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## **CHAPTER 1. CONTRACT**

## CONTRACT

### *Main concerns*

A review of Acquis International as well as comparative law leads us to suggest two approaches to the notion of contract. The first approach merely identifies the common traits of the notion and results in proposing a narrow definition of contract founded on the existence, the consistency and the integrity of the intention of the party taking on the obligation **(I)**. The second approach goes beyond the narrow framework of the intention to take on an obligation. Instead, its centre of gravity moves towards identifying the exchange which leads to reliance: the binding force is no longer conceived as protecting the will of the parties but as preserving the legitimate reliance of the parties concerned **(II)**.

Whatever the approach adopted, it is relevant to question the nature of the effects produced by a contract **(III)**.

### **I. A NARROW PERCEPTION OF CONTRACT: A CONTRACT FOUNDED ON THE RESPECT OF THE GIVEN WORD**

All of the legal systems observed as well as the legal texts analysed in Aquis Communautaire and Acquis International agree upon a narrow definition of contract. The contract is considered, according to this restrictive approach, as a meeting of wills intended to produce legal effects. The central element of this approach lies in the will of the party who takes on the obligation and the respect for the promise made.

In this narrow legal definition, the core element of the contract is the meeting of wills of two parties in view of creating legal effects. In this case the word “contract” can be used without ambiguity. It should even be preferred to other terms such as “agreement” or “*convention*” (in French). However, it is possible to identify certain expressions which seem inappropriate while using the word “contract”: for example expressions such as the « contract is governed by... », or « the contract is concluded » are often found. With regard to this type of use, it would no doubt be more precise to talk of the “contractual relations” or of the “agreement” even if it must be acknowledged that these expressions are well established.

This strict definition centred on the meeting of wills raises several questions in relation to the scope of the Principles of European Contract Law (PECL):

#### ***A. Should an agreement made in a domestic (family) context be included in the notion of contract ?***

- *First possibility*: The agreements entered into in a domestic context are contracts as defined above and are included in the Principles of European Contract Law (Agreements in respect of which there is no intention of producing legal effects would therefore be excluded, as is the case under English Law).

- *Second possibility*: The agreements entered into in a domestic context can be contracts, but should nevertheless be excluded as PECL were not intended to deal with family relationships.

## ***B. Should a gratuitous contract be included in the notion of contract ?***

- *First possibility*: To consider that gratuitous contracts fall within the scope of PECL.

A difficulty may arise out of the fact that in certain countries, such as England, a gratuitous promise is not a contract and is not, in principle, binding. It may however be binding if it has been made by deed.

- *Second possibility*: To consider that gratuitous contracts do not fall within the scope of PECL, for they do not conform to the notion of reciprocity; this would be in keeping with the economic vision which underpins PECL. The contracts which fall within the scope of PECL must be founded on the idea of “bargain” identified by certain authors as the nucleus of contract (See point 2 mentioned above).

## **II. TOWARDS A WIDENED CONCEPTION OF CONTRACT FOUNDED ON RELIANCE?**

Could legitimate expectations<sup>1</sup> become the heart of contract? Several indications from different jurisdictions, including from French law, which is very attached to the protection of the will of the party taking on an obligation, could justify a positive response. “If the contract is an exchange which has as its purpose the division of labour and the best use of resources and if this exchange is planned and regulated by reciprocal promises which take root in the expectation that they have given rise to, the will to contract is no longer a psychological fact and the subject is committed because he has led others to trust him.”<sup>2</sup> The objective would therefore be to respect the expectations of the parties as to the consequences of their acts.<sup>3</sup>

The national laws however, remain divided. These hesitations come to light in particular regarding the analysis of unilateral undertakings (“*engagements unilatéraux*” in French).<sup>4</sup> PECL (article 2 :107), like the European Code of Contracts drafted by the Academy of European Private Lawyers of Pavia (“Pavia Project”) (articles 4 et 20), decided to treat unilateral undertakings as contracts, in general terms.

The issue is probably more theoretical than practical: it is about knowing if an offeror is bound even without the acceptance of the offer by its recipient and without such recipient having knowledge of the undertaking (like promises of a reward under German law). In practice, this analysis will seldom be useful because it will be possible to identify an implied acceptance by the recipient. Such is the position under English law. The question arises, however, as to the difference between a unilateral promise and a unilateral undertaking?

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<sup>1</sup> Particular attention has been focussed on this issue in France over the last few years. Without purporting to be exhaustive, the following could be consulted : B. FAUVARQUE-COSSON (under the direction of), *La confiance légitime et l'estoppel*, SLC, 2007 ; P. LOKIEC, « Le droit des contrats et la protection des attentes », *D.* 2007, p. 321 ; E. POILLOT, *Droit européen de la consommation et uniformisation du droit des contrats*, Préf. P. de Vareilles-Sommières, LGDJ, 2006, n°1081, 889 and especially the references cited under note 2.

<sup>2</sup> R. SACCO, « Le contrat sans volonté, l'exemple italien », in : *Le rôle de la volonté dans les actes juridiques*, Etudes à la mémoire d'A. Rieg, Bruylant 2000, p.721.

<sup>3</sup> On the part played by appearance in reliance, see G. VINEY, note below Cass. 2<sup>ème</sup> civ., 11 Feb 1998, *JCP* 1998.I.185 and D. MAZEAUD, « D'une source, l'autre... », note below Cass. Ch. Mixte, 6 September 2002, *D.* 2002. p. 2963.

<sup>4</sup> For a further analysis from a private international law point of view, see V. HEUZE, « La notion de contrat international », *Travaux du Comité français de droit international privé* 1997-98, p. 319.

Several solutions are possible regarding the treatment of unilateral undertakings in European Contract Law.

-*First possibility*: maintain the general terms of the Pavia project and of PECL.

-*Second possibility*: delete all references to unilateral undertakings as a separate category; it would therefore be necessary to define more precisely what constitutes acceptance.

-*Third possibility*: a middle way would be to accept that unilateral undertakings can be governed by the contractual regime, but only as a subsidiary solution in exceptional cases, depending on the requirements of legal certainty.

The sources of the binding force would be different but the legal regime which would be applicable would be identical in part, with some elements borrowed from contract law.

### III. THE NATURE OF THE EFFECTS PRODUCED BY CONTRACT

Under most laws, the meeting of the wills produces real effects as well as mandatory effects.

The mandatory effects can be of varying nature. Some of these effects are general in the sense that they can be found in nearly every contract, despite the specific nature of the contract. This category includes behavioural effects (intangibility, fairness, or irrevocability) which translate into obligations for the parties<sup>5</sup>. Other effects are specific to the characteristics of each contract. This is the case in respect of obligations intended by the parties and implied obligations such as those referred to in article 1135 of the French Civil Code.

As for the real effects, German law proposes a particular analysis. In German law the real effects of a contract are separate from the meeting of wills. (§433, §929 BGB). This is what the Germans refer to under the term « *Abstraktionsprinzip* »: the contract creates the obligation, whereas the transfer of property occurs through another act, the two acts being independent of one another. This principle of « separability » is corrected by the mechanism of unjust enrichment (§812 BGB). In the French and Italian systems, if a contract is terminated, the goods should be restituted. The merits of German law on this point should be taken into consideration, whilst it should be recognized that the most widespread solution is to ignore the distinction between real and mandatory effects<sup>6</sup>.

#### *Acquis Communautaire and Acquis International*

An examination of both Acquis Communautaire and Acquis International reveals a traditional terminological use of the term « contract » (I).

The study of the notion of contract in relation to Acquis Communautaire and Acquis International is more informative if it extends to the examination of notions close to the notion of contract, which are different in theory, but almost interchangeable in practice, one notion

<sup>5</sup> See also the study on the terms « obligation/duty ».

<sup>6</sup> On this question, see the excellent comparative study carried out by U. DROBNIG, « Transfer of Property », in: *Towards a European Civil Code, Third Fully Revised and Expanded Edition*, Kluwer Law International, 2004, p.725 ; *adde.* J. DALHUISEN, *Dalhuisen on International Commercial, Financial and Trade Law*, Second Edition, Hart Publishing, 2004, p.561.

often having several meanings. Therefore, in addition to the notion of contract, the analysis will touch on the notions of undertaking (« *engagement* ») (II) and agreement (« *accord* ») (III).

We will conclude with the examination of the recent regulation of 11 July 2007 on the law applicable to non-contractual obligations (« Rome II »)<sup>7</sup>, which contains provisions which are specific to quasi-contracts (although not referred to as such) (IV).

## I. THE USE OF THE TERM « CONTRACT »

It is possible to identify from the study of Acquis Communautaire or Acquis International a certain number of elements which relate to the meaning itself of the word « contract » (A). However, beyond these traditional elements, there also emerges a conception of contract based on the idea of reciprocity (B).

### A. *The meaning of the word “contract”*

The use of the term « contract » in Acquis Communautaire and Acquis International reveals that the traditional terminological distinctions are still relevant (1) even if the contract is not the subject of a separate definition.

#### 1. *The traditional terminological use of the word « contract »*

The distinction between the « contract-agreement » and the « contract-legal relations » should be mentioned for the record. Such a distinction appears in Acquis Communautaire and Acquis International but its technical nature seems excessive in relation to the minor practical consequences which it entails<sup>8</sup>.

The notion of contract in the sense of « contract-agreement » refers to the meeting of the wills of the parties which gives rise to rights and obligations on the part of each party. It is this meaning for the notion which clearly predominates in Acquis Communautaire and Acquis International. However, the use of the word « contract » understood as a contractual document (contract being understood here in the sense of *instrumentum*) is also common, as illustrated by the study of a few chosen examples:

Whether it be in Acquis Communautaire or Acquis International, the most frequent use of the word « contract » occurs with reference to a « contract-agreement », that is to say « contract-meeting of wills. » This is the case every time there is a mention of « the conclusion of the contract », for example in PECL in articles 2 : 104 (1) ( « before or when the contract was concluded »), 2 : 205 ( « The contract is concluded when ») or again in 4 : 109 ( « at the time of the conclusion of the contract »). It also appears in this sense in various directives or pieces of international legislation.

The notion of contract is also used to refer to the contractual document. To cite but one example of the use of the term contract clearly understood as *instrumentum*, article 10.1 b of Directive 2000/31/CE of the European Parliament and the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market

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<sup>7</sup> JOL199 of 31 July 2007

<sup>8</sup> See, for example, articles 1 : 107, 6 : 111 or even 9 : 305 of PECL.

(« directive on electronic commerce »)<sup>9</sup> provides that « [...] whether or not the concluded contract will be filed by the service provider and whether it will be accessible [...] ».

These two traditional meanings clearly emerge from the study of Acquis Communautaire and Acquis International, however the contract is almost never defined as such

## ***2. The absence of a common definition of contract***

To our knowledge, there is only one legal document, whether in Acquis Communautaire or Acquis International, which proposes a definition of the term « contract ». Council Directive 90/314/CEE of 13 June 1990, on package travel, package holidays and package tours defines the contract as « the agreement linking the consumer to the organiser and/or the retailer »<sup>10</sup> This text proposes a restrictive approach to the notion of contract : it limits the notion to the agreement which legally binds the consumer and the professional.

Obviously the proposed definition cannot be generalized. Indeed, this type of text should be read in context, in a sectorial approach which only purports to govern a specific field.

There does not appear to be an abstract and general definition of contract anywhere else. This can be explained by the origin of the texts in questions. Community and international legislation have had as their principal objective to encourage commercial exchanges in specific sectors. The contract is not the central subject matter of these texts and is therefore not the subject of a uniform definition. As a simple legal tool for regulating the flow of wealth, the contract is never really defined by these supranational texts.

This absence of a definition contrasts however with the abundance of definitions relating to the subject-matter of the contract in these texts. The legislation seems to privilege an economic conception of contract founded on the principle of reciprocity.

### ***B. The primacy of a conception of contract founded on exchange***

Whether it be in Community directives or international legislation, the subject-matter of the contract (...) is often presented in terms which acknowledge the preeminence of reciprocity **(1)**. However, it should also be noted that current works relating to European contract law seem to grant a more important place to unilateralism in the contract **(2)**.

#### ***1. The principle of reciprocity in the definitions relating to the subject matter of a contract***

Although Community and international legislation is not particularly explicit when it comes to the meaning to be given to the term « contract », it is a lot clearer concerning the subject matter of the contract in question. These texts show a definite will to favour exchanges. This approach can explain the tendency to approach contractual relations with reciprocity in mind – contractual relations in which it might be possible to identify an underlying doctrine very close to the English doctrine of consideration. For example, there is often a reference, in the definition of the subject matter of a contract, to what is provided in return, whether this be monetary or not. There follow a number of examples from Community law as well as from Acquis International.

<sup>9</sup> JO n°L178 of 17 July 2000, p.0001-0016.

<sup>10</sup> JO n°L158 of 23 June 1990, p. 0025-0064, article 25.

Article 2 of Directive 94/47/CE of the European Parliament and the Council of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis<sup>11</sup> provides that « for the purposes of this Directive, a « contract relating directly or indirectly to the purchase of the right to use one or more immovable properties on a timeshare basis », hereinafter referred to as « contract » shall mean any contract or group of contracts concluded for at least three years under which, directly or indirectly, on payment of a certain global price, a real property right or any other right relating to the use of one or more immovable properties for a specified or specifiable period of the year, which may not be less than one week, is established or is the subject of a transfer or an undertaking to transfer ».

Article 1 of Council Directive 85/577 of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises<sup>12</sup> states that « the present directive shall apply to *contracts under which a trader supplies goods or services to a consumer* [...] ».

Under the terms of article 2 of directive 97/7/CE of the European Parliament and Council of 20 May 1997 on the protection of consumers in respect of distance contracts<sup>13</sup>, a « "Distance Contract ": means any contract concerning *goods or services* concluded between a supplier and a consumer under *an organized distance sales or service-provision scheme* run by the supplier, who, for the purpose of the contract, makes exclusive use of one or more means of distance communication up to and including the moment at which the contract is concluded ».

In the Brussels international Convention on travel contracts (CCV) of 23 April 1970, the following provisions of article 1 are of interest : « For the purpose of this Convention : 1. "Travel Contract" means either an organized travel contract or an intermediary travel contract.

2. "Organized Travel Contract" means any contract whereby a person undertakes in his own name to provide for another, *for an inclusive price*, a combination of services comprising transportation, accommodation separate from the transportation or any other service relating thereto.

3. "Intermediary Travel Contract" means any contract whereby a person undertakes to provide for another, *for a price*, either an organized travel contract or one or more separate services rendering possible a journey or sojourn. "Interline" or other similar operations between carriers shall not be considered as intermediary travel contracts. »

Similarly, the Vienna Convention of 11 April 1980 on contracts for the international sale of goods is not concerned with the definition of the notion of contract but provides details on the notion of « contract for the sale of goods » and therefore on the subject matter of the contract which is governed by the convention : the international sale of goods.

In the UNIDROIT Principles of international commercial contracts, the idea of reciprocity also appears. Indeed, articles 6.1.4 and 7.1.3 underline the fact that the obligations of the parties are interdependent.

Whilst they recognize the importance of reciprocity, recent projects carried out with a view to developing a European contract law have been keen to import into the notion of contract a more pronounced unilateral dimension.

## ***2. A limited unilateralism in recent projects***

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<sup>11</sup> JO n° L280 of 29 October 1994, p.0083-0087.

<sup>12</sup> JO n° L372 of 31 December 1985, p.0031-0033.

<sup>13</sup> JO n° L 144 of 4 June 1997, p. 0019 – 0027.

Recent Community projects have made a place for unilateralism<sup>14</sup>. Such unilateralism can take two forms. Either the contract remains as a meeting of wills, an agreement entered into by at least two parties, but with one party only taking on obligations : the contract itself is then unilateral ; or the projects recognize the validity of truly unilateral undertakings (« *engagements unilatéraux* » in French) which have binding force (...).

The Pavia Project is the only one to put forward an article which defines the contract and to place this article in first position within the proposed European Code. Article 1, Title 1, Book 1 provides as follows: « 1. A contract is the agreement of two or more parties to establish, regulate, alter or extinguish a legal relationship between said parties. It can also produce obligations or other effects *on only one of the parties*.(...) ». Thereafter, and throughout the Code, various references are made to promises (for example, article 23) or to unilateral acts (for example, articles 4 and 20).

Unlike the Pavia Project, PECL do not offer a definition of the notion of contract (although certain details are set out (...) on the conditions for its formation, as illustrated by article 2 : 101). However, article 2 : 107 of PECL provides for the possibility of a binding promise with no acceptance. The note<sup>15</sup> below this article mentions that in business, there are in existence a number of promises which are binding without acceptance, such as an irrevocable letter of credit opened by an issuing bank on the instructions of a buyer<sup>16</sup>. This provision appears to recognize, in a limited way, the unilateral undertaking.

In conclusion, both in Acquis Communautaire and Acquis International, the prevailing approach until now has been, overall, an understanding of contract based on reciprocity and interdependence. This is no doubt the direct result of the principles which guided the drafting of the legislation, principles which arose out of economic requirements, in respect of which the law needed to provide a unified or at least harmonised framework. From this economic viewpoint, the emphasis placed on exchange and reciprocity did not leave very much space for unilateralism.

Therefore, after examining the notion of contract, it appears most relevant to consider the notion of « *engagement* » (undertaking) in Acquis Communautaire and Acquis International, since this notion is likely to shed light on the notion of contract.

## II. THE NOTION OF “*ENGAGEMENT*”(UNDERTAKING)

A study of positive law shows that the term « *engagement* » (in French) does not have just one meaning and suffers from terminological inconsistencies (A). The notion of « obligation freely assumed », as is used by the ECJ in decisions relating to the interpretation of article 5.1 of Regulation 44/2001 shows a separate development : indeed, the notion of unilateral obligation is perceived as not being incompatible with the notion of contract (B).

### A. *The various meanings of the term “engagement”*

<sup>14</sup> D. MAZEAUD, « La Commission Lando, le point de vue d’un juriste français », in : *L’harmonisation du droit des contrats en Europe*, sous la dir. de Ch. Jamin et D. Mazeaud, Economica, 2001.

<sup>15</sup> *Les principes du droit européen du contrat*, SLC, 2003, note sous l’article 2 :107, p.118 et s.

<sup>16</sup> V. également, ci-après, les observations sur la notion d’engagement en droit bancaire.

The notion of « *engagement* » does not seem to be used in a consistent and univocal way, which makes it impossible to put forward a definition or even to identify the limits of the notion. An analysis of Acquis Communautaire is illustrative of this inconsistency (1) and Acquis International, although to a lesser extent, also shows that the term « *engagement* » is used with a number of different meanings (2). However, both in international banking law and in competition law, a univocal conception of « *engagement* » prevails, which will be considered separately (3).

### 1. A clear multiplicity of meanings in Acquis Communautaire

In French, only the term « *engagement* » is used. However, the English translation of this term varies.

Sometimes, the term « *engagement* », is reflected in the English text by the word « *undertaking* ». This carries the connotation of a promise creating an obligation. For example:

- article 6 :101 of PECL: « [...] (3) Such information and other *undertakings* given by a person advertising or marketing services, goods or other property [...] unless it did not know and had no reason to know of the information or *undertaking* ».

- article 2 of Directive 94/47 of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis<sup>17</sup> : « a transfer or an *undertaking* to transfer... ».

- article 1 e) of Directive 1999/44 of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees<sup>18</sup> : « guarantee: shall mean *any undertaking* by a seller or producer to the consumer ».

- article 4. 6. e) of Regulation (EC) 2006/2004 on consumer protection cooperation<sup>19</sup> : « to obtain from the seller or supplier responsible for intra-Community infringements *an undertaking* to cease the intra-Community infringement ; and, where appropriate, to publish the resulting *undertaking* ».

Sometimes, the term « *commitment* » is preferred in order to refer to the notion of « *engagement* », as is the case in the following examples :

- Article 1a of Council Directive 90/88 of 22 February 1990 concerning consumer credit<sup>20</sup> : « The annual percentage rate of charge, which shall be that equivalent, on an annual basis, to the present value of all *commitments* (loans, repayments and charges), future or existing, agreed by the creditor and the borrower, shall be calculated in accordance with the mathematical formula set out in Annex II ».

- Annex (n) of Directive 93/13 on unfair terms in consumer contracts, lists among the clauses which can be regarded as unfair, a clause limiting the seller's or supplier's obligation to respect *commitments* undertaken by his agents or making his *commitments* subject to compliance with a particular formality ».

- Directive 2005/29 concerning unfair business-to-consumer commercial practices in the internal market: article 6 (c) mentions « the extent of the trader's *commitments* ». Article 6 (2 )(b) mentions « ...(b) non-compliance by the trader with *commitments* contained in codes of conduct by which the trader has undertaken to be bound, where: (i) the *commitment* is not aspirational but is firm and is capable of being verified....».

<sup>17</sup> JO L 280 of 29 October 1994, p. 83-87.

<sup>18</sup> JO L. 171 of 07 July 1999, p. 12-16.

<sup>19</sup> JO L 364, of 9 December 2004, p.1-11.

<sup>20</sup> JOCE L. 061 du 10/03/1990, p.14 à 18.

Sometimes, « liability » in English is used for the French « *engagement* ». The underlying connotation is in such case that of liability, even payment.

For example, abovementioned Directive 93/13<sup>21</sup>, sets out in its preamble: « in insurance contracts, the terms which clearly define or circumscribe the insured risk and the insurer's *liability* shall not be subject to such assessment since these restrictions are taken into account in calculating the premium paid by the consumer ».

Sometimes, it is the term « obligation » which is used in English instead of the French « *engagement* ». The term seems to refer more to the subject matter of the « *engagement* », to its content. For example, article 9. 2 of Regulation (EEC) n° 2137/85 of 25 July 1985 on the European Economic Interest Grouping (EEIG)<sup>22</sup> provides that « If activities have been carried on behalf of a grouping before its registration in accordance with Article 6 and if the grouping does not, after its registration, assume *the obligations* arising out of such activities, the natural persons, companies, firms or other legal bodies which carried on those activities shall bear unlimited joint and several liability for them ».

In other cases, instead of the term « *engagement* », it is the term « agreement » which is used. The connotation in such case is that of an agreement, a meeting of wills.

For example, under the terms of Directive 93/13, Annex C, among the clauses which can be regarded as unfair, there is listed a clause « making an agreement binding on the consumer whereas provision of services by the seller or supplier is subject to a condition whose realization depends on his own will alone ». In the same way, Regulation (EC) n°261/2004 of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights specifies that<sup>23</sup> : « The Commission recalls its intention to promote *voluntary agreements* or to make proposals to extend Community measures of passenger protection to other modes of transport than air, notably rail and maritime navigation... ».

Finally, in some cases, the English term « engagement » is used. Directive 85/577 of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises<sup>24</sup>, which operates a distinction between the contract and the unilateral engagement, is in this respect an exception: « a contract or a *unilateral engagement* between a trader and a consumer »). The distinction does not appear to be fortuitous since a few lines below, the directive operates the same distinction: it mentions « such contracts and *engagements* »). Unfortunately, the directive does not give any indications as to the significance of the distinction between these terms. A definition of the notion of unilateral engagement could no doubt be found in the light of the context of the directive, as can be identified in paragraphs 3 and 4 of article 1. However, even if grounds could be found for such an interpretation, it cannot be extended to apply to every use of the notion of « *engagement* » under Community law. This would in any event be not be desirable since the express notion of « unilateral engagement » only appears in this Directive<sup>25</sup>.

It emerges from these various translations – « undertaking », « commitment », « liability », « obligations », « engagement » – that there is no univocal and unanimously accepted meaning for the French term « *engagement* »: it sometimes refers to the promise to do or not to do something, at other times it refers to the obligor's debts.

<sup>21</sup> JO L. 95 of 21 April 1993, p. 29-34.

<sup>22</sup> JO L 199 of 31 July 1985, p.1-9.

<sup>23</sup> JO L. 46 of 17 February 2004, p. 01-08.

<sup>24</sup> JO L. 372 of 31 December 1985, p. 31-33.

<sup>25</sup> Subject however of case C-27/02 *Peter Engler*, analysed below.

It can also refer to the manifestation of intention giving rise to a contract or to the obligations which arise out of a manifestation of intention.

The notion remains ambiguous and does not follow any overall terminological logic at a Community level. This multiplicity of meanings is however less present at an international level.

## **2. A more limited polysemy in *Acquis International***

More traditionally, in *Acquis International*, the notion of « *engagement* » seems to refer to a manifestation of intention, through which a person takes on an obligation – either in the form of a promise, or by entering a contract. Several examples illustrating these two meanings are set out below.

Article 33.1.c of the Hague Convention relating to a uniform law on the international sale of goods of 1 July 1964 provides that « The seller shall not have fulfilled his obligation to deliver the goods where he has handed over: [...] c) goods which lack the qualities of a sample or model which the seller has handed over or sent to the buyer, unless the seller has submitted it without any express or implied *undertaking* that the goods would conform therewith ».

Articles 3.8 and 3.9 of the UNIDROIT Principles relating to fraud and threat<sup>26</sup> provide that: « A party may avoid the contract when it *has been led to conclude the contract* by the other party's fraudulent representation, including language or practices, or fraudulent non-disclosure of circumstances which, according to reasonable commercial standards of fair dealing, the latter party should have disclosed. ». Article 6.1.7 sets out that: « However, an obligee who accepts, either by virtue of paragraph (1) or voluntarily, a cheque, any other order to pay or *to pay*, is presumed to do so only on condition that it will be honoured ».

## **3. No ambiguity: international banking law and competition law**

If the polysemy of the term « *engagement* » is much less evident in the context of *Acquis International* than in *Acquis Communautaire*, the term is however univocal in the context of international banking law (a) and in that of competition law (b).

### **a) « *Engagement* » (undertaking) in international banking law**

Although the meaning to be given to the term « *engagement* » is not generally established, it is however set out clearly in certain areas. This is the case in international banking law, which puts forward a single definition of « *engagement* ».

In the UNCITRAL Convention on independent guarantees and stand-by letters of credit, article 2, entitled « Undertaking » provides that « 1. For the purposes of this Convention, an *undertaking* is an *independent commitment*, known in international practice as an independent guarantee or as a stand-by letter of credit, given by a bank or other institution or person ("guarantor/issuer") to pay to the beneficiary a certain or determinable amount upon simple demand or upon demand accompanied by other documents, in conformity with the terms and any documentary conditions of the *undertaking*, indicating, or from which it is to be inferred, that payment is due because of a default in the performance of an obligation, or because of

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<sup>26</sup> Only the article regarding fraud is reproduced here, but the article regarding threat uses the word “engagement” in a similar context.

another contingency, or for money borrowed or advanced, or on account of any mature indebtedness undertaken by the principal/applicant or another person ».

In the same spirit, article 11:204 of PECL relating to « undertakings by assignor ») provides that « By assigning or purporting to assign a claim the assignor *undertakes* to the assignee that [...] ».

#### **b) « Engagement » (commitment) in competition law**

The term « *engagement* », translated into English as « commitment » has a specific meaning in competition law. Regulation 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in articles 81 and 82 of the Treaty<sup>27</sup>, provides in its article 9 that « where the Commission intends to adopt a decision requiring that an infringement be brought to an end and the undertakings concerned offer *commitments* to meet the concerns expressed to them by the Commission in its preliminary assessment, the Commission may by decision make those *commitments* binding on the undertakings. Such a decision may be adopted for a specified period and shall conclude that there are no longer grounds for action by the Commission.

Here, the notion of « commitment » contains a certain amount of unilateralism. First, it would appear that the term was chosen purposefully, in preference to the terms « agreement » or « contract », although the nature of these « commitments » requires negotiation with the controlling authority, and it is, in the end, this authority which will give its agreement to the proposal made by the undertaking<sup>28</sup>. Technically, the commitment seems to exist before and independently from the decision of the authority ; however, it will only be binding on the undertaking because such authority makes it binding. It would therefore appear that it is because the initiative of the « commitment » belongs to the undertakings that the « commitments » have been so named. It represents, in summary, the expression of the will to commit to adopting a behaviour which will not affect competition on a determined market ; a will to which the relevant controlling authority may or may not accept to give binding force.

#### ***B. « Obligation freely assumed » (“Engagement librement assumé”) and matters relating to a contract as per article 5.1 (Regulation n° 44/2001)***

In a Community and international context, there is, as seen above, a strong tendency towards reciprocity, on the basis that the interests in question are essentially economic interests.

However, the terminology used by the ECJ in its interpretation of article 5.1 of Regulation 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters<sup>29</sup> sheds a different light on the matter. In a series of cases, the ECJ defines the « matters relating to a contract » referred to in this article by the wording « obligation freely assumed ».

<sup>27</sup> JO n° L 1 of 4 January 2003, p. 1 – 25.

<sup>28</sup> L. IDOT, « Adaptation du droit français au nouveau système communautaire de mise en œuvre des articles 81 et 82 CE », *RDC*, 2005, p. 305. For an illustration of how much this procedure is used see, in particular, L. IDOT, « Le régime des engagements en cours de formalisation », *RDC*, 2005, p.697 ; « De nouveaux exemples de relations contractuelles aménagées par la technique des engagements », *RDC*, 2005, p. 1036 ; « Engagements et aménagement des contrats de distribution : un succès confirmé », *RDC*, 2006, p. 1111.

<sup>29</sup> JO n° L. 12 of 16 January 2001, p.1.

In the Jakob Handte case<sup>30</sup> of 17 June 1992, the ECJ was required to interpret article 5.1 of the Convention<sup>31</sup>. Using succinct wording, it held that this notion « is not to be understood as covering a situation in which *there is no obligation freely assumed by one party towards another* ». In this case, the preliminary ruling sought by the French Cour de Cassation was to determine whether the rule set out in article 5.1 could be applied in the context of an action brought by the sub-buyer of goods against the manufacturer, the initial seller, in a chain of contracts. After restating that article 5.1 must be interpreted independently, that is to say independently from any national consideration, the ECJ applied the article in a strict manner : it underlines that this article is an exception to the principle of article 2 set out by the same regulation and consequently deduces therefrom that « it must be observed that there is no contractual relationship between the sub-buyer and the manufacturer because the latter has not undertaken any contractual obligation towards the former ». This case sets out, as a condition for belonging to the category of « matters relating to a contract », the existence of an obligation freely assumed by one party towards another, it does not provide any information as to the definition of the notion of obligation itself, or of « obligation freely assumed ».

In the Réunion européenne S.A case<sup>32</sup> of 27 October 1998, the ECJ again took the view that « matters relating to a contract » should be interpreted strictly. Thus, if there is no proof of « any contractual relationship freely entered into between the consignee and the defendant », the litigious act could not be considered as being part of « matters relating to a contract » as per regulation 44/2001. It is clear, from the English version, that here, « *engagement librement assumé* » is synonymous with contractual relationship.

Such a reading seems to be confirmed by the Tacconi case dated 17 September 2002<sup>33</sup>. Indeed, point 22 of the case states as follows : «... although Article 5(1) of the Brussels Convention does not require the conclusion of a contract, the identification of an obligation is none the less essential for the application of that provision». Under the terms of this decision, in order for a matter to « relate to a contract », it is not necessary for a contract to be formed. It is essential for an obligation to have arisen. On the facts of the case, it appears that during the pre-contractual negotiations entered into with a view to concluding a contract between the parties, no such obligation seems to have been taken on, which is why article 5.1 could not apply.

The Petra Engler case<sup>34</sup> was decided on 20 January 2005, and was concerned with a marketing prize draw. According to the ECJ, although the marketing prize draw is not a contract as per article 13 of the Brussels Convention, it falls within the scope of « matters relating to a contract » as per article 5.1<sup>35</sup>. Indeed, this is the case if the claimant can establish « a *legal obligation freely consented to* by one person towards another and on which the claimant's action is based. ». Such an obligation was held to exist on the facts (points 52-56). The ECJ therefore decided at point 56 of the same case: «...*the intentional act* of a professional vendor in circumstances such as those in the main proceedings *must be regarded as an act capable of constituting an obligation which binds its author as in a matter relating to a contract.* »

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<sup>30</sup> Case C-26/91, Rec. p. I-3697.

<sup>31</sup> The convention was changed into a regulation on 22 December 2000.

<sup>32</sup> Case C-51/97, Rec. p. I-6511.

<sup>33</sup> Case C-334/00, Rec. p. I-7357.

<sup>34</sup> Case C-27/02, Rec. p. I-481.

<sup>35</sup> Regarding a case with similar facts, see ECJ, 11 July 2002 (case C-96/00, Gabriel), *Rev. crit.DIP* 2003.484, note P. REMY-CORLAY. In this case, however, the ECJ took the view that the matter fell within the imperative and exclusive jurisdiction for contracts entered into with consumers on the basis that the sending of the prize was closely linked to the order for goods.

This case could be interpreted as recognizing in a limited way the existence of unilateral undertakings. However, this autonomous Community interpretation is not shared by all Member States. For example, the French Cour de Cassation, in a similar case, took the view that the facts gave rise to a quasi-contract<sup>36</sup>.

The semantic difficulties surrounding the term « *engagement* » and the links which exist with the notion of « contract » are naturally just as relevant in relation to the term « agreement ».

### III. THE TERM « ACCORD » (AGREEMENT)

The term « agreement » is often used in a traditional way, to refer to a contract or to a way of expressing consent (A). However, it has a specific meaning in certain contexts (B).

#### A. *The various meanings of the term “agreement” when used traditionally*

In its most usual meanings, the term « agreement » refers sometimes to a category of contract or « *convention* » (1) sometimes to a form of expression of consent (2).

##### 1. *The use of the term « agreement » as a category of « contract » or « convention »*

If the term « contract » is frequently encountered, as seen above, with the meaning of « agreement », it is not unusual for the term « agreement » to be used to mean « contract » (a).

However, it would appear that, in certain cases, the use of the term « agreement » refers to a bilateral expression of consents, the subject matter of which is unclear and which could lead to conclude that the term « agreement » refers to a type of « *convention* » (contract) (b).

##### a) **In a large number of texts, the word « agreement » is used to refer to a type of contract**

Article 7 of directive 1999/44/EC of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees<sup>37</sup> provides that « Any contractual terms or *agreements concluded* with the seller [...] which directly or indirectly waive or restrict the rights resulting from this Directive [...] ». Recital 13 of Directive 94/47/EC of 26 October 1994, on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis<sup>38</sup> states that « Whereas in the event of cancellation of or withdrawal from a contract for the purchase of the right to use one or more immovable properties on a timeshare basis the price of which is entirely or partly covered by credit granted to the purchaser by the vendor or by a third party on the basis of an *agreement* concluded between that third party and the vendor, it should be provided that the *credit agreement* should be cancelled without penalty; ... ». The fact that in English the same word is used (whilst in French, the words used are « *accord conclu* » and in the second instance,

<sup>36</sup> See, below, the section dealing with comparative law: Ch. Mixte. 6 septembre 2002, *Bull. Civ. Mixte*, n°4, p.9.

<sup>37</sup> *JO* n° L 171 of 07 July 1999, p. 0012 – 0016.

<sup>38</sup> *JO* n° L 280 du 29 October 1994 p. 0083 – 0087.

« *contrat* ») may lead to conclude that the terms « contract » and « agreement » could be interchangeable in this recital.

**b) Sometimes, the term « *accord* » in French is understood as a category of « *convention* »**

For example, under the terms of article 1 of Council Directive 90/88/EEC of 22 February 1990 amending Directive 87/102/EEC for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit<sup>39</sup>, « membership subscriptions to associations or groups and arising from agreements (the French word used here is « *accord* ») separate from the credit agreement (« *contrat* » in French... »).

The terminology used in French shows that the term « *accord* » should be understood as a category of « *convention* » which is distinct from the contract in the narrow sense. However, the English translation, which in both cases uses the term « agreement », softens this distinction by treating both types of convention in the same way, terminologically at least.

In the UNCITRAL Model law on international commercial arbitration, the term « *accord/agreement* » is preferred, whether it be in French or in English, to that of « contract ». The instances in which the word « agreement » is used in this sense are numerous in the Model law. They can be found in articles 11 (appointment of the arbitrators), 13.2 (challenge procedure), 15 (appointment of substitute arbitrator), et 22 (language) in particular. The use of the word « agreement » seems to coincide here with the specific subject matter upon which the parties agree, that is to say, for example, the appointment of an arbitrator or the use of such or such rule of procedure. The agreement refers to a convention which does not give rise to any obligation on the part of one party or the other.

When it does not refer to a form of contract or « *convention* », the agreement frequently refers to the expression of consent.

**2. The agreement as a form of expressing consent**

More generally, the word « agreement » is often used to refer to the expression of consent. Council Directive 93/13/EEC of 5 April 1993, on unfair terms in consumer contracts<sup>40</sup>, among the clauses which can be regarded as unfair, lists a clause: « giving the seller or supplier the possibility of transferring his rights and obligations under the contract, where this may serve to reduce the guarantees for the consumer, without the latter's *agreement* ... ».

Article 6.3 of Directive 97/7/EC of the European Parliament and Council of 20 May 1997 on the protection of consumers in respect of distance contracts<sup>41</sup>, also states that: « Unless the parties have agreed otherwise, the consumer may not exercise the right of withdrawal provided for in paragraph 1 in respect of contracts: - for the provision of services if performance has begun, with the consumer's agreement, before the end of the seven working day period referred to in paragraph 1... ». Under the terms of recital 16 of the directive, it is provided: « Whereas the promotional technique involving the dispatch of a product or the provision of a service to the consumer in return for payment without a prior request from, or the explicit agreement of, the consumer cannot be permitted... ».

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<sup>39</sup> JOCE n° L 061 du 10/03/1990, p. 0014 – 0018.

<sup>40</sup> JOCE n° L 095 du 21/04/1993, p. 0029 – 0034, Annexe 1. p

<sup>41</sup> JOCE n° L 144 du 04/06/1997, p. 0019 – 0027.

## *B. Specific uses for the term “agreement”*

From a terminological point of view, the notion of agreement, in addition to its classical meaning, has a specific application in certain contexts, in particular in the present context of European deregulation and of the encouragement towards soft law, in which the notion appears as a tool for deregulation (1), as well as in the specific area of competition law (2).

### *1. The agreement, a tool for deregulation*

Directive 2000/31/EC of the European Parliament and the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market («directive on electronic commerce»)<sup>42</sup>, in its recital 40, uses the following expression: «voluntary agreements». This expression then reappears in recital 41 as «industry agreements».

The use of the term «agreement» with this meaning reappears in Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community framework for electronic signatures<sup>43</sup>, in which the following expression is used: «voluntary agreements under private law».

### *2. The agreement in competition law<sup>44</sup>*

In the context of competition law, legislation refers to the term «agreement» exclusively to refer to anti-competitive agreements<sup>45</sup>. Moreover, practice, caselaw and Community legislation use for the most part the term «agreement» in the context of agreements which are traditionally separated into «vertical agreements» and «concerted practices», likely to affect trade between Member States<sup>46</sup>.

An «agreement» is defined, throughout the caselaw, as «the joint intention of the parties to conduct themselves on the market in a specific way»<sup>47</sup>. In terms of competition law, the term «agreement» goes beyond, in a sense, the term «contract» since it does not necessarily have to produce binding legal effects. The judges make it clear, indeed, that it is not relevant to examine, in order to find the existence of an agreement, «whether the undertakings involved felt

<sup>42</sup> JO n° L 178 of 17 July 2000, p. 0001 – 0016.

<sup>43</sup> JO n° L 013 du 19 January 2000, p. 0012 – 0020.

<sup>44</sup> On the evolution of the notion of «agreement» in competition law, see the explanatory observations of L. IDOT, «Retour sur la distinction entre l'accord et le comportement unilatéral», *RDC* 2004, p. 289

<sup>45</sup> Under the terms of article 81 of the Treaty of Rome, «The following shall be prohibited as incompatible with the common market: all *agreements* between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market [...] Any *agreements* or decisions prohibited pursuant to this article shall be automatically void.»

<sup>46</sup> Our aim is not here to discuss the law relating to restrictive practices (on these issues, see in particular, in French: M. MALAURIE-VIGNAL, *Droit de la concurrence interne et communautaire*, Armand Colin, 3<sup>rd</sup> edition, 2005 ; M.-A. FRISON-ROCHE, M.-S. PAYET, *Droit de la concurrence*, Dalloz, 1<sup>st</sup> edition, 2006 ; J. SCHAPIRA, G. LE TALLEC, J.-B. BLAISE, L. IDOT, *Droit européen des affaires*, 5<sup>th</sup> edition, PUF, 1999 ; in English : R. WHISH, *Competition Law*, 5th edition, LexisNexis, 2003 ; V. KORAH, *An Introductory Guide to EC Competition Law and Practice*, 7th edition, Hart Publishing, 2000). We shall limit our study to the issue of the particular meaning of the term «agreement» under Community competition law.

<sup>47</sup> ECJ, 8 July 1999, *Anic*, aff. C-49/92 P, Recueil p. I-4125

legally, *de facto* or morally bound to adopt the agreed conduct »<sup>48</sup>. On that basis, gentlemen's agreements<sup>49</sup>, rules of professional ethics<sup>50</sup> or even recommendations<sup>51</sup> can be held to be agreements.

However, the line separating an « agreement » from unilateral conduct is sometimes difficult to draw. A distinction used to be made<sup>52</sup> between measures which are *genuinely* unilateral and *apparently* unilateral – the latter being the only ones which could be held to be « agreements » as per article 81 of the Treaty<sup>53</sup>. Today, following the direction taken by the Court of First Instance<sup>54</sup>, backed up by the ECJ<sup>55</sup>, it appears necessary to refine the analysis and distinguish between two situations. First of all, it is relevant to consider whether the litigious case arises in the context of a distribution network. Indeed, should that not be the case, the notion of « agreement » is based on the idea of offer (« invitation ») and acceptance, which must be proved by the competition authority. Conversely, in presence of a distribution network, two cases should be distinguished. The first concerns the measures which « arise out of the distribution contract, in respect of which the acquiescence of the distributor is assumed »<sup>56</sup>. In the second case, « the implementation of the manufacturer's policy by the distributor is equivalent to tacit acquiescence to the restrictive measure, but in the absence of proof of such acquiescence, the latter cannot be implied from the signing of a lawful distribution contract »<sup>57</sup>.

If the term « agreement » takes on a particular meaning in the context of competition law, the recent evolution of caselaw highlights that the concept is being brought closer to ordinary contract law, allowing the return of a form of pragmatism<sup>58</sup>.

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<sup>48</sup> M.-A. FRISON-ROCHE, M.-S. PAYET, *Droit de la concurrence*, Dalloz, 1<sup>st</sup> edition, 2006, n°157 ; *Adde.* M. MALAURIE-VIGNAL, *Droit de la concurrence interne et communautaire*, Armand Colin, 3<sup>rd</sup> edition, 2005, n°306.

<sup>49</sup> ECJ, 15 July 1970, *Chemiefarma*, case 41/69, Rec. p.661 ; *adde.* Decision, *FEG et TU*, 26 October 1999, JO n°L 39, 14 February 2000, ; Decision, *Treillis soudés*, 2 August 1989, JO, L. 260, 6 Sept. 1989.

<sup>50</sup> CFI, 28 March 2001, *Institut des mandataires agréés près l'Office européen des brevets (OEB)*, case T-144/9, *Contrats, conc., consom.* 2001, n°109.

<sup>51</sup> ECJ, 29 October 1980, *Heintz van Landewyck SARL and a. C/ Commission*, joined cases 209 à 215 et 218/78, Rec. p. 3125.

<sup>52</sup> See in particular ECJ, 12 July 1979, *BMW Belgium*, cases 32/78, 36/78, 82/78, Rec. p. 2435, ECJ ; 25 October 1983, *AEG*, case 107/82, Rec. p. 3151 ; ECJ, 17 September 1985, *Ford*, cases 25/84 and 26/84, Rec. p. 2725 ; ECJ, 11 January 1990, *Sandoz*, case C-277/87, Rec. p. I-45.

<sup>53</sup> « A distinction should therefore be drawn between cases in which an undertaking has adopted a genuinely unilateral measure, and thus without the express or implied participation of another undertaking, and those in which the unilateral character of the measure is merely apparent », TPICE, 26 octobre 2000, *Bayer AG*, aff. T-41-96, Rec. II-3383, point 71.

<sup>54</sup> CFI, 26 October 2000, *Bayer AG*, case T-41-96, Rec. II-3383, *Europe*, décembre 2000, comm. n°393 ; L. IDOT. ; *adde.* CFI, 3 December 2003, *Volkswagen AG*, case T.-208-01, Rec. II-05141.

<sup>55</sup> ECJ, 6 January 2004, *Bayer AG*, joined cases C-2/01 P and C-3/01 P, Rec. I-23, *Europe*, March 2004, comm. n°84, L. IDOT ; E. CLAUDEL, « Entente et concours de volonté. De la dénaturation à l'harmonie », *D.* 2004, p. 1970 ; *adde.* *JDI* 2004, p. 616, obs. C. PRIETO ; CJCE, 13 juillet 2006, *Commission c/ Volkswagen AG*, aff. C-74-04 P, Rec. I-6585, *Europe*, October 2006, comm. n°289, L. IDOT ; *adde.* Conclusions of the advocate-general Tizzano, 17 November 2005, *Commission v/ Volkswagen AG*, case C-74/04 P, Rec. I-6585.

<sup>56</sup> L. IDOT, « Retour sur la distinction entre l'accord et le comportement unilatéral », *RDC* 2004/2, p.296.

<sup>57</sup> *Ibid.*

<sup>58</sup> In favour of this caselaw, E. CLAUDEL, *op. cit.* ; *contra* the European Commission which « clearly worried about the serious consequences of this new interpretation, pleaded that it would be very difficult to fight against parallel imports » (E. CLAUDEL, *op. cit.*). The tribunal, in this perspective, declared at point 174 of the *Bayer* case, that the aim of article 85 of the Treaty was not to « eliminate » totally measures that prevent intracommunity trade ; it is more limited, because only the measures preventing competition installed by a joint will between at least two parties are prohibited by this provision ».

#### IV. OBSERVATIONS REGARDING QUASI-CONTRACTS UNDER EUROPEAN LAW

The draft Regulation of the European Parliament and of the Council on the law applicable to non-contractual obligations (Rome II)<sup>59</sup> sheds precious light on the notion of quasi-contract under European law.

There had already been mention of « quasi-delictual matter » in article 5.3 of Regulation n° 44/2001, it would appear however that draft Regulation Rome II grants a particular place to what it designates, in section 2 article 9, as « non-contractual obligations arising out of an act other than a tort/delict ». Paragraph 3 of the article refers to enrichment without cause and paragraph 4 deals with *negotiorum gestio*. The category seems to be understood narrowly, but the explanatory note offers a justification of this choice by the fact that these two cases are recognized by all Member States: it is by taking a pragmatic view that they have been included in the scope of this article. However, the lack of consistency regarding this area in the different Member States is such that it is probably preferable not to contain it by the use of technical vocabulary – like the word « quasi-contract » - which is foreign to many systems. In fact, the recent Rome II Regulation<sup>60</sup> has moved away from the initial draft. Indeed, under the expression « special rules where damage is caused by an act other than a tort/delict », are now grouped not only unjust enrichment and *negotiorum gestio*, but also *culpa in contrahendo*<sup>61</sup>. Finally, a twofold approach would appear to be emerging with regard to non-contractual obligations: those which result from a tort/delict and those which arise out of an act other than a tort/delict. Since unjust enrichment and *negotiorum gestio* are considered separately, it does not appear useful to group them under a category close to the category of quasi-contracts.

#### *Comparative Law*

The study of comparative law<sup>62</sup> – between Member States of the European Union but also outside the Union – shows that the use of the term « contract », understood as « agreement » is very frequent and that a number of differences, some slight and others more marked, become apparent between the various legal systems. Depending on the country, the contract is considered, sometimes as the meeting of wills with a view to producing legal effects (I), sometimes more widely, as a declaration of intention likely to produce effects (II). This difference does not necessarily reflect diverging approaches to the notion of contract itself.

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<sup>59</sup> COM 2003/0427 final.

<sup>60</sup> Regulation n°864/2007 of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), JO L 199 of 31 July 2007, p.40-4

<sup>61</sup> See recital 29. However, the main text of the regulation avoids any categorization on the basis that the rules relating to unjust enrichment (article 10), *negotiorum gestio* (article 11) and to *culpa in contrahendo* (article 12) form part of a chapter III entitled « Unjust enrichment, *negotiorum gestio* and *culpa in contrahendo* »

<sup>62</sup> It should be made clear that the narrow meaning of contract as contractual document (« *instrumentum* ») will be ignored in favour of a wider analysis of the notion.

The divergences are more obvious, however, when the question arises as to whether promises can result in binding effects without being accepted, that is to say without a meeting of wills (III) or when the specific issue of quasi-contracts is considered (IV).

## I. THE CONTRACT AS A MEETING OF WILLS INTENDED TO PRODUCE LEGAL RELATIONS

A large number of States takes the view that a contract is formed only when an agreement, generally materialized by the meeting of an offer and an acceptance, has been made between two persons. However, this meeting of wills is not sufficient to hold that a contract exists, there is also a requirement that the « parties » should have intended to create binding effects, or to use the anglo-saxon terminology, intended to be legally bound (A).

Similarly to what has been observed with regard to Acquis Communautaire and Acquis International<sup>63</sup>, the very notion of « agreement » takes on a particular meaning in certain contexts, and in particular in the context of competition law (B).

### *A. The contract as a meeting of wills with the intention of creating legal relations: a variety of examples*

A number of countries have adopted codified definitions of contract, which all place the emphasis on one main aspect, that of the meeting of wills of the parties with the intention of creating legal relations. The following examples can be examined:

French, Belgian and Luxemburg laws provide in article 1101 of their respective Civil Codes that : « the contract is an agreement by which one or several persons bind themselves, as regards one or several others, to transfer, to do or not to do something ». The contract is understood as a juridical act which requires the agreement of two or more individual wills. The meeting of wills in the contract is intended to result in an obligation. *Stricto sensu*, the contract can be distinguished from a « convention » (in French) which has the aim of amending or extinguishing an obligation or creating, transferring or extinguishing a right other than a personal right.

Under Italian law<sup>64</sup>, article 1321 of the Civil Code provides that: « a contract is an agreement between two or several parties to create, regulate, or extinguish as amongst each other a legal patrimonial relationship »<sup>65</sup>. Article 1174 of the Civil Code specifies: « it should be possible to carry out an economic assessment of the performance required by the obligation, which must correspond to an interest of the debtor, not necessarily patrimonial »<sup>66</sup>.

Under Dutch law<sup>67</sup>, article 6.213 NBW provides that: « a contract is a multilateral juridical act, by which one or several parties bind themselves as regards one or several others ».

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<sup>63</sup> See *supra*.

<sup>64</sup> R. SACCO, « Interaction Between the Pecl and Italian Law », in : *Principles of European Contract Law and Italian Law. A commentary*, L. ANTONIOLLI, A. VENEZIANO (eds.), Kluwer Law International, 2005, p.11.

<sup>65</sup> Art. 1321 « *Nozione. Il contratto è l'accordo di due o più parti per costituire, regolare o estinguere tra loro un rapporto giuridico patrimoniale* ».

<sup>66</sup> Art. 1174. « *Carattere patrimoniale della prestazione. La prestazione che forma oggetto dell'obbligazione deve essere suscettibile di valutazione economica e deve corrispondere a un interesse, anche non patrimoniale, del creditore.* »

<sup>67</sup> *The Principles of European Contract Law and Dutch Law. A Commentary*, D. BUSCH, E. HONDIUS, H. van KOOTEN, H. SCHELHAAS, W. SCHRAMA, Kluwer Law International, 2002.

In Denmark, a contract is defined as an agreement entered into between two or several persons which creates obligations (law of 8 May 1917).

Article 1378 of the Civil Code of Québec specifies that: « a contract is an agreement of wills by which one or several persons obligate themselves to one or several other persons to perform a prestation».

Article 1 of the Swiss Code of obligations provides that: « a contract is perfected when the parties have, reciprocally and in agreement, shown their will ». This provision does not give an express definition of contract, but it implies that the contract is the result of the meeting of wills of the parties.

It results from these definitions that a contract is a juridical act which is created by corresponding and interdependent declarations of will of two or several independent parties. These declarations are made with the intention of producing legal effects for the benefit of one party and imposing obligations upon the other, or for the benefit of both parties reciprocally, with the burden also being imposed reciprocally.

These characteristics are found in other texts, such as the Pavia Project, in which the contract is defined as follows: «A contract is the agreement of two or more parties to establish, regulate, alter or extinguish a legal relationship between said parties. It can also produce obligations or other effects on only one of the parties »<sup>68</sup>.

These definitions prevent certain types of agreement from being considered as being contracts, that is to say as meetings of will with the intention of producing binding legal effects. Certain meetings of will will therefore not be capable of creating binding legal relations: acts of politeness, voluntary assistance relationships (transport, work, etc.). And yet, the courts of certain countries, such as France, treats these as genuine contracts for pragmatic reasons relating to the compensation of the person carrying out the voluntary action in the event that such person suffers loss or damage by so doing. Although English caselaw also varies, decisions are recurrently based upon the existence of an *intention to be bound* in order to acknowledge the existence of a contract<sup>69</sup> (see for example *Balfour v. Balfour*<sup>70</sup>).

The courts seem moreover to be developing a system of presumptions in accordance with which certain agreements are presumed not to carry such an intention – that is the case for agreements entered into in a domestic context or debts of honor<sup>71</sup>- and certain others are presumed to include the intention of creating binding legal relations, such as in the commercial field, for example<sup>72</sup>. The distinction would then operate by reference to the identity of the parties rather than by reference to the terms of the agreement.

Although a generally accepted meaning of the notion of « contract » seems to emerge, where contract is understood as a meeting of wills resulting in binding legal effects, it remains that the notion of « agreement », *stricto sensu*, takes on a particular meaning, in particular in the context of competition law.

<sup>68</sup> On this text, see however the observations hereafter.

<sup>69</sup> The intention to be bound is not however the only criterion. The parties must have reached an agreement, materialized by the meeting of offer and acceptance.

<sup>70</sup> *Balfour v Balfour* [1919] 2 KB 571.

<sup>71</sup> For letters of comfort, see also *Kleinwort Benson Ltd. v. Malaysia Mining Cpn. Bdh.* [1988] 1 W.L.R. 799 ; [1989] 1 W.L.R. 379.

<sup>72</sup> *Rose and Frank v. Crompton Bros*, [1925] AC 445

## *B. The specificity of competition law*<sup>73</sup>

In the context of competition law, we have seen already that it is the term « agreement » which is clearly used, following the meeting of two wills, materialized by an « invitation » and an « acceptance », whether implied or express. Indeed, the fact that this « agreement » should produce legal effects is not of particular importance.

Bearing in mind the recent coming into force of Regulation 1/2003<sup>74</sup> which seeks to make competition procedures in various national laws more uniform, and the predominance and direct applicability of ECJ caselaw, the issues covered in the section above on « Acquis Communautaire and Acquis International » are also relevant here and should be referred to.

However, it would seem useful to mention here that the movement which has been observed resulting in contract law and competition law becoming closer, in particular through the notion of « agreement », was initiated in France, in the context of various cases.

Indeed, the commercial chamber of the Cour de Cassation, in two cases<sup>75</sup>, seems to have returned to a more traditional approach regarding the notion of « agreement », approach which was followed by the « Conseil de la concurrence » (the French competition authority). In order to distinguish between concerted practice and unilateral behaviour, the Conseil de la concurrence stated that « the caselaw has been unchanging on the point that by merely entering into a franchise agreement, an exclusive or selective distribution agreement or, more simply by purchasing in accordance with general conditions of sale, distributors are presumed to have agreed to the clauses – which may be anti-competitive- contained in such agreements or conditions. But the Conseil is careful not to assume from the contractual relations between a supplier and a distributor that the latter automatically agreed to anti-competitive practices outside the contract »<sup>76</sup>.

The national law, as is the case with Community law, seems therefore to return to a more traditional approach of the notion of « agreement », requiring the proof of an « invitation » and of an « acceptance ». This evolution shows evidence of the influence exercised by ordinary law upon competition law<sup>77</sup>.

Germany, however, is witnessing an opposite trend. Until 1999, §1 of the GWB (law against restrictions on competition) rendered nul and void any « contract » (« *Vertrag* ») entered into by enterprises for a common aim etc. Because the courts had already brought their interpretation of this notion of « contract » closer to the notion of « agreement »<sup>78</sup> (« *Vereinbarung* ») as par article 81 TCE, the German legislator finally reacted by replacing the notion of contract with the latter, with the express intention of including, in accordance with

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<sup>73</sup> See, generally, M.-A. FRISON-ROCHE, M.-S. PAYET, *Droit de la concurrence*, *op. cit.* n°157 ; M.-A. FRISON-ROCHE, « Remarques sur la distinction entre la volonté et le consentement en droit des contrats », *RTD civ.* 1995, p. 573 ; *adde.* E. CLAUDEL, « Le consentement en droit de la concurrence, consécration ou sacrifice ? », *RTD com.* 1999, p. 291 ; M. MALAURIE-VIGNAL, « Droit de la concurrence et droit des contrats », *D.* 1995, chron., p.51.

<sup>74</sup> Council Regulation (EC) n° 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, JO L 1, of 4 January 2003, p.1.

<sup>75</sup> Cass. com., 7 April 1998, n°96-13735, *Bull. civ.* IV, n°127, p. 102 ; Cass. com., 12 January 1999, n°97-10808. inédit titré.

<sup>76</sup> Report of the Conseil for the year 1999, p. 44, cited by L. IDOT, *op.cit.* p. 291.

<sup>77</sup> On these questions see in particular: M. CHAGNY, *Droit de la concurrence et droit commun des obligations*, Dalloz, 2004 ; B. FAGES, J. MESTRE, « L'emprise du droit de la concurrence sur le contrat », *RTD com.* 1998, p. 71 ; *adde.* The articles in the section « Débats » de la *RDC*, 2004, p. 861, dealing with « Droit de la concurrence et droit des contrats ».

<sup>78</sup> BGH, 22 April 1980, NJW 1980, 2813.

prior caselaw, the agreements in respect of which the parties specifically did not wish to create any legal effects.<sup>79</sup>

In any event, in other countries, the contract is more centered upon the declaration of intention and on the behaviour induced by such declaration.

## II. THE CONTRACT AS A DECLARATION OF INTENTION CAPABLE OF PRODUCING LEGAL EFFECTS

The fundamental element of the contract is stated differently and is, in appearance at least, different from that which has just been discussed. Although, the basis of the contract is still formed by the meeting of wills (« agreement »), in certain legal systems, its definition is wider: the contract resides in the *intention* of one of the parties to be bound and in the behaviour which results from such intention on the part of the other party.

The importance of intention appears, for example, in the following laws:

Under English law, the contract is a promise or a series of promises which will be enforced by the law. It is traditional to find, at the root of the formation of a contract, at common law, the meeting of offer and acceptance. However, since the XIXth century, the courts have added an additional criterion: the intention to create legal relations<sup>80</sup>.

Under German law, § 311 para. 1 of the BGB provides that: « For the creation of an obligation by a juridical act, and for any amendment of the substance of an obligation, a contract between the parties is necessary, unless otherwise provided by law ». A contract is the agreement between two or several parties concerning a legal subject matter. There is no difference (as there is under French law) between contract and « *convention* ». Although there is specific wording for agreements « for disposal » (or « real ») in the BGB (« *Abtretung* » for the sale of a debt, « *Einigung* » for the transfer of moveable property, and « *Auflassung* » for the transfer of immovable property), the legal regime applicable to « contracts » (« *Verträge* ») applies regarding their conclusion and validity, and they are considered as contracts in accordance with this meaning. A contract may also have the aim of amending or extinguishing obligations.

There are contracts which do not relate to obligations, but to the dividing up of goods : the cause of the « real » contract relating to the property transfer is the « obligation contract » which forms the basis thereof (like, for example, the contract of sale). Acts of kindness can be « contracts » as under French law : German courts takes the view that the criterion should be found in an analysis of the will of the parties, which is often determined in accordance with presumptions of fact which follow objective factors such as the financial amounts in question and the importance of the case.

The Russian Civil Code distinguishes between contracts and unilateral acts. A unilateral act is defined as the act in respect of which the expression of the will of one of the parties only is necessary and sufficient (article 154). They are subject to the same rules as contracts on the

<sup>79</sup> See D. ZIMMER, in U. IMMENGA, E.-J. MESTMÄCKER, *Gesetz gegen Wettbewerbsbeschränkungen*, 3rd ed., Beck, 2001, § 1 N° 84.

<sup>80</sup> « Although a separate requirement of intention to create legal relations did not exist until the nineteenth century, it is now established that an agreement will not constitute a binding contract unless it is one which can reasonably be regarded as having been made in contemplation of legal consequences ». J. BEATSON, *Anson's Law of Contract*, 28th edition, 2002, OUP, p.69.

basis that these rules are not contrary to the law, nor to the character or the nature of the juridical act (article 156).

Under American law, the 2<sup>nd</sup> *Restatement of Contrats* defines the contract as follows: « a contract is a promise or a set of promises for breach of which the law gives a remedy, or performance of which the law in some way recognises as a duty ». In the *Uniform Commercial Code*, section 1-201, states that: « the total obligation in law which results from the parties' agreement...; agreement means the bargain in fact as found in the language of the parties or in course of dealing or usage of trade or course of performance or by implication from other circumstances ».

In these legal systems, despite different wording, it would appear that the contract is characterized by a meeting of wills with the intention of creating binding legal effects, and that the emphasis is placed on the meeting of wills or on the intention of the parties. However, the approaches are more varied with regard to the value of promises which have not been accepted.

### III. THE CONTRACT AS A BINDING PROMISE WITHOUT ACCEPTANCE

It appears traditional to take the view that claims and debts can only arise out of the conclusion of a contract. *A contrario*, the view is taken that it is not possible voluntarily to make oneself the obligee or especially the obligor of a person. However, by exception, certain national or anational clauses provide that « promises » can result in obligations for the promisor even without having been accepted.

The Pavia Project, as well as PECL, seems to consider that promises can result in obligations for the person making the promise, even though such promise has not been accepted<sup>81</sup>.

PECL do not use, strictly speaking, the term « undertaking » (« *engagement* » in French) as source of the obligation. It is the term « promise » which is used, but more in the sense of a « unilateral intentional undertaking » and not in the sense of « unilateral contract ». Although the French lawyer will not be fooled by the two cases, it would seem, however, that from a terminological and conceptual point of view, it is relevant to question the way in which the concepts of « undertaking », « promise » and *a fortiori* « unilateral contract » interrelate.

On the contrary, more reservations are expressed with regard to the Pavia Project. Indeed, the drafting of articles 20<sup>82</sup> and 23<sup>83</sup> seems to suggest that a « unilateral undertaking », although not expressly mentioned, is itself a source of obligation<sup>84</sup>.

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<sup>81</sup> see article 2.101 of the PECL commentary I ; article 2.107, in : *Principes du droit européen du contrat*, SLC, 2003, pp.97, 108.

<sup>82</sup> « Les déclarations et les actes unilatéraux réceptives produisent les effets qui peuvent en dériver en vertu de la loi, de la coutume et de la bonne foi, à partir du moment où ils parviennent à la connaissance de la personne à laquelle ils sont destinés et, même si leur émetteur les déclare irrévocables, ils peuvent être retirés jusqu'à ce moment ».

<sup>83</sup> « La promesse adressée au public, prévue à l'art.13 alinéa 2, lie celui qui la fait dès qu'elle est rendue publique et s'éteint à l'expiration du délai qui y est indiqué ou que l'on peut déduire de sa nature ou de son but, ou à compter d'un an après son émission si la situation qu'elle prévoit n'est pas survenue ».

<sup>84</sup> Supporting this view, see C. GRIMALDI, *Quasi-engagement et engagement en droit privé. Recherches sur les sources de l'obligation*, Préf. Y. Lequette, Defrénois, 2007, n°932.

The national laws are split when it comes to deciding whether these promises can be held to be « contracts ». Certain systems take the view that they constitute unilateral undertakings, others see them as quasi-contracts whilst others see them as contracts. In fact, the terminology used evolves in the light of each country's ideas, which shows the delicate distinction to be made between the terms « contract » and « engagement » (A) independently from the fact that the term « engagement » takes on a specific meaning under competition law (B).

### ***A. The delicate distinction between “engagement” and “contract” as a source of obligation***

It is necessary to understand distinctly the laws which recognize unilateral undertakings as a source of obligation (2) and those which exclude them (1).

#### ***1. The delicate distinction made between « engagement », « contract » and « promise » under French and English law***

Under French law<sup>85</sup>, we have already shown that from a terminological point of view, the term « engagement » refers to the source of obligation as well as to the obligations themselves. We shall therefore only consider the term « engagement » understood as source of obligations<sup>86</sup>.

A limited number of unilateral juridical acts is regulated by law (the will, the notice to quit given by the lessee or by the lessor...). The caselaw remains divided regarding the possibility that a person could, by exercising its will alone, become the obligor of another. The announcement of a prize has given rise to hesitations, such an announcement being treated sometimes as a unilateral undertaking<sup>87</sup>, sometimes as a contract<sup>88</sup>. The court decisions also produce varying results on how to treat an offer to contract and more particularly on what happens to an offer which contains a delay for acceptance in the event of the death or incapacity of the offeror: certain decisions take the view that the offer, as unilateral commitment of will, survives the events that affect the offeror<sup>89</sup>, whilst others consider that the offer should lapse<sup>90</sup>.

In the same way, a promise to perform a natural obligation is considered to be a civil obligation: no manifestation on the part of the beneficiary is necessary<sup>91</sup>. French law

<sup>85</sup> Ph. JESTAZ, « L'engagement par volonté unilatérale », in : *Les obligations en droit français et en droit belge. Convergences et divergences*, Actes des journées d'étude organisées les 11 et 12 décembre 1992 par la Faculté de droit Paris Saint-Maur et la Faculté de droit de l'Université Libre de Bruxelles, Bruylant – Dalloz, 1992, p. 17 ; A. SERIAUX, « L'engagement unilatéral en droit positif français », in : *L'unilatéralisme et le droit des obligations*, Ch. JAMIN and D. MAZEAUD (under the direction of), Economica, 1999, p.7 ; J.-L. AUBERT, *Enc. Dalloz, Rep. civ.*, V° « Engagement par volonté unilatérale » ; J. GHESTIN, M. BILLIAU, G. LOISEAU, *Le régime des créances et des dettes*, Traité de droit civil, LGDJ, 2005, n°103 ; *adde.* C. GRIMALDI, *Quasi-engagement et engagement en droit privé. Recherches sur les sources de l'obligation*, Defrénois, 2007, n°600 et s.

<sup>86</sup> On the relationship between « engagement » and « obligation », see the report on the terms « Obligation / duty ».

<sup>87</sup> It would appear in fact that academics have recently shown interest in the notion of « engagement ». See in particular, C. GRIMALDI, *Quasi-engagement et engagement en droit privé. Recherches sur les sources de l'obligation*, Defrénois, 2007, n°600 et s. ; J. GHESTIN, *Cause de l'engagement et validité du contrat*, LGDJ, 2006, n°1 ; *adde.* from the same author, « Validité – Cause (Art. 1124 to 1126-1) », in : *Avant-projet de réforme du droit des obligations et de la prescription*, Pierre CATALA (under the direction of), La documentation française, 2006, p.37.

<sup>88</sup> Cass. civ. 1<sup>ère</sup> 28 March 1995, *Bull. civ.* I, n° 190 ; Cass. civ. 1<sup>ère</sup> 11 February 1998, *D.* 99, SC 109.

<sup>89</sup> Cass. civ. 3<sup>ème</sup> 27 November 1990, *Bull. civ.* III, n° 255.

<sup>90</sup> Cass. civ. 3<sup>ème</sup>, 10 May 1989, *Bull. civ.* III, n°109, p. 60 ; Cass. Soc., 14 April 1961.

<sup>91</sup> Civ. 1<sup>ère</sup> 10 October 1996, *D.* 1997.p.158.

traditionally appears nervous about expressly recognizing a unilateral undertaking as an autonomous source of obligation<sup>92</sup>.

English law does not really recognize the notion of « *engagement* », with the meaning of unilateral undertaking. However, it is familiar with the theory of « unilateral promise ». On principle, there cannot be a unilateral promise in the absence of consideration. However, the courts have softened this vision of consideration. In the case of *Carlill v Carbolic Smoke Ball Company*,<sup>93</sup> a promise *lato sensu* of a prize gave rise to a unilateral contract in the English sense when it was accepted by the performance of what was required (on the facts, using the smoke ball during a specified period). This solution does not apply if the « promisee » did not know of the promise: he could not act in contemplation of the promise, and there could therefore not be an acceptance. This approach is not so far from the approach taken regarding the unilateral undertaking, in respect of which the acceptance by the obligee is not necessary for a right to arise, although such acceptance is shown the implementation of the said undertaking.

Once the difficulties relating to the distinction between « contract » and « *engagement* » understood, the question arises as to the relationship between these two notions and that of a « promise », traditionally understood in civil law countries as a « unilateral contract »<sup>94</sup>.

## **2. The acceptance of the theory of unilateral undertakings: the Belgian, German and Italian examples**

Under Belgian Law<sup>95</sup>, the notion of unilateral undertaking has progressively been accepted until it was finally acknowledged generally by caselaw<sup>96</sup>. Indeed, in two cases of 9 May 1980<sup>97</sup>, the Belgian Cour de cassation held that: « the basis for the binding force of an offer is an intentional unilateral undertaking ». The unilateral undertaking therefore appears, in Belgium, among the source of obligation. It should however be noted that this source of obligation is ancillary « in the sense that it should only be relied upon if the other sources of obligation cannot, without artificial device, provide a justification for the binding character of the alleged commitment »<sup>98</sup>.

Under German law, article 311, para. 1 of the BGB specifies that a contract is the principle for creating a binding relationship, unless otherwise provided by law. However, in application of the theory of the unilateral undertaking, article 657 of the BGB provides that in the case where an individual lets it be known by public announcement that he will give a prize if a particular act is performed, then he is bound to do so even if the person performing the act had not acted in consideration of the promise.

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<sup>92</sup> A recent study has however demonstrated the importance and usefulness of the general acknowledgment of the notion of « *engagement* » as source of obligation. See generally, C. GRIMALDI, *op. cit.*

<sup>93</sup> [1893] 1 *QB* 256

<sup>94</sup> The notion of « unilateral contract » has in fact recently been considered as « unnecessary » by an author who sees it as a mere unilateral commitment of will, with the exception of real contracts. See C. GRIMALDI, *op. cit.* n°835-1. The study should therefore be more concerned with the distinctions between the notion of « promise », « *engagement* » and « unilateral contract ».

<sup>95</sup> L.SIMONT, « L'engagement unilatéral », in : *Les obligations en droit français et en droit belge. Convergences et divergences*, Actes des journées d'étude organisées les 11 et 12 décembre 1992 par la Faculté de droit Paris Saint-Maur et la Faculté de droit de l'Université Libre de Bruxelles, Bruylant – Dalloz, 1992, p. 17 ; *adde.* C. GRIMALDI, *Quasi-engagement et engagement en droit privé. Recherches sur les sources de l'obligation*, Defrénois, 2007, n°839.

<sup>96</sup> L. SIMONT, *ibid.*

<sup>97</sup> *RCJB* 1986, p.135, n°153 ; cited by C. GRIMALDI, *op. cit.* n°842.

<sup>98</sup> L. SIMONT, *op. cit.*, p.45

Under Italian law, article 1324 of the Italian Civil Code<sup>99</sup> provides that the rules applicable to contracts are applicable to unilateral undertakings.

The undertaking as a source of obligation appears to be controversial, whilst the unilateral contract seems to be accepted without too many difficulties. The term « undertaking » should therefore *a priori*, not cause too many difficulties when it is understood as source of obligation. However, as in PECL, the notion of « promise » should be preferred. It appears that it is the notion of promise which should be defined in order to avoid any difficulty in distinguishing unilateral undertaking and unilateral contract.

The term « *engagement* » (translated as « commitment »), finally, has a specific meaning in the context of competition law, which should be clarified.

### ***B. The specificity of the term “commitment” under competition law***

The notion of « commitment » in French competition law raises the same issues as the notion of « agreement ».

However, it is interesting to note that the use of these procedures, which is new, is directly inspired by the American procedure of « consent decrees »<sup>100</sup>, expression which seems to reflect the two sides of this type of measure: the manifestation of a will, the binding force of which arises out of a judicial act.

The English translation of this form of « commitment » (« *engagement* » in French) is different from the wording used in the United States<sup>101</sup>.

This terminological difference in English should not however, let us lose sight of the fact that the term « commitment » implies both the idea of unilateralism and personality. A person, when it commits morally or legally, manifests its will to be involved, its attachment, to a lesser or greater extent, to accomplish something.

## **IV. A CONTRACT AS A SPECIFIC RELATIONSHIP BETWEEN TWO PERSONS**

Under French law, it would appear that the expressions « contract » (« *contrat* ») and « contractual relations » (« *relation contractuelle* ») are generally used indifferently. However, a deeper analysis brings to light a specific use of the term « relations », when the contract *stricto sensu* goes beyond the objective framework of the performance required, and refers to a series of undefined elements which are witness to a more subjective facet of contract: reliance, expectation, dependency... Contract loses its cold and automatic aspect, broadly materialized by the payment of the price in exchange for the performance of what was agreed, in order to encompass the situation or rather the social reality created by the contract.

It is, in fact, most interesting to note that this mutation from objectivity to subjectivity which appears under French law and under German law, which occurs when moving from contract to

<sup>99</sup> « Art. 1324 (*Norme applicabili agli atti unilaterali*) : *Salvo diverse disposizioni di legge le norme che regolano i contratti si osservano, in quanto compatibili, per gli atti unilaterali tra vivi aventi contenuto patrimoniale* ».

<sup>100</sup> R.A. EPSTEIN, *Antitrust Consent Decrees in Theory and Practice*, AEI Press, 2007 ; M. MALAURIE-VIGNAL, « Engagements, droit de la concurrence et droit des contrats », *Contrats, conc. consom.*, 2007, Repère 2.

<sup>101</sup> In addition to the official translation into english, see R. WHISH, *op. cit.* p. 256. On peut, d’ailleurs, s’interroger sur l’articulation, en anglais, des notions telles que « *commitment* », « *undertaking* » et « *promise* ».

« contractual relations » (A), finds its equivalent in the American theory of relational contracts (B).

### A. From contract to “contractual relationship”

Although the term « relations » is never used as a synonym of the word « contract », the two terms are sometimes joined together in order to describe a type of contractual relationship or a type of contract in particular. This is illustrated under French law by the use of the expression « established commercial *relations* »<sup>102</sup> or « contractual work *relations* »<sup>103</sup>.

Originating in the Galland law of 1st July 1996<sup>104</sup>, the new article L. 442-6-I-5° of the commercial code, as amended by the NRE law of 15 May 2001<sup>105</sup>, imposes a genuine duty to act fairly in the breaking off of « established commercial relations »<sup>106</sup> with an economic partner<sup>107</sup>.

From a terminological point of view, the expression is surprising. Despite the fact that the area is limited to « commercial » relations, and the possibly unnecessary addition of the adjective « established », it is the term « relations » which is intriguing. It appears that the « relations » tend to bring to light the personal aspect of the relationship between the parties to the contract, to go beyond the mere examination of the performance of the parties' reciprocal obligations.

Although the judgments applying article L. 442-6-I-5° of the commercial code do not provide a real definition of the « established commercial relations », nor do they make it possible to determine the criteria to be used to identify such relations, they do however provide certain elements the presence of which points towards the existence of such relations. On this basis, Judith ROCHFELD has identified two relevant criteria: the length and intensity (collaboration and/or investment) of the relations<sup>108</sup>.

<sup>102</sup> Article L. 442-6-I-5° of the commercial code.

<sup>103</sup> Article L. 122-3-4 and L. 122-3-10 of the commercial code.

<sup>104</sup> Loi n°96-588 du 1<sup>er</sup> juillet 1996 sur la loyauté et l'équilibre des relations commerciales, JO 3 juillet 1996, p.9983, *RTD civ.* 1996, p. 1009, obs. Ch. JAMIN.

<sup>105</sup> Loi n°2001-420 du 15 mai 2001 relatives aux nouvelles régulations économiques, JO 16 mai 2001, p. 7776, *RTD civ.* 2001, p. 671, obs. J. ROCHFELD.

<sup>106</sup> The « *relation commerciale établie* » (established commercial relations) includes all types of commercial relations between two professionals, but excludes relations with consumers. This law applies to the purchase and sale of products as well as the provision of services. In other words, it could include any contract the performance of which is in successive or staggered parts which organises the exchange of goods or the provision of services between two commercial partners (distribution, supply or maintenance contract, *etc*). It could also include relations which are not organised, a « business trend » made up of a succession of contracts (Cass. com. 28 February 1995, *Bull. civ.* IV, n°63) », M.-A. FRISON-ROCHE, M.-S. PAYET, *Droit de la concurrence, op. cit.*, n°473.

<sup>107</sup> On all of these questions, see in particular: M.-A. FRISON-ROCHE, M.-S. PAYET, *Droit de la concurrence*, Dalloz, 1<sup>st</sup> edition, 2006, n°472 ; *adde.* J. BEAUCHARD, « Stabilisation des relations commerciales : la rupture des relations commerciales continues », *LPA*, 5 January 1998, n°2, p.14 ; Ch. LACHIEZE, « Quelques précisions sur la notion de rupture brutale d'une relation commerciale établie », *JCP E* 2004, p. 1477 ; *adde.* from the same author, « La rupture des relations commerciales à la croisée du droit commun et du droit de la concurrence », *JCP E* 2004, p. 1815 ; D. MAINGUY, « Les mystères de la rupture brutale de relations commerciales établies », *JCP E* 2003, p. 1792.

<sup>108</sup> J. ROCHFELD, « Au croisement du droit de la concurrence et du droit civil : l'avènement de la relation contractuelle ? », *RDC* 2006, p. 1033. In her article, the author takes the example of a recent case (albeit unpublished) which illustrates this trend of taking into account these two criteria (Cass. com., 25 April 2006, n°02-19577). *Adde.* A. de BROSSES, « La rupture fautive des relations commerciales continues », *Droit et patrimoine*, June 2003, p.50 ; A. GRIZAUT, « Rupture brutale des relations commerciales, réflexions sur les premiers cas d'application de l'article L. 442-6 », *Droit et patrimoine*, juin 2003, p.71 ; B. MAGERAND, *Les relations d'affaires en droit des obligations*, préf. E. Loquin, PUAM, 2003.

In addition, it should be noted that the expression « established commercial relations » is used, under French law, in the context of the breach of a contract. For example, if an agent suddenly breaks off established commercial relations (by ceasing to order or reducing orders or deliveries significantly), that is to say without respecting a notice period which takes into account the length of the commercial relations or the minimum period fixed by law, commercial usage or interprofessional agreements, such agent will be found liable in tort (delictual liability)<sup>109</sup> and must compensate his partner for any loss suffered. However, ordinary law, without expressly recognizing the notion of « relations », prevents contractual relations from being broken off brutally, abusively and even sometimes legitimately. The right to put an end to contractual « relations » remains the principle, but it should not be abused.

It is in this spirit that it would appear useful to turn the notion of « relations » *lato sensu* into a concept, in order to bring together its implications: « the admission of « incompleteness » of this type of contract, and starting with the requirement that they be flexible (...); a shift in appreciation, from the economic exchange and its performance in terms of precise and defined obligations, towards an assessment of the behaviour of the parties and of their « duties » »<sup>110</sup>. Such an approach seems, moreover, to be compatible with German law.

Indeed, two close concepts should be mentioned here. Firstly, the general notion of « *Schuldverhältnis* » (obligation relationship), defined in § 241 of the BGB, which exists « around » any obligation (whether statutory or contractual), and which adds supplementary duties of information, diligence, respect for the property, rights and interests of the other party (§ 241, para. 2 of the BGB), so as to impose a liability which is wider than the general delictual liability. Secondly, and in parallel with the concept of the « established commercial relations », German caselaw has acknowledged from the beginning of the 20th century the concept of « *ständige Geschäftsbeziehung* » (permanent commercial relations) which also creates duties of information, respect and diligence as regards the other party, which are even more important than those which existed in the simple « obligation relationship ».<sup>111</sup> Finally, under company law as in labour law, the specific bond between the directors or between employer and employee goes even further with regard to the intensity of the supplementary duties, so that the caselaw often talks of « *Treueverhältnis* » (loyalty relationship) or of « *Treuepflichten* » (loyalty obligations).

This shift from contract to relations has, for over thirty years, been highlighted in the United States by Professor Ian MACNEIL essentially around the theory of the relational contract which he devised.

### ***B. Relational contracts under American law***

The paternity of the relational contract can be attributed to Ian R. MACNEIL<sup>112</sup>. In the midst of the seventies, the professor at the Northwestern University School of Law made a distinction between two types of contract: discrete contracts and relational contracts.

<sup>109</sup> Cass. com. 6 February 2007, n°04-13178.

<sup>110</sup> J. ROCHFELD, « Au croisement du droit de la concurrence et du droit civil : l'avènement de la relation contractuelle ? », *op. cit.*, spec. p. 1038. adde. du même auteur, « Les modes temporels d'exécution du contrat », *RDC* 2004, p. 47, spec. n°23 et s., p. 60 et s.

<sup>111</sup> See, for example, BGH, 13 March 1996, NJW 1996, 1537.

<sup>112</sup> See, among the various works of the author: « The many futures of contracts », *Southern California Law Review*, 1974, vol. 47, p. 691; « Relational contract : What we do and do not know », *Wisconsin Law Review*, 1985, p. 483 et s. ; « Reflections on Relational Contract », *Journal of Institutional and Theoretical Economics*, 1985, p.

The first category brings together all the contracts which carry out a punctual or isolated exchange. In this type of contract, the identity and position of the parties has no importance: the contracting parties do not necessarily know each other before they enter into the contract and, by entering into the contract, « they do not form any psychological bond »<sup>113</sup>. In these discrete contract, the subject matter of the obligations and the details of their performance are provided in detail, so that the contract can be performed in accordance with what had been agreed (in its entirety) on the day it was entered into<sup>114</sup>.

The second category brings together all the contracts which last a certain length of time. Relational contracts are marked by the existence of a strong relationship between the contracting parties who « get to know each other, become involved, collaborate »<sup>115</sup>. In addition, because these contracts are intended to last a certain length of time, their content is not fixed definitively upon the day they are entered into. On the contrary « it is intended to be clarified or amended during the performance of the contract, depending on surrounding events »<sup>116</sup>.

French scholarship remained totally indifferent to this theory for a long time. It was only at the end of the nineties that certain authors started to present, to promote or discuss the distinction between discrete and relational contracts<sup>117</sup>.

In her doctoral thesis, Mme BOISMAIN attempted to clarify the limits of the notion and to propose a legal regime which would apply to relational contracts (« régime encourageant la poursuite de la relation ») (regime encouraging the continuation of the relations) : increased intervention on the part of the judge<sup>118</sup>, requirement for a contractual balance<sup>119</sup>, restraints on the freedom to put an end to the contract<sup>120</sup>, adjustment of the damages due by the obligor<sup>121</sup>, and also, most importantly perhaps, adjustment of the contracts during their performance<sup>122</sup>.

The main fault affecting the relational contract is that it is difficult to ascertain. A number of criteria have been put forward by academics<sup>123</sup> : the length of the duration of the contract<sup>124</sup>, the

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541 et s. ; *The New Social Contract : An inquiry into Modern Contractual Relations*, New Haven, Yale University Press, 1980.

<sup>113</sup> Y.-M. LAITHIER, « A propos de la réception du contrat relationnel en droit français », *D.* 2006, Chron., p. 1003, espec. p. 1004, 2nd col. *in limine*.

<sup>114</sup> *Ibid.*

<sup>115</sup> *Ibid.*

<sup>116</sup> *Ibid.*

<sup>117</sup> See, inter alia, F. OST, « Temps et contrat, critique du pacte faustien », in : *La relativité du contrat*, TAHC, 2001, p. 137, espec. p. 162 ; H. MUIR WATT, « Du contrat « relationnel », Réponse à François Ost », in : *La relativité du contrat*, TAHC, 2001, p. 169 et s. ; J. ROCHFELD, « Les modes temporels d'exécution du contrat », *RDC* 2004, p. 47 , espec. n° 23 ; R. LIBCHABER, « Réflexions sur les effets du contrat », in : *Propos sur les obligations et quelques autres thèmes fondamentaux du droit*, Mélanges offerts à J.-L. Aubert, 2005, espec. n° 22 ; M. FABRE-MAGAN, *Les obligations*, PUF, 2004, n° 74, pp. 179-180 ; Ph. MALAURIE, L. AYNES and Ph. STOFFEL-MUNCK, *Droit civil, Les obligations*, Defrénois, 2005, n° 428, p. 208 ; Ch. JAMIN, « Théorie générale du contrat et droit des secteurs régulés », *D.* 2005, Chron., p. 2342, espec. p. 2343 ; C. BOISMAIN, *Les contrats relationnels*, Préf. M. Fabre-Magnan, PUAM, 2005, qui oppose les contrats « relationnels » aux contrats « impersonnels » (n° 17, pp. 27-28) ; Y.-M. LAITHIER, « A propos de la réception du contrat relationnel en droit français », art.cited above.

<sup>118</sup> C. BOISMAIN, *Les contrats relationnels*, above cited thesis, n° 282 et s., p. 213 et s.

<sup>119</sup> C. BOISMAIN, *Les contrats relationnels*, above cited thesis, n° 316 et s., p. 235 et s.

<sup>120</sup> C. BOISMAIN, *Les contrats relationnels*, above cited thesis, n° 359 et s., p. 267 et s.

<sup>121</sup> C. BOISMAIN, *Les contrats relationnels*, above cited thesis, n° 425 et s., p. 305 et s.

<sup>122</sup> C. BOISMAIN, *Les contrats relationnels*, above cited thesis, n° 582 et s., p. 399 et s.

<sup>123</sup> E. McKendrick summarises the criteria identified by Ian Macneil in the following way: « Macneil has identified a number of ingredients of a discrete transaction which, he argues, are not present in the case of a relational contract. These are : (1) a clearly defined beginning, duration and termination ; (2) clear and precise definition of the subject matter of the transaction, its quantity and the price ; (3) the substance of the exchange is planned at the

amount of detail contained in the provisions<sup>125</sup>, the difficulty of finding an equivalent partner<sup>126</sup>, etc. The relative imprecision of these criteria makes it impossible to put together a precise list of relational contracts<sup>127</sup>.

Authors cite, in no particular order, the company, the non-profit making body (« *association* »), the contracts for carrying out large works, turnkey contracts for the delivery of factories, technology transfer contracts, work contracts, distribution contracts, supply contracts or more recently contracts for civil union (« *pacte civil de solidarité* »).

Certain authors even question whether all « contracts » might not be « relational », in the sense that they all imply a minimum amount of collaboration between the parties<sup>128</sup>. However, although it is clear that the concept of relational contract is not a working proposition, it will at least have brought to light the notion of « relations », in respect of which Y.-M. LAITHIER proposes a dual interpretation: in the first case, « the relations are the bond that the parties must respect and preserve because there is some value attached to it. But the bond which binds the parties meets the definition of an obligation. It could therefore be argued that because the contract gives rise to obligations, it gives rise to relations. Any contract would then be *by definition* a relational contract ; on the contrary, in the second case, which is much more elaborate, there should be a distinction made between the obligation and the relations, the relations « would refer to the behaviour, the relationship and the practices adopted by the parties, whilst the contractual obligation would remain classically defined as the legal bond which is their to ensure the obligee obtains satisfaction; (...) In this way, the definition of contract provided by the Civil Code would be completed : it could be defined as an agreement (« *convention* ») giving rise to obligations and to relations. The contract would therefore be constituted of two elements: a content relating to obligations and a content relating to relations. The distribution of these two elements would vary depending on the intensity of the relations »<sup>129</sup>.

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*moment of formation of the contract ; (4) the benefits and burdens of the contract are clearly assigned at the moment of formation ; (5) there is little emphasis upon, interdependence, future co-operation and solidarity between the parties ; (6) the personal relationship created by the contract is extremely limited ; and (7) the contract is created by a single exercise of bilateral power »* E. McKENDRICK, « The Regulation of Long-term Contracts in English Law », in : *Good Faith and Fault in Contract Law*, J. BEATSON, D. FRIEDMANN (eds.), Oxford University Press, 1995, reprinted 2002, p. 308.

<sup>124</sup> See, among the American authors: R. E. SPEIDEL, « The Characteristics and Challenges of Relational Contracts », *Northwestern Law Review* 2000, vol. 94, p. 805, espec. p. 815 ; among the French authors: F. OST, « Temps et contrat, critique du pacte faustien », art. cited above, p. 162 ; J. ROCHFELD, « Les modes temporels d'exécution du contrat », art. cited above, n° 28.

<sup>125</sup> See among the American authors: C. J. GOETZ et R. E. SCOTT, « Principles of Relational Contracts », *Virginia Law Review* 1981, p. 1089, espec. p. 1091 ; among the French authors: J. ROCHFELD, « Les modes temporels d'exécution du contrat », art. cited above, n° 28 ; R. LIBCHABER, « Réflexions sur les effets du contrat », art. cited above, n° 25.

<sup>126</sup> C. BOISMAIN, *Les contrats relationnels*, above cited thesis, n° 209, p. 165.

<sup>127</sup> « ... it is impossible to locate, in the relational-contract literature, a definition that adequately distinguishes relational and nonrelational contracts in a legally operational way – that is, in a way that carves out a set of special well-specified contracts for treatment under special well-specified rules » M.A. EISENBERG, « Relational Contracts », in : *Good Faith and Fault in Contract Law*, J. BEATSON, D. FRIEDMANN (eds.), Oxford University Press, 1995, reprinted 2002, p. 291.

<sup>128</sup> G. ROUHETTE, « Compte-rendu de Ian R. MacNeil », *JDI* 1983, p. 960, and espec. p. 963 ; H. MUIR WATT, « Du contrat « relationnel », Réponse à François Ost », art. cited above, p. 173.

<sup>129</sup> Y.-M. LAITHIER, *op. cit.* However, the author notes further on that the distinction is not after all operational: « La raison tient tout simplement à l'existence d'un phénomène d'absorption des effets normatifs de la relation par l'obligation contractuelle. De sorte que tantôt la relation digne de considération crée une obligation nouvelle, tantôt la relation digne de considération modifie l'exécution d'une obligation existante ».

## V. CONTRACT AND QUASI-CONTRACT

Most laws acknowledge a category which exists alongside the contract: the category of quasi-contracts, which brings together different concepts, which have in common the fact that they borrow certain aspects of their legal regime from contract. It appears interesting to compare the national approaches to this category, to assess whether it is sufficiently homogenous and determine whether the quasi-contract should be included in the scope of PECL.

Article 1371 of the French Civil Code provides that « quasi-contracts are purely voluntary acts of man, from which there results some undertaking towards a third party, and sometimes a reciprocal undertaking of both parties ». The will of the parties is, in this case and unlike in relation to contract, a material act which produces effects which are organised by law, effects which are partly borrowed from the contractual regime (see for example the *negotiorum gestio* which borrows certain aspects from the regime of representation). The will of the parties does not play the same part as in the formation of the contract, because it is not directed towards the creation of obligations: the law recognizes the obligations because it considers it fair and useful.

However, certain effects are different from a defined contractual model, which suggests that the effects of quasi-contracts are specific. For example with regard to *negotiorum gestio*, it is accepted that the manager may carry out material acts, and not only legal acts as is the case for an agent, in respect of which he will be able to be reimbursed by the owner. In the same way, unjust enrichment can be the consequence, on the one hand, of non-contractual situations (for example the *de in rem verso* action brought by the person whose paternity is questioned against the real father for the alimony which was paid to the child in his place) and, on the other hand, of a number of varied contractual situations which appear to borrow elements from various contractual regimes. Similarly, the payments made under a mistaken belief cannot be merely treated as a contract for a loan just because it requires the delivery of goods or a sum of money, which is the usual consideration in a contract.

The courts have tended to show some flexibility when considering the conditions necessary for the existence of quasi-contracts. (See for example the body of caselaw according to which situations of voluntary assistance fall within the definition of *negotiorum gestio*).

They have also used the notion of quasi-contract to impose the obligation on the organiser of a prize draw to pay all of the promised prize money if he fails to show the existence of a random draw<sup>130</sup>.

In England and in the United States, the idea that unjust enrichment was based on an intentional element has been abandoned. Whilst for a long time, unjust enrichment was considered to be an implied contract, it is now based on concepts of equity and natural justice according to which an unjustified imbalance between the parties must be rectified.

American law proposed a general definition of unjust enrichment: article 1 du *Restatement of Restitution 1936* provides: « a person who receives a benefit by reason of an infringement of another person's interest or of loss suffered by the other, owes restitution to him in the manner and amount necessary to prevent unjust enrichment ». English law does not adopt a global approach: it offers several specific rights of action for each type of unjust enrichment. Certain of these actions, however, go beyond the framework of quasi-contracts as it is defined in France.

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<sup>130</sup> Ch. mixte, 6 sept. 2002, *Bull. civ. C.M.*, n°4, p. 9, *D.* 2002. p. 2531, note LIENHARD et rapport GRIDEL – 2963, note D. MAZEAUD; *LPA* 24 October 2002.16, note D. HOUTCIEFF and Ph. LE TOURNEAU.

For example, the action « for money had and received » applies in a particular case: it enables the plaintiff to recover money to which he is entitled, and which in justice and equity the defendant ought to refund to the plaintiff, and which he cannot with a good conscience retain. [The obligor may offer to pay his obligee with monies held by his own obligor– if the latter fails to pay, then the plaintiff can bring an action « for money had and received » against the obligor who was supposed to pay him. This action supposes the express agreement of the initial obligor and of his own obligor.]

Neither English nor American law, however, recognize *negotiorum gestio*. There is no right of action, in principle, to recover expenses incurred by a person who voluntarily managed another's affairs<sup>131</sup>. Under English law, the action which is closest to the French « *gestion d'affaires* » is the « *quantum meruit* » action. In particular, this action authorises, subject to certain conditions, the compensation of a party who intervened in favour of another. It is therefore related to the protection of the manager of another's affairs, but is based on the principle of restitution.

Moreover, the courts have progressively accepted that an action based on unjust enrichment should be brought in two cases : the case where the intervention occurs following preexisting contractual relations (« agency of necessity »), and the case where the interference occurs without any preexisting contractual relations (« necessitous intervention »).

Under German law, *negotiorum gestio* and unjust enrichment are referred to in the BGB under paragraphs 677 and following (for *negotiorum gestio*) and 812 and following (for unjust enrichment). Without ever naming them as quasi-contracts, German law considers both *negotiorum gestio* and unjust enrichment as autonomous sources of obligation, which exclude a meeting of wills on the part of the parties. Paragraphs 683 and 684 of the BGB distinguish two types of *negotiorum gestio*: justified or legitimate management on the one hand, and unjustified or illegal management on the other. The management is legitimate if it corresponds to the true intention, or in the absence of true intention, the presumed intention and to the objective interest of the owner.

In the absence of this element, the rights of the manager are limited. It is therefore the intention or the interest of the owner and not the behaviour of the manager which determines the amount of compensation.

Paragraph 812 of the BGB provides that « any person who acquires something without legal cause by reason of another person's performance or by other means to the detriment of such other person, is under an obligation to restitute such thing ». The performance is the performance carried out by the aggrieved party on the basis of legal or contractual relations which binds him to the enriched party. The action can be brought to impose upon the buyer the restitution of the goods and of the ownership in the event that the contract of sale is annulled – indeed, under German law, the passing of title is separate from the agreement of the parties to the sale agreement. Regarding unjust enrichment arising out of other means, this most generally refers to the case of an act which affects another party's property, carried out by the enriched party, the aggrieved party or a third party.

Finally, in 2000, German law imposed a legal obligation on a professional who has sent a promise of a prize to a consumer, to pay such prize to the consumer (§ 661a of the BGB). A number of problems have arisen in trying to place such an obligation in a category. Whilst most authors almost unanimously reject its categorization as a contract, most call it

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<sup>131</sup> For England, *Falcke v. Scottish Imperial Insurance Co.* [1886] 34 Ch. 234 and for the United States, article 2 du *Restatement of Restitution*

« *rechtsgeschäftsähnlich* », which could be translated as « quasi-contractual » (the literal translation would be « treated as a juridical act »). Indeed, certain provisions of the general legal regime applicable to juridical acts apply to the promise, for example, the rules relating to legal capacity, representation and lack of consent.<sup>132</sup>

As for private international law, German courts, after initially insisting on treating the obligation as delictual<sup>133</sup>, finally followed the ECJ<sup>134</sup> which categorizes this obligation as contractual as per art. 5 n° 1, 13.1 n° 3 of the Brussels convention.<sup>135</sup> However, this private international law treatment of the obligation has no incidence on the internal private law position, in accordance with the principle of relativity of legal notions and of the autonomous interpretation of international law.

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<sup>132</sup> See H. H. SEILER, in *Münchener Kommentar zum BGB*, 4<sup>th</sup> ed., Beck, 2005, § 661a n° 4.

<sup>133</sup> BGH, 28 November 2002, NJW 2003, 426.

<sup>134</sup> CJCE, 11 July 2002, C-96/00, *Rudolf Gabriel*, Rec. 2002, I-6367; 20 January 2005, C-27/02, *Petra Engler c/ Janus Versand GmbH*, Rec. 2005, I-481. See above.

<sup>135</sup> BGH, 1 December 2005, NJW 2006, 230.