clauses” of the mortgage loan agreements entered into with variable interest rates signed with consumers and users of the aforementioned entities were not null and void. It deemed that the prerequisites contained in the General Law for the Defence of Consumers and Users for them to be considered abusive were not present.

The Supreme Court, contrary to the reasoning of the Appellate Court, has declared the aforementioned clauses null and void, ordering the defendant entities to remove them from their agreements and to refrain from using them hereinafter in the form and manner in which they had been doing.

The clauses lacked the clarity and transparency to enable the consumer to perceive that they defined the main purpose of the agreement, which in turn affected or may have affected the content of the consumer’s obligation to pay, as well as preventing him from obtaining a real and reasonably complete knowledge of how they played out or could have played out in the financial aspects of the agreement. They created an appearance that the floor had as an indivisible consideration, the fixing of a ceiling. The offer of variable interest was not completed with adequate information and was therefore misleading for the consumer, especially in cases where his attention was diverted and the analysis of the impact of the floor clause was made more difficult through the joint offer of ceiling clauses.

27. It is a clause that the bank can include in the mortgage, which establishes the minimum interest rate that the customer will pay even when the Euribor, which is the rate used as a reference for most Spanish mortgages, is lower. That is to say, it is a clause which does not allow the customer to benefit from the lowering of the Euribor rate.

28. See Supreme Court, S.T.S., Dec. 2, 2014 (R.J. 2014, 6872).

ity and effectiveness of this kind of contract does not lie in the consent of the adherent, but in the compliance by the stipulator to certain special contractual duties in order to balance the interests of the parties and to make the standard terms comprehensible. This interpretation is essential for understanding the scope of the so-called “transparency review,” a second review after the “review of inclusion” of the standard terms in the contract and prior to the “review of content,” as regulated in the Unfair Contract Terms Directive.

“Transparency review” goes beyond the mere “formal requirement of drafting a clear and understandable clause” by the stipulator, to become the additional obligation of making the clause understandable “in a way that the adherent can assess the consequences to this contractual term.”<sup>29</sup> Indeed in Spain, where these consumer protection norms are collected in a “Consumer Protection Act,” the act resulting from the transposition of the Unfair Contract Terms Directive has been left out, as it has to be applied to any standardized contract, and does not require the participation of a consumer (although for a clause to be declared abusive by means of its content, it is necessary that a consumer is affected).<sup>30</sup>

### *B. Conformity of the Goods*

Traditionally the European civil codes, most of them strongly inspired by the French Civil Code, used to provide a double regime

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29. FRANCISCO JAVIER ORDUÑA MORENO, CARLOS SÁNCHEZ MARTÍN, & RAQUEL GUILLÉN CATALÁN, *CONTROL DE TRANSPARENCIA Y CONTRATACIÓN BANCARIA* (Tirant lo Blanch 2016).

30. On June 3, 2016, the Plenary of the First Chamber of the Supreme Court decided by judgment no. 367/2016 (JUR 2016, 128769) that the control of transparency applicable to the general conditions of contracts with consumers does not extend to contracts concluded with professionals or entrepreneurs. The judgement contained a dissenting vote by Judge Francisco Javier Orduña Moreno (previously a Civil Law Professor at the University of Valencia), in which he affirmed that transparency extends to standardized contracts between entrepreneurs, particularly with regard to small and medium-sized businesses which act as mere adherents. He maintains that, given that the control of transparency has become a general principle of law, it has to be given an extensive interpretation in the contracts concluded between entrepreneurs.

for the non-performance of contractual obligations “liability for hidden defects and warranties” and the general regime for the breach of the contract.

This dual system is not reflected in the CISG and in harmonized European law (i.e., PECL, DCFR, CESL) where all is based on the principle of conformity of the goods. The same unitary regime also appears in the EU Directive on certain aspects of the sale of consumer goods and associated guarantees.<sup>31</sup>

Under this unitary approach, a non-conforming performance proves to be a specific type of non-fulfilment for sales contracts and follows a general principle of contract law: contracts have to be performed in accordance with the terms of the agreement. The concept of conformity assigns more importance to the contractual terms, according to the principle of party autonomy and *pacta sunt servanda*. To sum up, the concept of “lack of conformity” is much wider than that of “hidden defects” contained in the civil codes enacted in Europe in the 19th century, and “non-conformity” is the result of the comparison between the promised performance and actual performance. The concept fits the current economic context, with a predominance of mass-produced goods, as against predominantly customized goods in the 19th century.

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31. In the different European Legal Texts, *cf.* Directive 1999/44, *supra* note 16, at art. 2 (“Conformity with the contract”); PECL, *supra* note 21, art. 9:401 refers to the right to reduce the price in cases of non-conformity; Draft Common Frame of Reference, section 3 (Conformity of the goods) at arts. IV.A- 2:301 *et seq.* [hereinafter DCFR]; CESL, *supra* note 4, at section 3 (Conformity of the goods and digital content) arts. 99 *et seq.* See also María Paz García Rubio, *Non Conformity of Goods and Digital Content and its Remedies*, in EUROPEAN PERSPECTIVES ON THE CESL, *supra* note 19, at 163:

The rules concerning the non-performance and conformity of the contract included in CESL are a direct inheritance from the United Nations Convention on Contracts for the International Sale of Goods (CISG) re-defined by Directive 1999/44/EC of the European Parliament and of the Council of the 25th of May 2009 on certain aspects of the sale of consumer goods and associated guarantees, the case-law of the ECJ that interprets the afore-mentioned Directive, and the Draft Common Framework of Reference (DCFR). In all of these instruments the issue of conformity is one of the most significant topics.

In addition, the concept of “lack of conformity” has a unifying effect. For instance, under the different criteria for conformity of goods contained in art. 2 of the Directive 1999/44<sup>32</sup> there is a combination of a subjective dimension and an objective dimension to determining the lack of conformity. The objective approach is characteristic of French-inspired civil codes, such as the Spanish Code. According to the Spanish Code, the concept of the “vice” of a good is confined to its inaptitude for the use for which goods of the same type are usually intended. The subjective dimension is a particular feature of Germanic and common law, for which the concept of a defect includes the lack of those qualities in the good that the buyer expects.<sup>33</sup> This subjective criterion was preferred by the European drafter, as can be observed in the legislative history of Directive 1999/44. Nevertheless, due to the influence of the professional sectors involved, the final text of the Directive placed both criteria on an equal footing.

When Directive 1999/44 had to be transposed in the legal systems of Member States, two options were available. First was the

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32. Directive 1999/44, *supra* note 16, at art. 2.2: Consumer goods are presumed to be in conformity with the contract if they:

- (a) comply with the description given by the seller and possess the qualities of the goods which the seller has held out to the consumer as a sample or model;
- (b) are fit for any particular purpose for which the consumer requires them and which he made known to the seller at the time of conclusion of the contract and which the seller has accepted;
- (c) are fit for the purposes for which goods of the same type are normally used;
- (d) show the quality and performance which are normal in goods of the same type and which the consumer can reasonably expect, given the nature of the goods and taking into account any public statements on the specific characteristics of the goods made about them by the seller, the producer or his representative, particularly in advertising or on labelling.

33. Cf. C.J. (Niels) de Bruijn, *Historical Perspectives on the Remedies for Non-Conformity with Contract in EU Consumer Sales Law*, in *ALTERNATIVE WAYS TO IUS COMMUNE: THE EUROPEANISATION OF PRIVATE LAW* 111-124 (Anne L.M. Keirse & Marco B.M. Loos eds., Intersentia 2012).

so-called “big solution,” followed in Germany and in the Netherlands,<sup>34</sup> whereby the regime of the Directive became the general regime included in the civil code and applicable to every sale contract, whether one of the parties was a consumer or not. The second option was the so-called “small solution,” adopted by other countries. It consisted in transposing the Directive by a special act applicable to consumer sales only, amending the existing rules applicable to consumers (such as the *Code de la consommation* in France), or introducing in the civil code a section on sales between professional sellers and consumer buyers (as is the case of Italy or Spain). This contributes to a certain “de-harmonization” of the legislation on sales in the various Member States.

As a consequence, the Spanish Civil Code contains a double regime for the non-performance of contractual obligations: “liability for hidden defects and warranties” and the general regime for the breach of the contract (arts. 1094 *et seq.*). This is because in Spain, Directive 1999/44 was the object of transposition through a special norm, Act 23/2003, July 10, on Guarantees in the Sale of Consumer Goods, applicable only to the sale of consumer goods, leaving intact the regime of the Civil Code. Subsequently, this Act was abrogated and its content was included in the Royal Legislative Decree 1/2007, Nov. 16, approving the revised text of the General Law for the Protection of Consumers and users and other supplementary Laws (a compilation of special norms for the protection of consumers resulting from the implementation of European Directives),<sup>35</sup> in arts. 114 *et seq.*

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34. See Sonja A. Kruisinga, *The Impact of Uniform Law on National Law: Limits and Possibilities – CISG and Its Incidence in Dutch Law*, 13.2 ELECTRONIC J. OF COMP. L. 9 (2009), at <https://perma.cc/8PLF-Z777>:

In the new rules on the sale of goods in the Dutch Civil Code, the notion of conformity replaced the regulation of hidden defects. This part of the Civil Code has been modelled after the aforementioned Benelux draft for a Uniform Law. The concept of (non-)conformity in art. 35 CISG corresponds almost literally with the requirements in art. 7:17 BW. This provision was clearly – indirectly – inspired by the provisions in ULIS. Both provide that the goods need to be in conformity with the contract.

35. English text available at <https://perma.cc/WSV4-UMMP>.

As for the modernization process in Spain, the proposal to reform the Civil Code (Law of Obligations) made by the Spanish Ministry of Justice<sup>36</sup> has the aim, among others, of modernizing the regulation of the sales contract, taking the regime of the Directive 1999/44 as a reference.<sup>37</sup> In Spain, it is accepted among scholars that any reform which, now or in the future, aims at changing the Civil Code, has to be aligned with the harmonized European legal texts.<sup>38</sup>

As the Spanish legislature has not yet completed this task, this work has been mostly done by the Spanish Supreme Court. As regards the non-conformity of goods, courts are applying the general regime of non-performance to cases that could be included in the special regime.

A good example of this is the judgment of the Supreme Court, Sept. 21, 2004, where the Court considered the jurisprudential principle of *aliud pro alio* (delivery of one thing instead of another) as a remedy for situations of extreme injustice, due to the narrowness of the concept of hidden defects in the Civil Code. It connects with the principle of conformity of the goods enshrined in article 35 of the CISG, also applied to consumer sales under Act 23/2003 on guarantees in the sale of consumer goods. Although none of these legal texts was applicable to the case, the Court interpreted the Code according to this new legal framework.

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36. Spanish proposal to reform the Civil Code, *supra* note 6.

37. Cf. Nieves Fenoy Picón, *La modernización del régimen del incumplimiento del contrato: Propuestas de la Comisión General de Codificación. Parte primera: Aspectos generales. El incumplimiento*, LXIII ANUARIO DE DERECHO CIVIL 64-65 (2010).

38. Luis Díez-Picazo, *Reforma de los Códigos y Derecho Europeo*, LVI ANUARIO DE DERECHO CIVIL 1574 (2003).

*C. The Legal Consequences of a Breach of Contract**1. The Unitary Concept of Non-Performance*

The CISG has been a model in the field of breach of contract and its consequences for harmonized European private law<sup>39</sup> and therefore, for the modernization of the civil codes in Europe. Under the CISG, a liable party is obligated to pay damages and the termination of the contract is only possible when the breach is severe and fundamental. This is also the solution in Directive 1999/44,<sup>40</sup> and the German BGB has also accepted it in the general law of obligations.

The CISG model bridges the common law and the civil law as it “has been the standpoint of the common law that a party is liable for keeping its contractual promise in principle irrespective of any fault, whereas the civilian tradition held the party liable for any breach of contract only if the party was at fault.”<sup>41</sup> In the CISG, a party is not held liable in cases where performance has become impossible due to circumstances for which this party neither bore the risk nor was

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39. Cf. Ole Lando, *Non-performance (Breach) of Contracts*, in TOWARDS A EUROPEAN CIVIL CODE 505 (3d ed., Arthur S. Hartkamp et al. eds., Kluwer 2004): In the Principles of European Contract Law (PECL) the Commission on European Contract Law (CECL) has set up a structure and terms for a future European Code in relation to the “breach of contract.” In doing this the CECL has been guided by two main considerations. The first is to have a structure which is compatible with that of the CISG. The second is to use one which in principle may apply to all kind of contracts and not only to the sale of goods.

40. The *acquis communautaire* tends to provide a general concept of the violation of the obligation and to apply some remedies that do not depend on a qualified kind of non-performance (such as delay or impossibility). For instance, apart from Directive 1999/44, *supra* note 16, the art. 13 (3) of Directive 2015/2302, 2015 O.J. (L 326) (EU), on package travel and linked travel arrangements, states that: “If any of the travel services are not performed in accordance with the package travel contract, the organiser shall remedy the lack of conformity . . . .”

41. Ulrich Magnus, *The Vienna Sales Convention (CISG) between Civil and Common law – Best of all Worlds?*, 3 J. CIV. L. STUD. 75 (2010). Under English Law, liability is strict, non-performance is “excused” in the limited cases of frustration. Harmonized European private law does not adopt the English distinction between breaches of condition, warranty, and intermediate terms.

at fault (CISG art. 79). The CISG model also includes the concepts of *force majeure* and economic hardship.<sup>42</sup>

Defining contract non-performance in Spanish Law is problematic because it encompasses two different things: it covers the lack of performance but also the so-called *mora debitoris* or delay in performance, which differs from cases of simple delay.<sup>43</sup> Furthermore, there has been a long discussion as to whether the liability of the debtor for the breach should be based on fault or if it is better to have an objective system of contractual liability.<sup>44</sup> There is also no coherent regulation in relation to the claim for performance, termination, and compensation of damages.

Harmonized European private law is clearer as there is a unique concept of non-performance and some remedies. First comes the claim of specific performance. This remedy is not possible when fulfilment of the contract has become impossible. It also requires that the claim be exercised without further delay. Also, the other contractual party can object to the claim if specific performance is excessively burdensome (an intermediate solution between common law and civil law).

Secondly, it is possible to terminate the contract, but only when the breach of the contract qualifies as “fundamental.” This new regulation allows the creditor to elevate a non-fundamental delay in performance to a fundamental one by means of granting a grace period. This does not, however, apply in cases of defective performance.

The third remedy is compensatory damages. The debtor that breached the contract is liable for the damage caused, except in the

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42. Cf. Pablo Salvador Coderch, *Comentario del artículo 79*, in LA COMPRAVENTA INTERNACIONAL DE MERCADERÍAS. COMENTARIO DE LA CONVENCION DE VIENA 635-656 (Luis Díez-Picazo & Antonio Cabanillas Sánchez eds., Editorial Aranzadi 1998).

43. The simple delay is irrelevant. The debtor will only be held responsible if the creditor requires the debtor to fulfil the contract. This is a requirement in order to obtain compensation for the damage that has been caused by means of the delay.

44. Díez-Picazo, *supra* note 38.

circumstance that without the default of either party a contractual obligation has become incapable of being performed because the circumstances in which the performance is called for would render it impossible.

In the above mentioned Proposal to reform the Spanish Civil Code,<sup>45</sup> the drafters adopt a broad and unitary notion of non-compliance. The debtor who breaches the contract does not fulfil exactly the provision or any other of the duties resulting from the obligation.<sup>46</sup> This is in accordance with the Principles of European Contract Law. As the Official Commentary on the PECL makes clear:

Under the system adopted by the Principles there is non-performance whenever a party does not perform any obligation under the contract. The non-performance may consist in a defective performance or in a failure to perform at the time performance is due, be it a performance which is effected too early, too late or never. It includes a violation of an accessory duty such as the duty of a party not to disclose the other party's trade secrets. Where a party has a duty to receive or accept the other party's performance a failure to do so will also constitute a non-performance.<sup>47</sup>

In the Spanish Proposal, if the fulfilment of the contract becomes definitively impossible, even without the fault of the debtor, it is still a case of breach of the contract (art. 1188.I). The notion of breach includes both an excusable and non-excusable breach. Nevertheless, this distinction has some effects on the scope of remedies. According to article 1209.I of the Proposal, the debtor is not responsible for the damage that the breach has caused to the creditor in cases of excusable breach of contract. However, article 1209.IV of the Proposal provides that in this case, the creditor is not prevented from seeking remedies other than damages such as the termination of the

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45. See Spanish proposal to reform the Civil Code, *supra* note 6.

46. *Id.* at art. 1188.I.

47. See *Comment and Notes: PECL art. 8:101: Remedies Available, Comment A. Non-performance*, CISG DATABASE, available at <https://perma.cc/M3WU-MCVZ>.

contract or the price reduction (following the model of CISG art. 79).

In the PECL, art. 1:301(4) explicitly clarifies that there is a breach of contract whether the non-fulfilment is excused or not.<sup>48</sup> PECL art. 8:108 defines when the non-fulfilment is excused.<sup>49</sup> In this case, “the aggrieved party may resort to any of the remedies set out in Chapter 9 except claiming performance and damages.”<sup>50</sup>

This is exactly the model in DCFR art. III.–1:102(3)<sup>51</sup> complemented by DCFR art. III.–3:101, also adopted by the European Commission in CESL art. 87.<sup>52</sup> However, there are some differ-

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48. Lando, *supra* note 39, at 506:

The legal systems will allocate detrimental consequences to the defaulting party if that party is in fault or carries the risk. The failure to perform may give the other party – the aggrieved party – certain rights against the defaulting party. The aggrieved party may have a right to damages for the loss he suffers from the other party’s failure to effect due performance. If he accepts a tender of performance not conforming to the contract he may reduce his own performance. Furthermore, he may withhold his performance until the other party makes a due performance. Under certain conditions he may terminate the contract . . . The aggrieved party may finally have a right to specific performance, that is to claim that the contract be performed as agreed. All these rights are here called remedies.

49. PECL, *supra* note 21, at art. 8:108:

(1) A party's non-performance is excused if it proves that it is due to an impediment beyond its control and that it could not reasonably have been expected to take the impediment into account at the time of the conclusion of the contract, or to have avoided or overcome the impediment or its consequences.

(2) Where the impediment is only temporary the excuse provided by this article has effect for the period during which the impediment exists. However, if the delay amounts to a fundamental non-performance, the obligee may treat it as such.

(3) The non-performing party must ensure that notice of the impediment and of its effect on its ability to perform is received by the other party within a reasonable time after the non-performing party knew or ought to have known of these circumstances. The other party is entitled to damages for any loss resulting from the non-receipt of such notice.

50. *Cf.* PECL, *supra* note 21, at art. 8:101.

51. DCFR, *supra* note 31, at art. III. – 1:102 (3): “Non-performance of an obligation is any failure to perform the obligation, whether or not excused, and includes delayed performance and any other performance which is not in accordance with the terms regulating the obligation.”

52. “One could and should read this proposal and its predecessors in the Draft Common Frame of Reference on the Principles of European Contract Law as a

ences, as the draft Common European Sales Law in art. 87 only defines a uniform notion of non-performance but does not refer to any excuse for impediment beyond the parties' control or for the creditor's misbehavior. The consequences of an excuse in CESL art. 88 are only regulated in the rules on remedies (CESL arts. 106(4), 131(2), 167(1), 168(1)). Otherwise in the DCFR and the PECL there is a distinction between two separate categories of excused non-performance and inexcusable non-performance.<sup>53</sup>

## *2. Fundamental Non-Performance and Termination of the Contract*

Termination is considered a subsidiary remedy both in the common and in the civil law tradition. In common law, termination is only possible if the obligation which has been broken is a "condition" of the contract or if the breach is "fundamental." In civil law countries, termination needs further requirements.<sup>54</sup>

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mirror of the development of contract law, and sales law in particular, in Europe," see Martin Schmidt-Kessel & Eva Silkens, *Breach of Contract*, in EUROPEAN PERSPECTIVES ON THE CESL, *supra* note 19, at 112.

53. See *id.* at 115:

From a pragmatic point of view this difference may be seen as minor, however, for dogmatically trained continental lawyers this shift is of an importance which should not be underestimated. The text and the structure of the Commission's proposal prevents or, at least, should help to prevent dogmatic national lawyers from raising systematic arguments based on two different types of breach. Coming from a legal system with a bad experience with cause approaches and their necessities to draw lines between these types of breach, the solution proposed by the Commission to us seems an important and innovative progression in the formulation and structuring of European Contract Law.

54. For a comparative analysis of the CISG, the PECL, and English Law on this topic, see CISG, *supra* note 3; PECL, *supra* note 21; and see EWAN MCKENDRICK, *CONTRACT LAW: TEXT, CASES AND MATERIALS* 791 *et seq.* (6th ed., Oxford U. Press 2014). In English law, termination is an important remedy (although not as important as damages). In addition, English law, on the basis of the principle of freedom of contract, confers the parties' freedom to decide themselves when the right to terminate will arise (they have the opportunity to classify any term as a condition). Whereas, in other legal systems, it depends on the court to decide whether or not the breach justifies termination. CISG (art. 25) appears to deny to the parties the right to agree that any breach of a particular term shall give rise to a right to terminate. This is because there is a preference for remedies that enable the parties to maintain their relationship (like the right to cure the

This subsidiary nature is because termination faces serious factors of complexity. Its use as a remedy assumes the end of the contractual relationship and perhaps the elimination of the consequences arising from the contract that have already been fulfilled. Termination is difficult to understand in universal terms for all contracts and for all modalities of non-fulfilment. In addition, it does not respond nor adapt to a general model, because there is a great variety of factors (the moment in which the non-fulfilment took place and costs associated; the specific investments made; the fluctuation of prices; the existence of markets for resale, etc.) that can have a high differential significance in terms of its effects on the contracting parties and their incentives for action in view of such effects.

Being aware of the costs associated with the termination of the contract, legal systems create doctrines, principles, and rules that modulate the exercise of such a remedy (such as fundamental breach,<sup>55</sup> *favor contractus* principle, and the debtor's right to cure

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breach and price reduction). Nevertheless, as explained by McKendrick, the provisions of the PECL (art. 8:103) appear to be closer to English law:

To English eyes, this provision is very different from the Vienna Convention. The vital difference is paragraph (a) which seems to approximate a condition. It thus appears to preserve the right of the parties to classify the status of the terms of their contract. Paragraph (b) is much closer to an intermediate term, while paragraph (c) distinguishes between intentional and unintentional non-performance (a distinction which is not generally drawn in English law).

55. Reinhard Zimmermann, *Breach of Contract and Remedies under the New German Law of Obligations*, 48 SAGGI, CONFERENZE E SEMINARI (2002) (It.), available at <https://perma.cc/6358-Y3GU>:

The notion that the remedy of termination is available only if the non-performance attains a certain minimum level of seriousness is also reflected, in some or other form, in most of the more traditional national legal systems; it is based on the consideration that termination, in a way, jeopardizes the fundamental principle of *pacta sunt servanda* and has the effect of throwing back on the defaulting party a risk which, according to the contract, was to have been borne by the aggrieved party.

Roman law was even stricter in this regard and never recognized a general right of termination in case of breach of contract. This approach has, for a long time, dominated the *ius commune*, and it has even shaped the BGB.

default).<sup>56</sup>

Under the PECL, termination is available in cases of a fundamental breach of the contract. The BGB<sup>57</sup> and the Dutch Civil Code<sup>58</sup> require the granting of a period of grace before the remedy of termination is available. Also, in CESL arts. 114-115, 134 and 136 for commercial buyers, the remedy of termination is subject to

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Before the reform, the German BGB did not contain a general statutory right of termination, it used to provide a highly fragmented regime which was conceptually based on a *lex commissoria* that had been tacitly agreed upon. The duty to perform was extinguished if performance became impossible, as a result of the debtor's fault and also, in the case that the debtor had not been responsible for the impossibility of performance; in cases of *mora debitoris*, and in those of defective performance, provided it seriously affected the contractual relationship. As Professor Zimmermann says, "the rules contained in the BGB were not generally admired for their clarity and ease of operation." *Id.*

56. Fernando Gómez Pomar & Marian Gili Saldaña, *La complejidad económica del remedio resolutorio por incumplimiento contractual—Su trascendencia en el Derecho español de contratos, en la normativa común de compraventa europea (CESL) y en otras propuestas normativas*, in LXVII ANUARIO DE DERECHO CIVIL 1218-1219 (2014).

57. See Zimmermann, *supra* note 55, comparing the PECL, *supra* note 21, with German Law: it can be stated that "[t]ermination under the *Principles* is available in cases of fundamental breach of the contract." Furthermore, the German BGB "requires the granting of a period of grace before the remedy of termination is available," although there are exceptions to this requirement in certain cases of serious breach. Both under the PECL art. 8:106 (3) and in German Law, the creditor only loses his right to choose between claiming performance and terminating the contract at the moment he gives notice of termination. The mechanism of termination is the same in the German BGB and in the PECL art. 9:303 (1): "a party's right to terminate the contract is to be exercised by notice to the other party." Nevertheless, sometimes even a notice of termination is dispensable because the contract is terminated automatically, the BGB §326 relates to cases of impossibility and art. 9:303 (4) of the PECL refers to the situation where a party is excused under art. 8:108 in view of an impediment, which is total and permanent.

58. See Krusinga, *supra* note 34, at 13:

In the Dutch Civil Code, the right to avoid a contract is regulated in Arts. 6:265-277 BW. art. 6:265(1) BW provides that poor performance or non-performance of the obligation of a party, allows the other party to avoid the contract, unless this remedy is inappropriate considering the special nature or the limited extent of the breach of contract. The creditor is thus allowed to choose this remedy, except where the non-performance is of minor importance.

See CISG, *supra* note 3; PECL, *supra* note 21: Scholars in the Netherlands have defended the position that this article should be interpreted according to the CISG, so that termination is only possible in the case of a fundamental breach of the contract. Nevertheless, this argument was rejected by the Supreme Court of the Netherlands; see HR Feb. 4, 2000, NJ 2000, 562 m.nt. JBMV (Mol/Meijer Beheer) (Neth.).

the requirement that the non-fulfillment is fundamental. Non-fulfillment is fundamental when non-performance “substantially deprives the other party of what that party was entitled to expect under the contract, unless at the time of conclusion of the contract the non-performing party did not foresee and could not be expected to have foreseen that result” or “it is of such a nature as to make clear that the non-performing party’s future performance cannot be relied on.”<sup>59</sup> A buyer will lose this right to terminate the contract “if notice of termination is not given within a reasonable time from when the right arose or the buyer became, or could be expected to have become, aware of the non-performance, whichever is later.”<sup>60</sup>

Nevertheless, according to the CESL, in B2C transactions where there is non-performance because the goods do not conform to the contract, the consumer may terminate the contract unless the lack of conformity is insignificant.<sup>61</sup> Consequently, in this case the requirements for termination are not so strict.

Concerning the concept of a fundamental breach, CISG art. 25 states that:

A breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would have not foreseen such a result.<sup>62</sup>

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59. *CESL*, *supra* note 4, at art. 87(2) (a) and (b).

60. *CESL*, *supra* note 4, at art. 119. The European Parliament proposed to fix this period at two months in order to increase legal certainty, *see* PARL. EUR. DOC. (A7-0301/001-264) 85-86 Amendment 201 (2014).

61. *CESL*, *supra* note 4, at art. 114 (2).

62. Aneta Spaic, *Interpreting Fundamental Breach*, in *INTERNATIONAL SALES LAW 237 et seq.* (Larry A. DiMatteo ed., Cambridge U. Press 2014). Aneta Spaic reviews a number of approaches that have been applied in order to determine fundamental breach. The author states that this situation has led to a great deal of uncertainty that a single approach would eliminate. For that reason, she proposes a definition combining a purposive approach (whether the aggrieved party has been substantially deprived of what he expected out of the contract) and a remedy-oriented approach (whether the aggrieved party’s interests can be protected through remedies short of avoidance).

An exact definition of what constitutes a fundamental breach is not provided due to the many differences among the definitions of fundamental breach to be found in the various legal systems.<sup>63</sup>

The delivery of defective goods is undoubtedly the most recurrent situation in international sales litigation. The number of decisions dealing with this issue is relatively high, but what is more problematic is to determine the kind of deficiencies in the goods that may amount to a fundamental breach. In this field, the courts follow an economically oriented approach based on the loss suffered by the aggrieved party. Some elements judges take into consideration are the percentage of defective goods, the estimated cost of the repair compared to the total value of the goods, and the merchantability of the defective goods.<sup>64</sup>

The PECL and the DCFR also consider that a fundamental breach occurs where the breach of the contract is intentional or reckless.<sup>65</sup>

International instruments like the CISG, the UNIDROIT Principles, the PECL, and the DCFR harmonize the concept of fundamental breach.

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63. PETER SCHLECHTRIEM & PETRA BUTLER, *UN LAW ON INTERNATIONAL SALES—THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS* 100-101 (Springer 2009):

Of course, despite the attempt to consolidate the principle of fundamental breach through Article 25 CISG, there is still room for the national courts and arbitral tribunals to assess the concept of fundamental breach according to the particular domestic understanding of fundamental breach, its significance in the particular national legal system, and the particular traditions which necessarily leads to slightly different approaches by different courts and tribunals. The German and the Swiss Supreme courts take a strict approach on fundamental breach whereas the French, Austrian, and United States courts are more flexible in finding a fundamental breach and allowing avoidance of the contract.

64. Cf. Leonardo Graffi, *Case Law on the Concept of “Fundamental Breach” in the Vienna Sales Convention*, 3 INT’L BUS. L. J. 338-349 (2003), available at <https://perma.cc/7UWA-Q55W>.

65. “[H]olding every intentional breach to be fundamental independent of its significance does not fit to international trade practices and cannot be justified by the legitimate interest of the non-breaching party.” See Ingeborg Schwenzer & Pascal Hachem, *Drafting New Model Rules on Sales: CFR as an Alternative to the CISG?*, 11 EUR. J. L. REFORM 464 (2009).

For the CISG, the criteria of foreseeability contained in article 25 is extremely important. Even if the breach of contract results in a detriment to the other party that substantially deprives him of what he is entitled to expect, the breach is not fundamental if the party in breach of contract did not foresee such a result and a reasonable person of the same kind in the same circumstances would not have foreseen such a result. Likewise, article 8:103 of the PECL contains a similar notion of foreseeability: the consequences of a breach should be foreseeable at the moment of the conclusion of the contract. The foreseeability requisite is made more objective by the reasonableness criteria. In article 8:103(2) of the PECL, the test to be applied is not what the party in breach of contract did not foresee or could not have foreseen due to certain conditions, but rather what a reasonable person, acting in good faith, in the same circumstances would not have foreseen. The CISG also uses the “reasonable person of the same kind in the same circumstances” criterion in art. 25. Under art. III. – 3:502 of the DCFR, termination requires a fundamental non-performance of the debtor similar to the other mentioned texts, yet without the requirement of reasonableness.<sup>66</sup> The same is true of art. 87.2 of the CESL.<sup>67</sup>

Another criterion of fundamental breach is the concept of substantial deprivation, which is almost the same in the CISG, the PECL and the DCFR though with a difference of wording (“detriment,” in the CISG; distinction between “strict compliance” and

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66. See DCFR, *supra* note 31, at art. III. – 3:502 (2):

A non-performance of a contractual obligation is fundamental if: (a) it substantially deprives the creditor of what the creditor was entitled to expect under the contract, as applied to the whole or relevant part of the performance, unless at the time of conclusion of the contract the debtor did not foresee and could not reasonably be expected to have foreseen that result . . . .

67. See CESL, *supra* note 4, at art. 87.2:

Non-performance of an obligation by one party is fundamental if: (a) it substantially deprives the other party of what that party was entitled to expect under the contract, unless at the time of conclusion of the contract the non-performing party did not foresee and could not be expected to have foreseen that result; or (b) it is of such a nature as to make it clear that the non-performing party’s future performance cannot be relied on.

“substantial deprivation” in the PECL). Substantial deprivation is related to the expectations of the aggrieved party. In addition, the party’s special expectations for the performance of the contract are also relevant for ascertaining whether the breach was fundamental. The breach is fundamental regardless of whether it occurred in respect to a primary obligation or an ancillary obligation. What should be taken into consideration is the importance of the aggrieved party’s interests, and this is a matter for judicial discretion.<sup>68</sup>

In Spain, there is an important body of case law reinterpreting the concept of fundamental breach in the light of harmonized European legal texts. The idea is that not every case of non-performance by one of the contractual parties authorizes the other to terminate the contract, according to the fundamental principle of “conservation of the contract.”<sup>69</sup>

Highly illustrative is the Supreme Court judgment of May 23, 2014<sup>70</sup> regarding the sale of a parking-garage place. The Court held that the less than expected height of the entrance door and the risk of water filtration did not prevent the usefulness or suitability of the object to be used in accordance with the nature of the contract. It was not therefore a fundamental breach of the contract making termination possible. The Supreme Court expressly referred to European Contract Law and the CISG.

In the opinion of the Court, fundamental breach relates to the satisfaction of the interest of the creditor. The focus of attention is not the possible breach of duties established in the contract or implemented in accordance with the principle of good faith. To determine the content of the satisfaction of the creditor, one has to take into account the interests involved in the conclusion of the contract, identified according to the so called “basis of the contract,” the specific cause of the contract, whether that is expressed in it or is simply

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68. GUENTER H. TREITEL, *REMEDIES FOR BREACH OF CONTRACT—A COMPARATIVE ACCOUNT* 350 (Clarendon Press 1988).

69. *Cf.* Spanish Supreme Court, S.T.S., Feb. 25, 2013 (R.J. 2013, 7413).

70. Spanish Supreme Court, S.T.S., May 23, 2014 (R.J. 2014, 3878).

known to both parties, and the type and characteristics of the contract concluded. This is in line with art. 25 of the CISG. Spanish courts use terms like “frustration of the practical purpose pursued” or refer to the “legitimate expectations” of the parties when concluding the contract.<sup>71</sup>

This solution is in accordance with the principle of the conservation of the contract.<sup>72</sup>

### 3. *Specific Performance and Compensation for Damages*

Conceptually, in the field of remedies for the breach of contract, there are great differences between common law and civil law countries. Compensation for damages has been the ordinary remedy in common law countries for a breach of contract, while the civil law aims at specific performance,<sup>73</sup> although at present this distinction

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71. The basis of the contract can be defined as the aim pursued by one of the contractual parties that was known and accepted by the other, and was reflected in the economic consequences of the contract. For instance, in the judgment of the Spanish Supreme Court, S.T.S., Nov. 12, 2014 (R.J. 2014, 5911), the delay in the delivery of the immovable that was sold, is considered as a fundamental breach by interpreting the contract according to its basis. In this case, the object of the contract was a piece of developable land, and the deadline for the execution of the deed was fundamental (otherwise, the buyer would not have had the opportunity to apply for the building licence).

In addition, the judgment of the Spanish Supreme Court, S.T.S., June 13, 2014 (R.J. 2014, 3435), solves a case of a fundamental breach of the contract by the seller. The parties had concluded a contract of sale for a piece of land that the buyers had planned to develop. After the conclusion of the contract, a new administrative regulation was adopted that meant that the building process was no longer possible, as the immovable was now listed as a building of Cultural Interest. The Supreme Court considered that this was not a case of a risk that should be held by the buyer (*res perit emptore*). While, generally speaking, it is true that the buyer assumes the risk represented by a change in land development regulations, in this case, the fact that the buyer intended to develop the piece of land occupied by the building (that it was no longer possible to demolish), was considered a basic element of the contractual object and for that reason, a principal obligation of the seller (according to the basis of the contract).

72. Cf. Spanish Supreme Court, S.T.S., Jan. 3, 1991 (R.J. 1991, 105). In this case, termination is not possible, as the breach is not fundamental. Otherwise, there would be a violation of the principle of conservation of the contract. This principle avoids possible situations of fraud and meets the essential aim of complying with the expressed will of the contracting parties to satisfy the needs of the economy of the contract.

73. Alex Geert Castermans, Ruben de Graaff, & Matthias Haentjens, *The Digital Single Market and Legal Certainty: A Critical Analysis*, in 7 CONTENTS

is no longer so sharp.<sup>74</sup> In the CISG the question is not resolved, leaving the decision to the national courts.<sup>75</sup>

Directive 1999/44 bridges the gap between the two options by giving the seller the opportunity to cure the lack of conformity. In the regime of the Directive, the consequences of a breach of the contract are not completely determined by the buyer's option for one or

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AND EFFECTS OF CONTRACTS-LESSONS TO LEARN FROM THE COMMON EUROPEAN SALES LAW, STUDIES IN EUROPEAN ECONOMIC LAW AND REGULATION 60 (Aurelia Colombi Ciacchi ed., Springer 2016).

74. The new version of the Uniform Commercial Code makes the remedy of specific performance possible. To accommodate buyers who want the goods and not money, the Code offers sections 2-716 and 2-502. *See* UCC, *supra* note 24, at section 2-716:

(1) Specific performance may be decreed where the goods are unique or in other proper circumstances.

(2) The decree for specific performance may include such terms and conditions as to payment of the price, damages, or other relief as the court may deem just.

(3) The buyer has a right to replevin for goods identified to the contract if after reasonable effort he is unable to effect cover for such goods or the circumstances reasonably indicate that such effort will be unavailing or if the goods have been shipped under reservation and satisfaction of the security interest in them has been made or tendered.

“Of course the Code drafters did not write on a *tabula rasa* here but upon a slate already crowded with centuries of judicial and legislative markings.” *Cf.* JAMES WHITE & ROBERT SUMMERS, UNIFORM COMMERCIAL CODE 314 (6th ed., West 2010).

The Sale of Goods Act, 1979, c.54 (UK), at section 52, governs specific performance in English sales law and common law principles are provided by the section 62(2) of the same Act. Specific performance under English sales law will only be granted to an aggrieved buyer of goods at the discretion of the court. This will be in the form of a judgment or order, requiring the seller to deliver the goods to the buyer in conformity with the terms of the contract when the goods are unique and damages are proved to be inadequate.

Furthermore, in English law, the court can have the power to order that a specific performance is carried by a party to a contract. The Consumer Rights Act, 2015, c.15 (UK), at sections 23-24, contains rights which allow consumers to have items replaced and repaired if they do not adequately conform to the terms of the contract which were originally agreed on between the parties.

75. *See* CISG, *supra* note 3, at art. 28:

If, in accordance with the provisions of this Convention, one party is entitled to require performance of any obligation by the other party, a court is not bound to enter a judgment for specific performance unless the court would do so under its own law in respect of similar contracts of sale not governed by this Convention.

another or by the mere economic interest of the seller.<sup>76</sup>

Specific performance is a remedy that fits one of the general principles of the law present in EU contract law, which is the conservation of the contract.<sup>77</sup> One has to put this in relation to the termination of the contract, which is a remedy of an exceptional character in the common law and in the civil law tradition.

From a dogmatic point of view, it was said that French law used specific performance, not because of any supposed underlying economic efficiency of this remedy, but in order to grant the creditor, who is the victim of a breach of contract, satisfaction in the form of the expected benefit available when an award of only damages seemed unfair.

Nevertheless, some scholars consider this well-known “principle” of French law only didactic, conjured up by academics in order to categorize and influence case law.<sup>78</sup>

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76. By means of the transposition of the Directive 1999/44, *supra* note 16, under Dutch Law, this remedial scheme has now gained an even more subtle character, which gives the courts more power to intervene when a particular solution is seen as disproportionate. See Castermans, de Graaff, & Haentjens, *supra* note 73, at 61.

77. Directive 1999/44, *supra* note 16, in this particular topic, has “its basis in the principle of conservation of the contract. Repair and replacement of the goods are, in fact, remedies which enjoy priority, in that they bring about the exact execution of the sale.” See Massimo C. Bianca, *Article 3: Rights of the Consumer*, in E.U. SALES DIRECTIVE—COMMENTARY 168 (Massimo C. Bianca & Stefan Grundmann eds., Intersentia 2002). In addition, this principle is reflected in the *CELS*, *supra* note 4, at C. Annex II (32): “The Common European Sales Law should aim at the preservation of a valid contract whenever possible and appropriate in view of the legitimate interests of the parties.”

78. See Yves-Marie Laithier, *Comparative Reflections on the French Law of Remedies for Breach of Contract*, in *COMPARATIVE REMEDIES FOR BREACH OF CONTRACT* 103-122 (Nili Cohen & Ewan McKendrick eds., Hart Publ'g 2005). The author analyses a judgment of the French *Cour de cassation* [Cass] [supreme court for judicial matters], Cass. Civ. 3, June 24, 1971, Bull. Civ. III, no. 408, which refuses to state that specific performance is, as a matter of “principle” available to a creditor who is the victim of a breach of contract. In this case, the *Cour de cassation* approved the court of appeal’s refusal to grant specific performance and to award damages instead. The defects were not significant enough to require the rebuilding of the construction. The building contractor could avoid specific performance and substitute a pecuniary compensation for the specific performance.

The situation has changed with the French revision of obligations by Ordinance no. 2016-131, Feb. 10, 2016. It has introduced an important modification so that specific performance can be excluded if there is an imbalance between the cost of the enforcement for the debtor and its benefit for the creditor.<sup>79</sup>

Moreover, the general starting point in German law is that the parties to a contract are entitled to demand performance of their respective obligations in kind. “The effect of an obligation,” says BGB § 241, “is that the creditor is entitled to claim performance from the obligor” (it is also contained in PECL art. 9:102). The most important exception is fixed in BGB § 275 (1): a claim for specific performance is excluded, as far as such performance is impossible.

Also, according to BGB § 275 (2), “(t)he obligor may refuse performance to the extent that performance requires expense and effort which, taking into account the subject matter of the obligation and the requirements of good faith, is grossly disproportionate to the interest in performance of the obligee.” When it is determined what efforts may reasonably be required of the obligor, it must also be taken into account whether he is responsible for the obstacle to performance. This version of BGB § 275 (2) is based on considerations which can also be found in the PECL. In this sense, art. 9:102 (2)(b) of the PECL states that specific performance cannot be obtained where performance would cause the debtor unreasonable effort or expense. In Spanish law, one can find statements to the effect that specific performance is the general and preferential remedy in cases of breach of contract, although this is not always true.<sup>80</sup>

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79. Cf. Code Civil [C. CIV.] art. 1221 (Fr.): “The creditor of an obligation may, after a putting in default, seek execution in kind unless such execution is impossible or unless there is a manifest disproportion between the cost to the debtor and the interest of the creditor.” See on the French revision, Mustapha Mekki, *The French Reform of Contract Law: The Art of Redoing Without Undoing*, 10 J. CIV. L. STUD. 223 (2017).

80. Fernando Gómez Pomar, *El incumplimiento contractual en Derecho español*, 3 INDRET 16 (2007). Despite some rhetorical manifestations of the Supreme Court, in Spanish Law, specific performance does not seem to be the general remedy in cases of breach of contract. It is generally but not necessarily pref-

Specific performance has a “bigger content” in Spanish Law due to the transposition of Directive 1999/44, as in certain contracts of sale it is possible to demand the repair and the replacement of goods that do not conform to the contract.

However, the idea that the creditor has a right to specific performance is an idea that can be questioned as it can create an excessive burden for the debtor, and the reasonableness of introducing other limits to this remedy, different from impossibility and good faith, is currently under discussion. This kind of reasoning approximates civil law and common law solutions, as it was traditionally common law that granted greater importance to economic considerations in the implementation of remedies for breach of contract.<sup>81</sup>

Furthermore, according to Spanish case law, the defendant cannot refuse compensation for damages on the grounds that he would prefer specific performance.<sup>82</sup>

#### *4. The Change of Circumstances*

##### *a. The Change of Circumstances in Harmonized European Law*

The principle of *pacta sunt servanda* is universally recognized. Contracts are binding because individuals are willing to fulfil them and they trust that their counterparts will do the same. If all contracts were generally reviewable, the confidence of the economic agents

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erential to the remedy of compensation for damages. The author quotes a judgment of the Supreme Court of Spain, S.T.S., July 2, 1998 (R.J. 1998, 5123), where specific performance was not impossible, but the cost of compliance was so disproportionate that the remedy of compensation for damages was more appropriate.

81. The situation is similar in the Netherlands where, on the basis of the requirements of reasonableness and equity, it is thought that “the creditor may not demand specific performance if that remedy would unreasonably burden the debtor and the specific performance would not be more beneficial to the creditor than another remedy would have been.” See M.B.M. Loos, *Section 1: Right to Performance*, in *THE PRINCIPLES OF EUROPEAN CONTRACT LAW AND DUTCH LAW—A COMMENTARY* 355 (Danny Busch, Ewoud Hondius, Hugo Van Kooten, Wendy Schrama, & Harriet Schelhaas eds., Kluwer 2002).

82. Spanish Supreme Court, S.T.S., Oct. 10, 2012 (R.J. 2013, 1537).

would vanish, and it is confidence that is fundamental in any economic system. In any case, the idea that, as a general rule, contracts are binding and, therefore, in the case of non-performance generate some kind of responsibility, is a necessary condition for the efficient functioning of the economic system.

Yet, in many legal systems, a fundamental change to the circumstances of a contract can serve to loosen the binding nature of that contract. The legal doctrine that provides this effect is called by various names in different European countries. In previous European instruments, such as the PECL, and the DCFR, the term used has been “change of circumstances,” also to be found in the CESL.<sup>83</sup>

In comparing article 89 of the CESL with its precedents in the PECL and the DCFR, we can conclude that there are no great differences in their respective rules. In all of them, at the very beginning, there is an explicit recognition of the principle *pacta sunt servanda*. Nevertheless, this principle can be moderated in cases where there is a change of circumstances that makes the contract more onerous, either because it has increased the value of the performance or because it has devalued the consideration. The impact that the exceptional change of circumstances would have on the contract is described in different words: “performance of the contract becomes excessively onerous” in the PECL; the contract “becomes so onerous . . . that it would be manifestly unjust to hold the debtor to the obligation” in the DCFR; and “performance becomes excessively onerous” in the CESL. On the other hand, there is no hierarchy established between a variation of the contract or its termination; the decision in each case is left to the judge. The remedy of termination does not present a huge problem: the judge will determine its consequences. As for variation, the terminology changes, “adapt the contract in order to distribute between the parties in a just

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83. Cf. PECL, *supra* note 21, at art. 6:111; DCFR, *supra* note 31, at art. I. - 1:103; CESL, *supra* note 4, at art. 89.

and equitable manner the losses and gains” in the PECL; “vary the obligation in order to make it reasonable and equitable in the new circumstances” in the DCFR; and “adapt the contract in order to bring it into accordance with what the parties would reasonably have agreed at the time of contracting if they had taken the change of circumstances into account” in the CESL.

Both the CESL and the PECL, as a consequence, first establish the duty to renegotiate. The DCFR refers directly to the judge's intervention, but renegotiation is a prerequisite for the application of that intervention. Apart from that, the requirements for the application of this intervention almost totally coincide, except that art. III.-1:110 of the DCFR is applicable to both contractual obligations and obligations arising from a unilateral legal act. The inclusion of the latter category is not a common feature of national jurisdictions or international instruments. Its inclusion in the DCFR has its justification in the protection of the debtor in cases of unilateral contracts that, in most cases, are gratuitous in nature.

On the other hand, it is only in the PECL that the court may award damages for the loss suffered through a party refusing to negotiate or breaking off negotiations contrary to good faith and fair dealing.<sup>84</sup>

This rule of an “unexpected change of circumstances” does not have an equivalent in every legal system of the Member States, but there are some that recognise this legal doctrine.

#### *b. Change of Circumstances in Spanish Law*

The legal doctrine used to solve problems arising from unexpected circumstances in Spanish Law is the so-called *rebus sic stantibus* clause. This remedy seeks to restore the equilibrium of the contract, which has been destroyed as a result of an unforeseeable change of circumstances. There is no regulation of the clause in the

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84. See Luz M. Martínez Velencoso, *Change of Circumstances*, in EUROPEAN PERSPECTIVES ON THE CESL, *supra* note 19, at 137-163.

Spanish Civil Code; instead it has been developed by the courts. According to jurisprudence, the requirements for the application of the clause are the following: the clause is only applicable to deferred execution contracts or contracts that should be performed at successive intervals; and the change of circumstances should be unforeseeable.

There must be a change in the basis of the contract due to the fact that the equilibrium of the contract has been affected or because the aim of the contract has been frustrated.

The change in the basis of the contract must be considered “reasonably” extraordinary and unforeseeable at the moment of the conclusion of the contract. For that reason, it is not possible to apply the clause when the change of circumstances concerns a contractual risk that has been assumed by the parties. The inclusion of the concept of reasonableness comes from the recent judgments of the Spanish Supreme Court, because traditionally it was understood that the change of circumstances should be utterly extraordinary and should mean a total destruction of the equilibrium of the contract.

In many judgments, the application of the clause has been dismissed because there was an express assumption of the risk of a change of circumstances in the contract, or that the change of circumstances formed part of the normal distribution of risks (determined either contractually or statutorily).<sup>85</sup>

In addition, the change in circumstances must be unforeseeable. This requirement is difficult to meet, because in modern society, certain risks are not natural but artificial, in the sense that they arise as a social product, and it is very difficult in some cases to anticipate

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85. For example, in the judgment of the Spanish Supreme Court, S.T.S, June 16, 1983 (R.J. 1983, 3632), concerning a contract for the execution of building works, there was a clause excluding justification for late delivery of the building in the event that the workers went on strike. For that reason, the Supreme Court did not apply the clause *rebus sic stantibus* when the work became more expensive than initially expected, because of strike action. There was also another clause stipulating that the price should not be increased.

and to insure against them. Thus, unforeseeability should be assessed in relation to the type of contract and the amount of information to which the contracting parties had access to at the time of contracting.<sup>86</sup>

Furthermore, none of the parties must be responsible for the change of circumstances, because it is unfair to grant a defence mechanism to a party who is being held to account because he violated the duty of care to avoid the risk that was required of him according to the principle of good faith.<sup>87</sup>

As for the effects arising from the change of circumstances of the contract, although only a few judgments in the past accepted the application of the clause to the case under consideration, some of them have allowed the termination of the contract, while others have opted for its modification. The modification of the contract is done by the court through an integrated interpretation of the content of the contract. The legal basis for this integrated interpretation is art. 1258 CC, which states that, apart from the agreed obligations, parties should also respect the obligations arising from the principle of good faith.<sup>88</sup>

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86. For that reason, depreciation of currency is not considered an unforeseeable circumstance, according to the judgment of the Spanish Supreme Court, S.T.S., Dec. 14, 1940 (R.J. 1940, 1135), involving a contract for the sale of a mine; the judgment of the Spanish Supreme Court, S.T.S., Mar. 26, 1963 (R.J. 1963, 2120), on the use of water by a community; and the judgment of the Spanish Supreme Court, S.T.S., Nov. 31, 1963 (R.J. 1963, 4264), on a mine leasing contract.

Other cases have held that, the alteration of the value of the assets, in the period between the time of conclusion of the contract and its performance, is not an unforeseeable circumstance. *See* the judgment of the Spanish Supreme Court, S.T.S., June 5, 1945; the judgment of the Spanish Supreme Court, S.T.S., Oct. 6, 1987 (R.J. 1987, 6720); the judgment of the Spanish Supreme Court, S.T.S., May 29, 1996 (R.J. 1996, 3862); and the judgment of the Spanish Supreme Court, S.T.S., Apr. 27, 2012 (R.J. 2012, 4714).

87. *See* the judgment of the Spanish Supreme Court, S.T.S., Apr. 19, 1985 (R.J. 1985, 1804); the judgment of the Spanish Supreme Court, S.T.S., Nov. 19, 1994 (R.J. 1994, 8539); and the judgment of the Spanish Supreme Court, S.T.S., Nov. 15, 2000 (R.J. 2000, 9214).

88. In the judgment of the Spanish Supreme Court, S.T.S., Nov. 23, 1962 (R.J. 1962, 5005), the effect of the clause was to modify the contract. However, two judgments of the Spanish Supreme Court declared the termination of the contract, S.T.S., Jan. 28, 1970 (R.J. 1970, 503) and S.T.S., Mar. 23, 1988 (R.J. 1988,

There has recently been a change of perspective in this doctrine developed by the Spanish Supreme Court due to the ongoing effects of the financial crisis on the Spanish economy and the influence of harmonized European private law (the PECL, the DCFR, and the CESL). For instance, in the judgment of June 30, 2014,<sup>89</sup> quoting the PECL and the DCFR, the Spanish Supreme Court came to the conclusion that it is necessary to reinterpret the old doctrine of *rebus sic stantibus* according to these harmonized European texts. Referring to an advertising contract, the court states that: “Economic expectations about the advertising activity formed part of the basis of the contract (the price could be increased if the benefits increased as well).” As the annual turnover decreased substantially due to the financial crisis, the price should be reduced, according to the court and in this case also the legal consequence was the modification of the contract by the court and not its termination.

Another important milestone was the judgment of Oct. 15, 2014<sup>90</sup> that concerned the lease contract of a hotel. The Supreme Court following its previous doctrine about the necessity of modernizing the old *rebus sic stantibus* doctrine came to the conclusion that the rent should be revised as it had been proved that, in the city of Valencia, in 2009, the income of this kind of companies had fallen by 42.3% per room. The rent should correspondingly be reduced by 29% (according to an expert opinion). Even after the reduction “the resulting income would be superior by 20% in relation to the market rent.” Again, the modification of the contract was the preferred option.

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2228). In other judgments of the Spanish Supreme Court, the effect was the modification of the contract, S.T.S., July 9, 1984 (R.J. 1984, 3803); S.T.S., Nov. 6, 1992 (R.J. 1992, 9226); and S.T.S., July 21, 2010 (R.J. 2010, 3897).

89. Spanish Supreme Court, S.T.S., June 30, 2014 (Rec. 2250/2012).

90. Spanish Supreme Court, S.T.S., Oct. 15, 2014 (Rec. 2992/2012).

## III. CONCLUDING REMARKS

In Spain, although a proposal to reform the Civil Code (Law of Obligations) has been published by the Spanish Ministry of Justice, the necessary modernization of the Civil Code has not yet taken place. This task has, nevertheless, been assumed by the Spanish Supreme Court interpreting the harmonized European Law as an instrument to integrate national law, especially through the construction of a new system of contractual liability (unitary concept of non-performance, lack of conformity of the goods, and termination by means of a fundamental breach).

Also, the influence of the so called *acquis communautaire* can be observed in Spanish Law. The various European Directives for the protection of consumers have been the object of transposition in Spain through different special acts that were finally gathered together in one single act, the Royal Legislative Decree 1/2007, Nov. 16, 2007, approving the revised text of the General Law for the Protection of Consumers and Users. Spanish Courts, applying this text, have developed some important principles, like the so-called control of transparency, understood as an instrument to make sure that “the consumer has real knowledge of what the financial sacrifice is and of the legal burden that is derived from the contract”<sup>91</sup> in cases of standardized contracts. Consequently, any clauses introduced in the contract that suffer from this lack of transparency should be declared null and void.

Finally, the influence of harmonized European Law can be observed in relation to the change of the circumstances of the contract, particularly important because of the ongoing effects of the financial crisis on the Spanish economy. There is no regulation of this legal institution in the Spanish Civil Code; instead it has been developed by case law. There has recently been a change of perspective in this doctrine developed by the Spanish Supreme Court due mainly to the influence of harmonized European private law (the PECL, the

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91. See judgment of the Spanish Supreme Court, Sept. 8, 2014, *supra* note 9.

DCFR, and the CESL), softening the strict previous requirements and consequences.