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Content:

III. Substantive Freedom Of Contract

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Freedom of contract governs the CISG,\(^{22}\) and has been made the portal of the UPICC and PECL. "The parties are free to enter into a contract and to determine its contents," says UPICC art. 1.1. Art. 1:102 (1) of PECL provides that, "parties are free to enter into a contract and to determine its contents, subject to the requirements of good faith and fair dealing, and the mandatory rules established by these Principles."\(^{23}\)

Everybody has a right to a free scope for his personality in so far it does not violate the rights of others and is not in contravention of the constitutional order or public morality," says the German Constitution,\(^{24}\) and this free scope includes freedom of contract. Statutes and Codes of many other countries have proclaimed this freedom, and the courts both in the civil and common law countries have stuck to it tenaciously.\(^{25}\)

IV. You Shall Keep Your Bargain (pacta sunt servanda)

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This is a basic principle in the laws of all countries. Many laws and courts stick to it with rigor.\(^{28}\) It is stated in the famous article 1134 (1) of the French Civil Code. "The agreements validly concluded are regarded as law for the parties," the UPICC states in art. 1.3. "A contract validly entered into is binding upon the parties. It can only be modified or terminated in accordance with its terms or by agreement or as otherwise provided in these Principles."\(^{29}\) A contracting party must be able to rely on the contract and exercise the rights granted to him or her under the contract. As the draftsmen of the CISG, the CECL considered the principle to be so obvious that it was not stated in a special rule. It is, however, implied in several articles, including CISG art. 79, see force majeure below in section 9. It is also implied in art. 6.111 (1) of the PECL on change of circumstances, which provides that a party is bound to fulfil its obligations even if performance becomes more onerous.

V. Informality

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The rules in CISG art. 11 and UPICC art. 1.2 reflect the necessity of having international transactions freed from formal...
requirements.\textsuperscript{31} The comment to UPICC points out that art. 1.2 seems particularly appropriate in the context of international trade relationships where, thanks to modern means of communication, many transactions are concluded with great speed and are not recorded. It is submitted that the reservation as to form made by some countries under art. 96 of CISG should be revoked. It is worthy of note that the United States did not make that reservation.

VII. Good Faith And Fair Dealing

UPICC art. 1.7 states that, "each party must act in accordance with good faith and fair dealing in international trade."

PECL art. 1:201 provides that, "each contracting party must act in accordance with good faith and fair dealing.\textsuperscript{37} Both rules are to be mandatory. Particular applications of this principle appear in several specific provisions of the two instruments. The laws of several countries have adopted the principle. Some countries' legal systems, such as German and Dutch law, have given it a wide scope of application. Here, it is a "vitally important ingredient for a modern general law of contract."\textsuperscript{38} In other laws, it has received a more modest scope of application,\textsuperscript{39} although in some of them, one finds a tendency to widen that scope. The representatives of the OHADA countries decided to adopt the good faith principle in the AFRAC and to give it the same scope of application as it has in UPICC.

[...]

VIII. Reliance

It is generally held that a contract is to be interpreted according to the common intention of the parties, even if this differs from the literal meaning of the words.

[...]

IX. The "Reasonably Foreseeable" Test

Related to the reliance doctrine is the maxim that a party can only be made to face those consequences of its acts or omissions which the party could reasonably foresee at the time of the conclusion of the contract. This principle, the purpose of which is to protect the party against surprising and onerous conditions and contingencies, is found in several rules.

[...]

4. The Reasonably Foreseeable Test also puts a limit on the compensation for harm that a party sustained as a result of the other party's non-performance.\textsuperscript{67} The aggrieved party can only claim to get compensated for the loss, including lost profit, which at the time of the conclusion of the contract was reasonably foreseeable to occur as arising naturally in the ordinary course of things, or which the defaulting party had reason to foresee due to information given to him or her by the aggrieved party or otherwise.\textsuperscript{68} This rule, which is provided in CISG art. 74, UPICC art. 7.4.4. and PECL art. 9:503. is gaining ground in the world.\textsuperscript{69}

X. Proportionality
2. [...] It has been argued that a party that is then exposed to hardship must bear the consequences. However, the hardship that a party may suffer in these cases is often too severe a penalty for its forgetfulness or improvidence. Therefore, in addition to a rule on vis major covering impossibility and quasi-impossibility, some legal systems have relieved the debtor when performance, though not impossible, has become excessively onerous (Italian: essesivamente onorosa so that the economic basis on which the contract was made has lapsed, (German: Störung der Geschäftsgrundlage). A hardship rule is also found in Dutch law, and a similar rule on imprevisión exists in French administrative law.

CISG has no such provision, but the UPICC and PECL (PECL I & II. supra note 6 at 322 ff.) provide rules on hardship. Under UPICC art. 6.2.1, a party is bound to fulfil its obligations, even if its performance has become more onerous. A party cannot get out of a contract merely because it has turned out to be unprofitable, but the party can have it modified or ended in case of hardship. Art. 6.2.2. states:

There is hardship where the occurrence of events fundamentally alters the equilibrium of the contract either because the cost of a party’s performance has increased or because the value of the performance a party receives has diminished, and:

a

The events occur or become known to the disadvantaged party after the conclusion of the contract;

b

The events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract;

c

The events are beyond the control of the disadvantaged party; and

d

The risk of the events was not assumed by the disadvantaged party.

Article 6.2.3 gives rules on the effects of hardship:

(1)

In case of hardship, the disadvantaged party is entitled to request renegotiations. The request shall be made without undue delay and shall indicate the grounds on which it is based. Then the disadvantaged party must wait for relief:

(2)

The request for renegotiation does not in itself entitle the disadvantaged party to withhold performance.

(3)

Upon failure to reach agreement within a reasonable time, either party may resort to the court.

(4)

If the court finds hardship it may, if reasonable,
(a)

terminate the contract at a date and on terms to be fixed; or

(b)

adapt the contract with a view to restoring its equilibrium.

The PECL art. 6:111 provides similar rules as UPICC arts. 6.2.1-6.2.3. The rules on hardship are not mandatory. When making their contract, the parties may agree on how to distribute the risks. Whereas vis major destroys the contract, hardship, which is due to an imbalance in the parties' rights and duties, may keep the contract alive, but its terms will then have to be modified.

3. It is a general rule in many jurisdictions that the aggrieved party can terminate a contract for the other party's non-performance only if it is fundamental. Some legal systems do not openly apply the doctrine of fundamental non-performance, but rather approach it in various ways. The reason for this requirement is that, for the defaulting party, termination usually involves a serious detriment. In attempting to perform, the defaulting party may have incurred expenses, which are now wasted. Thus the party may lose all or most of its performance when there is no market for it elsewhere. This argument carries great weight in international trade, where goods are sent to foreign markets. When other remedies, such as damages, are available, these remedies will often safeguard the interests of the aggrieved party sufficiently so that termination should be avoided.

22See on art. 6 Honnold, Uniform Law for International Sales Under the 1980 United Nations Convention, 2d ed. 1991 (hereinafter Honnold) No. 74 ff. The freedom was made possible by excluding certain issues such as the validity of the contract from the scope of CISG.

23See also Berger, supra note 15 Annex 1 Principle no. 1.

24Art. 2 (1) Jeder hat das Recht auf die freie Entfaltung seiner Persönlichkeit, soweit er nicht die Rechte anderer verletzt und nicht gegen die verfassungsmäßige Ordnung oder das Sittengesetz verstößt. (English translation: "Everybody has a right to the full development of his personality in so far as he does not violate the rights of others or infringe the constitutional order or the moral laws."). See also § 311 BGB.


26See Enforceability of Promises, supra note 12 passim.

27See also Berger, supra note 15 Annex 1, Principle no 3.

28See Schlechtriem, supra note 1, art. 11 note 4.

29See also Berger, supra note 15, Annex 1 Principle no. 2.

30See Good Faith, supra note 12, at 13.

31See PECL I & II, supra note 6, at 116 and on French Law, Sonnenberger/Autexier, Einführung in das Französische Recht (Introduction to French Law) no. 84 (3 ed. Heidelberg 2000). On American law see Summers in Good Faith, supra note 61, at 118.

67The rule was established in the common law. see on Hadley v. Baxendale (1854) 9 Ex. 431. which was inspired by the French civil code arts 1149-1151, and which has been followed in later English and American cases see Treitel. supra note 32 at 965. On American law, see Restatement Second of Contracts § 351 (1981). For a short survey of the laws of the European countries see PECL I & II. supra note 6 at 442 and Berger, supra note 15 Annex 1 Principle no 61.

68See also the UCC 2.715 (2)a (1977)


70Italian civil code art. 1467.


80Dutch BW art 6:258.


82See Berger, supra note 15 Annex 1 Principle no. 29.

83The rule applies in the Nordic laws of contract and corresponds very closely to English, Irish and Scottish law. It is laid down in CISG art. 49 cf. art. 25, in UPICC supra note 4 art. 7.3.1 and PECL I & II supra note 6 art. 9:301 cf. art. 8:103. See also Berger supra note 15 Annex 1 Principle no. 31 and Restatement (Second) of Contracts § 242 cf. § 241 (1981).

84German and Nordic law, PECL I & II art 9:102 (2) (b) see supra note 6, and UPICC art. 7.2.2. (b) see supra note 4. See on the laws in Europe PECL I & II notes to art 8:103. 366ff. The way in which the American Restatement (Second) of Contracts (1981) approaches the problem is complicated, see §§ 225 and 237. Comment A. on conditions, § 243 (1) cf. § 236 (1) on breach and § 253 on repudiation. See also §§ 237-242. The idea behind this approach is that the Restatement
wishes to distinguish the non-performance in general which results in discharge and the non-performance which is breach, and which has the additional effect of giving a damage action.

**Referring Principles:**

- I.1.1 - Good faith and fair dealing in international trade
- IV.1.1 - Freedom of contract
- IV.1.2 - Sanctity of contracts
- IV.4.1 - Freedom of form
- IV.5.1 - Intentions of the parties
- VI.1 - Termination of contract in case of fundamental non-performance
- VII.2 - Principle of foreseeability of loss
- VIII.1 - Definition