

# EUROPEAN COMMUNITY SOURCES OF FRENCH CONTRACT LAW

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## I. INTRODUCTION TO FRENCH CONTRACT LAW

Contracts and companies have significant effects on the economy. It is not surprising, therefore, that the European Community (EC), while building a framework for the regulation of companies,<sup>1</sup> has also had a strong indirect impact on laws governing contracts.

Often the indirect European influence on contract law is a result of the application of general principles of law laid down in the European Community Treaty (Treaty or EC Treaty).<sup>2</sup> For example, a recent

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1. See, e.g., Michel Germain, *Rapports entre droit communautaire et droit interne des sociétés* [Relationship Between Community Law and National Law of Companies]; L'ENTREPRISE DANS LE MARCHÉ UNIQUE EUROPÉEN [THE ENTERPRISE IN THE SINGLE EUROPEAN MARKET] 267; Hervé Synvet, *La société européenne et les fusions transfrontalières, techniques de concentration des entreprises* [The European Company and Cross-border Fusion, Techniques of Enterprise Concentration], in L'ENTREPRISE DANS LE MARCHÉ UNIQUE EUROPÉEN, *supra*, at 295.

2. See generally TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY, Mar. 25, 1957, 298 U.N.T.S. 3 [hereinafter EC TREATY].

European Court of Justice decision invalidated a contract clause pertaining to the method of expense reimbursement used by professional soccer teams when playing matches in a rival team's city.<sup>3</sup> The expense reimbursement clause was struck down because it violated the fundamental EC principle of free movement of persons.<sup>4</sup> However, in most cases, derived law, regulations, and directives of the EC institutions have the most influence on the contract law of the Member States. Even though Member State contract law is not directly legislated by the EC, many regulations and directives currently exist in both active and drafted stages that have, or will have, unintended effects on Member State contract law. These European Community sources of contract law bring important changes to Member State contract law.

#### A. *Scope and Limits*

There is much existing and pending contract-related legislation from the European Community. One body of legislation concerns consumer protection: the directive on misleading advertising;<sup>5</sup> the directive to protect the consumer in respect of contracts negotiated away from business premises;<sup>6</sup> the consumer credit directives;<sup>7</sup> the recommendation concerning payment systems, and in particular, the relationship between cardholder and card issuer;<sup>8</sup> the directive on unfair terms in consumer contracts;<sup>9</sup> the proposed directive on contracts negotiated at a distance (distance selling);<sup>10</sup> the green paper and proposal

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3. See Gérard Auneau, *L'affaire Bosman: les spécificités sportives en question* [*The Bosman Case: the sports exception called into question*], JURIS-CLASSEUR PÉRIODIQUE [JCP] II 226-60 (1996); Laurence Idot, *Libre Circulation des Travailleurs. Joueurs professionnels de football. "Bosman"* [*Free Movement of Workers. Professional Soccer Players. "Bosman"*] EUROPE REVUE MENSUELLE, comm. 73, pt. 601 (1996); Jean-Pierre Cot, *Jean-Marc Bosman: Travailleur ou Marchandise?* [*Jean-Marc Bosman: Worker or Merchandise?*], GAZETTE DU PALAIS [GAZ. PAL.] May 22-23, 1996, at 4. The case received tremendous media attention.

4. See EC TREATY tit. III.

5. Council Directive 84/450 Concerning Misleading Advertising, 1984 O.J. (L 250) 2.

6. Council Directive 85/577 To Protect the Consumer In Respect of Contracts Negotiated Away from Business Premises, 1985 O.J. (L 372) 31.

7. Council Directive 87/102 For the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Concerning Consumer Credit, 1986 O.J. (L 42) 48; Council Directive 90/88 amending Council Directive 87/102, 1990 O.J. (L 61).

8. Commission Recommendation Concerning Payment Systems, and in Particular the Relationship between Cardholder and Card Issuer, 88/590, 1988 O.J. (L 317) 55.

9. Council Directive 93/13 on Unfair Terms in Consumer Contracts, 1993 O.J. (L 95) 29.

10. Commission Proposal for a Council Directive on the Protection of Consumers in Respect of Contracts Negotiated at a Distance, 1992 O.J. 156 [hereinafter Proposal in Respect of Contracts Negotiated at a Distance].

for a directive on sale of consumer goods and associated guarantees;<sup>11</sup> the directive on liability for defective products;<sup>12</sup> the timeshare directive;<sup>13</sup> and the directive on package travel, package holidays, and package tours.<sup>14</sup> Another body of legislation pertains to the regulation of professionals: the directive concerning self-employed commercial agents,<sup>15</sup> the regulation on exclusive purchasing agreements,<sup>16</sup> the regulation on exclusive distribution agreements,<sup>17</sup> and the regulation on franchising agreements.<sup>18</sup> In addition, the directives on computer programs<sup>19</sup> and databases<sup>20</sup> have impacted on contract law in the Member States.<sup>21</sup> A majority of the existing legislation was transposed into French law.<sup>22</sup> Separate from law derived from the Treaty of Rome

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11. Green Paper on Warranties of Consumer Goods and Services after Sales, COM(93)509 final; Commission Proposal for a European Parliament and Council Directive on the Sale of Consumer Goods and Associated Guarantees, COM(95)520 final [hereinafter Proposal on Consumer Goods and Associated Guarantees].

12. Council Directive 85/374 on the Approximation of Laws, Regulations and Administrative Provisions of the Member States Concerning liability for Defective Products, 1985 O.J. (L 210) 29 (not yet transposed into French law). See Jérôme Huet, *Responsabilité du fait des produits défectueux [Liability for Defective Products]*, JURIS-CLASSEUR EUROPE [JCE] 2020 (1991) (discussing the Directive of July 25, 1985) [hereinafter *Liability for Defective Products*].

13. European Parliament and Council Directive 94/47 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, 1994 O.J. (L 280).

14. Council Directive 90/314 Regarding Travel, Vacations, and Package Tours, 1990 O.J. (L 158) 59.

15. Council Directive 86/653 on Commercial Agents, 1986 O.J. (L 382) 17.

16. Commission Regulation 1984/83 on Categories of Exclusive Purchase Agreements 1983 O.J. (L 173) 5.

17. Commission Regulation 1983/83 on Categories of Exclusive Distribution Agreements 1983 O.J. (L 173) 1; Commission Regulation 1475/95 Regarding Motor Vehicle Distribution and Servicing Agreements, 1995 O.J. (L 145) 25 (replacing Commission Regulation 123/85).

18. Commission Regulation 4087/88 on the Application of Article 85(3) of the Treaty to Categories of Franchise Agreements 1988 O.J. (L 359) 46.

19. Council Directive 91/250 on the Legal Protection of Computer Programs, 1991 O.J. (L 122) 42; see Jérôme Huet, *L'europe des logiciels: le principe de la protection par le droit d'auteur [Software of Europe: the Principle of Copyright Protection]*, DALLOZ 221 (1992); see also Jérôme Huet, *L'europe des logiciels: les droits des utilisateurs [Software of Europe: Users' Rights]*, DALLOZ 315 (1992).

20. Council Directive 96/229 on the Legal Protection of Databases, 1996 O.J. (L 77) 1. See N. Mallet-Poujol, *La directive concernant la protection des bases de données: la gageure de la protection privative [The Directive Concerning the Protection of Databases: the Wager of Private Protection]*, REVUE DE DR. INFORMATIQUE ET TELECOMS [REVIEW OF COMPUTER SCIENCE AND TELECOMMUNICATIONS LAW] 6 (1996).

21. Legislation pertaining to software protection and databases marginally influences contracts law but nonetheless falls outside the scope of this study.

22. See, e.g., Law of June 25, 1991, Concerning Commercial Agents; Law of July 13, 1992, on Travel Agencies; Law of February 1, 1995, on Unfair Terms in Consumer Contracts.

(Rome Treaty) (namely regulations and directives), the Rome Treaty itself has also significantly influenced Member State contract law.<sup>23</sup>

Together, the European legislation addresses both relationships between professionals and individuals, and between two or more professionals. It covers the consumer and distribution sectors of the economy. It concerns sales, loan, and travel-related types of contracts. All of these areas directly legislated by the EC have implicit influence on Member State contract law. Nonetheless, the goals of the EC place two limits on the scope of Community legislation. First, Community law only applies when a Community policy is at stake (i.e. consumer protection, competition) or when the functioning of the common market is at issue. Thus it is understandable that EC law has an effect on contractual relationships with respect to remote sales and payments, doorstep sales, and travel-related transactions—all areas directly regulated by EC law. These types of contracts affect consumers and thus come within EC consumer protection policy.

At the same time, a large portion of Member State contract law, most notably French contract law, by its very nature, remains untouched by European norms. In particular, those contracts which come under the aegis of local law, such as real estate sales, construction, and residential and commercial lease contracts remain largely untouched by European legislative influences because these areas are outside EC jurisdiction.

The second limit derives from the fact that EC law has little effect on the fundamental principles of Member State contract law. The basic theories of contract law, such as formation (consent, object, cause) and performance (specific performance, rescission), are unique to each Member State and remain intact. Perhaps in the future a European law of contracts will be adopted, but for the present time, only a few proposals have been made by scholars and none have been made by lawmakers.<sup>24</sup>

### B. *Foundations and Techniques*

Articles 100, 100A, and 85 of the EC Treaty<sup>25</sup> are the principal treaty bases for Community legislation affecting contracts. Articles 100

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23. See generally Hélène Gaudemet-Tallon, *Entrée en vigueur de la Convention de Rome du 19 juin 1980 sur la loi applicable aux obligations contractuelles [Application of the Convention of Rome of June 19, 1980 to the Law of Obligations]*, 4 REVUE TRIMESTRIELLE DE DROIT EUROPÉEN [REV. TRIM. DR. EUROP.] 635 (1991).

24. See generally Giuseppe Gandolfi, *Pour un code européen des contrats [A European Code of Contracts]*, 4 REVUE TRIMESTRIELLE DE DROIT CIVIL [REV. TRIM. DR. CIV.] 707 (1992).

25. See EC TREATY. Article 100A was added by the Single European Act of 1985. SINGLE

and 100A call for an approximation of the legislation of the various Member States as necessary to provide for the operation of the internal market.<sup>26</sup> Since each Member State's contract law is different, an EC Treaty article calling for the approximation of laws implicitly calls for a change in Member State contract law. Thus Member State contract law is indirectly affected by the Treaty. In addition, Article 100A refers incidentally to consumer protection,<sup>27</sup> one area in which EC legislation has impacted on contracts. Article 85 of the Treaty, pertaining to cooperation between undertakings,<sup>28</sup> provides an additional foundation for Community legislation pertaining to contracts; it is the focal point for Community competition policy. Paragraph 3 of Article 85 provides for the possibility of an exemption for agreements or categories of agreements which contribute to "improving the production or distribution of goods or to promoting of technical or economic progress. . . ."<sup>29</sup>

The technical means used by the European institutions to achieve these objectives vary. Apart from the decisions of the European Court of Justice, regulations, directives, and recommendations implement and interpret Articles 100, 100A, and 85. There is a clear hierarchy: national law is subordinate to Community law.<sup>30</sup> Regulations have direct effect,<sup>31</sup> and directives have direct effect once transposed into national law by the Member States.<sup>32</sup> The subordination of national law to Community law is absolute. There is some debate as to the legal effect of a recommendation, which is not obligatory. However, the threat that Community officials might later adopt a more constraining directive lends an additional force to this relatively flexible form of legislation. It must be noted that there is no obligation to transpose a directive when the national law is already in harmony with Community legislation.<sup>33</sup> Thus, some directives are not the object of a specific transposition into national law.

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EUROPEAN ACT, effective July 1, 1987, 1987 O.J. (L 169/1) [hereinafter SEA].

26. See EC TREATY, arts. 100, 100A.

27. See *id.* art. 100A.

28. *Id.* art. 85.

29. *Id.* art. 85(3).

30. See *Costa v. Ente Nazionale per L'Energia Elettrica (E.N.E.L.)*, 1964 E.C.R. 585, 614.

31. See *Case 26/62, van Gend en Loos v. Nederlandse Administratie der Belastingen*, 1963 E.C.R. 1, 12-14).

32. See *Case 41/74, van Duyn v. Home Office*, 1974 E.C.R. 1337; *Case 148/78, Pubblico Ministero v. Ratti* 1979 E.C.R. 1629; *Case 152/84, Marshall v. Southampton and South-West Hampshire Area Health Authority*, 1986 E.C.R. 723; *Case C-106/89, Marleasing S.A. v. La Comercial Internacional de Alimentacion S.A.*, 1992 1 C.M.L.R. 305.

33. See *Case 29/84, E.C. Commission v. Germany*, 1985 E.C.R. 1661.

## II. The Influence of Community Norms on General Principles of Contracts Law

Community Law has an effect on certain basic principles of contract law, despite the lack of specific EC law on contracts. This is so largely because of harmonizing EC legislation in the area of consumer protection.<sup>34</sup> There are two justifications for such harmonization of Member State legal systems. Both are based on Articles 100 and 100A of the Treaty. First, there is the need to ensure that the internal market functions properly. This result is sought to be achieved through EC legislation. Some believe such legislation is the only means by which the internal market can function properly. However, this argument is not entirely convincing. To take one example, in the United States, a federation characterized by a high level of economic integration, there is not a body of federal law concerning consumer protection or products liability. Yet common consumer protection and products liability laws exist nonetheless. Second, and more importantly, harmonization allows for the elaboration of Community policy, first defined in 1975 and later developed in 1985 in the Single European Act (Article 100A)<sup>35</sup> and in the 1992 Maastricht Treaty (Article 129A).<sup>36</sup> Article 100A stipulates that this policy favoring the consumer should lead to a heightened level of consumer protection.<sup>37</sup>

The EC legislation adopted in this context establishes only a minimum level of consumer protection: Member States are free to maintain this level or augment it in relation to the interests at stake;<sup>38</sup> and in the same vein, several EC laws expressly state that it is possible for a Member State to adopt more protective legislation.<sup>39</sup>

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34. Certain legislation does not directly seek to protect consumers but nonetheless affects the law of contracts, e.g. regulation of deceptive advertising.

35. SEA, *supra* note 25.

36. See EC TREATY. See Jérôme A. Huet, *L'harmonisation du droit de la consommation* [The Harmonization of Consumer Law], in L'ENTREPRISE DANS LE MARCHÉ UNIQUE EUROPÉEN [THE ENTERPRISE IN THE SINGLE EUROPEAN MARKET] 521 (Travaux de la CEDECE, La documentation Française, 1995) [hereinafter Huet, *Harmonization*].

37. EC TREATY.

38. See Case C-361/89, Republic v. Di Pinto, 1991 E.C.R. 1189 (regarding the application of the Directive of 1985 in relation to contracts negotiated away from business premises); Michel de Guillenchmidt and Jean-Claude Bonichot, *Jurisprudence Commentée de la Cour de Justice et du Tribunal de Première Instance des Communautés Européennes* (2e partie), 63 LES PETITES AFFICHES 7 (1991); see also Case C-339/89, Alsthom Atlantique S.A. v. Compagnie de Construction Mécanique Sulzer, S.A., 1991 E.C.R. 107. For discussion of the Alsthom case, see Claude Berr, DALLOZ 273 (1991) (declaring that the hardline French case law on the seller's liability is not incompatible with the treaty).

39. See Council Directive 84/450, *supra* note 5, art. 7; Commission Recommendation for a

The variations in intensity are quite minor for French transpositions of European consumer protection legislation. French law as originally drafted tends to protect consumers and often meets or exceeds European standards.<sup>40</sup>

French contract law is influenced by European norms in the pre-contractual and financing stages. European Community Law also influences the conclusion of the contract and its content.

A. *Preparation and Financing Stages of Contracting*

In this phase, the most influential EC provisions include those pertaining to misleading advertising, consumer credit, and card payment.<sup>41</sup> These texts were generally adopted in the 1980s, and the provisions contained therein are not particularly strict.

With respect to commercial advertising for products and services, Community rules were defined very early. The requirements are relatively simple. The Directive of September 10, 1984, on misleading advertising defines such advertisement as “any advertising which in any way, including its presentation, deceives or is likely to deceive the persons to whom it is addressed or whom it reaches.”<sup>42</sup> This Directive additionally requires Member States to “ensure that adequate and effective means exist for the control of misleading advertising in the interests of consumers as well as competitors and the general public.”<sup>43</sup> In so doing, Member States must, notably, “confer upon the courts or administrative authorities powers enabling them . . . to order the cessation of, or to institute appropriate legal proceedings for an order for the cessation of, misleading advertising.”<sup>44</sup>

Thus, consumer protection is coupled with the desire to maintain fair competition between commercial entities. The 1984 Directive has not been the object of a specific transposition because French Law has

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European Parliament and Council Directive on the Sale of Consumer Goods and Associated Guarantees, COM(95)520 final at 4.

40. See Huet, *Harmonization*, *supra* note 36, at 522.

41. Many European cards are debit cards (e.g. Carte Bleue in France is debited from a bank account) whereas American cards are more often credit cards.

42. Council Directive 84/450, *supra* note 5, art. 2-2; see also *Protection des Consommateurs [Protection of Consumers]*, JCE 2015-1 (1993) (providing the text of the legislation).

43. Council Directive 84/450, *supra* note 5, art. 4-1.

44. *Id.* art. 4-2.

required a high level of integrity in advertising since the 1973 enactment of the *Loi Royer*.<sup>45</sup>

European regulations concerning consumer credit have not led to any significant modifications in French law.<sup>46</sup> The Directive of December 22, 1986, establishes the principle that credit agreements must be made in writing and must state the annual percentage rate.<sup>47</sup> However the level of consumer protection established by this Directive remains low, particularly concerning the link between the contract for goods and services, and the credit agreement. The Directive simply provides that if the good or service being financed is nonconforming, the borrower has no means of nullifying the credit agreement unless "the grantor of the credit and the supplier of the goods or services have a pre-existing agreement whereunder credit is made available exclusively by that grantor of credit to customers of that supplier for the acquisition of goods or services from that supplier."<sup>48</sup> Unlike French Law,<sup>49</sup> the Directive does not offer the consumer any means for withdrawing consent within a given time period after the contract is concluded.

Lastly, with respect to payment mechanisms, the Community attempts to provide a framework for the use of payment cards and other electronic means of payment, given that these mechanisms are frequently used in international transactions. To appease financial institutions, the Community legislation takes the less constricting form of a recommendation. The Recommendation of November 17, 1988, addresses payment systems and in particular the relationship between

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45. Established in 1963, the principal of truth in advertising has been reinforced by Article 44 of the *Loi Royer* of December 27, 1973, which sanctions somewhat misleading publicity, and puts in place effective means of initiating a legal action, appearing today in the Consumer Code. See CODE DE LA CONSOMMATION [C. CONSOM.] art. L. 121-1; YVES GUYON, DROIT DES AFFAIRES [BUSINESS LAW] 949-50 (9th ed. 1992).

46. See, e.g., Council Directive 87/102, *supra* note 7 (concerning consumer credit); see also Mário Tenreiro, *Protection des intérêts économiques des consommateurs* [Protection of Consumer Economic Interests] JCE 2011 (1993) [hereinafter *Consumer Economic Interests*].

47. See Council Directive 87/102, *supra* note 7, art. 4. In addition to this Directive, there is also the Directive of February 22, 1990, which elaborates on the issue of modes of calculating interest rate, and notably unifies, at a European level, the notion of annual percentage rate. Council Directive 90/88, *supra* note 7.

48. Directive 87/102, *supra* note 7, art. 11. By comparison, French law provides that a loan contract is rescinded or nullified when the principal contract, in view of which it was concluded, is itself rescinded or nullified. See C. CONSOM. art. L. 311-21.

49. The statutory period is, in principle, seven days under French law. See C. CONSOM. art. L. 311-15. Furthermore, the Directive anticipates the possibility of allowing consumers to pay by bills of exchange, which is illegal under French law. See Council Directive 87/102, *supra* note 7, art. 10.



cardholder and card issuer.<sup>50</sup> The measures of the Recommendation are quite protective of the cardholder. Notably, the Recommendation provides for immunity for transactions made when the consumer's credit card was stolen if the theft is reported.<sup>51</sup> The burden of proof is on the issuer to show that the operation was accurately recorded.<sup>52</sup> This legislation has caused banks to improve the credit card terms and conditions offered to customers.

*B. Concluding the Contract and the Contents of the Agreement*

Consumer protection, on the European level, has a marked influence on the process of concluding the contract. There are two important pieces of legislation in this area. First, the Directive of December 20, 1985, on contracts negotiated away from business premises,<sup>53</sup> led to a modification in the 1972 French Law on doorstep sales.<sup>54</sup> Additionally, the 1985 Directive affected the Proposal for a Council Directive on the protection of consumers with respect to contracts negotiated at a distance (distance selling).<sup>55</sup> The 1985 Directive also applies to contracts to supply goods or services to a consumer which are concluded during an excursion organized by a trader away from his business premises.<sup>56</sup> The Directive specifies what information the trader must provide to consumers and institutes a seven day period following

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50. See Commission Recommendation 88/590, *supra* note 8; see also Commission Recommendation 87/598, on a European Code of Conduct Relating to Electronic Payment, 1987 O.J. (L 365) 72 (dealing with the relationship between the financial institutions, merchants-service providers, and consumers); JÉRÔME HUET & HERBERT MAISL, *DROIT DE L'INFORMATIQUE ET DES TÉLÉCOMMUNICATIONS* [LAW OF COMPUTER SCIENCE AND OF TELECOMMUNICATIONS] 803-15 (1989). The Recommendation of 1988 is scheduled to be revised and may be divided into two: one recommendation dealing with the payment by credit card, and the other dealing with electronic payments (via network). See Commission Recommendation 88/590, *supra* note 8.

51. See Commission Recommendation 88/590, *supra* note 8, art. 8(2) (unless cardholder acted with extreme negligence or fraudulently). Article 8(1) states, in addition, that, in the event that the card is lost or stolen, the issuer of credit cards must provide clients with means to notify the issuer of the loss, day or night.

52. See *id.* art. 6-2.

53. Council Directive 85/577, *supra* note 6 (concerning the protection of consumers in the case of contracts negotiated outside of commercial establishments); see also *Protection of Consumer Economic Interests*, *supra* note 46, JCE 35-63.

54. French national law was modified by the Law of June 23, 1989 (codified in C. CONSUM. art. L. 121-21 to -33 in the context of the rules pertaining to contracts negotiated away from business premises).

55. Proposal in Respect of Contracts Negotiated at a Distance, *supra* note 10; see also *Protection of Consumer Economic Interests*, *supra* note 46, JCE 75-97. Articles cited are those of the project of 1992, and not subsequent versions.

56. See Council Directive 85/577, *supra* note 6, art 1.

conclusion of the contract during which consumers may withdraw from the agreement.<sup>57</sup>

In addition, the proposed Directive concerning distance selling is wider in scope than the French law, which is limited to sales conducted via television.<sup>58</sup> This proposed Directive is of particular interest given the rapid development of intra-Community mail order business. In addition to requiring that the seller provide information to the consumer prior to concluding the contract,<sup>59</sup> and a minimum seven day withdrawal period following the sale,<sup>60</sup> the Directive prohibits the sale of unsolicited goods<sup>61</sup> and protects the consumer who reveals bank card information in the process of making payment.<sup>62</sup>

The first major influence on the content of contract law is the Directive of July 25, 1985, on products liability,<sup>63</sup> which has not yet been transposed into French national law. The Directive holds the manufacturer liable if such manufacturer puts a defective product on the market and the product causes damage.<sup>64</sup> A defect exists if the product "does not

57. *See id.* art 5 (stating that seven days is the minimum). Member states may provide for a longer waiting period. "This Directive shall not prevent Member States from adopting or maintaining more favourable provisions to protect consumers in the field which it covers." *Id.* art. 8.

58. *Compare* Proposal in Respect of Contracts Negotiated at a Distance, *supra* note 10, with Law of January 6, 1988, on sales via television and telephone (incorporated in C. CONSOM. art. L. 121-16 to -20, in the context of the rules pertaining to contracts negotiated at a distance). The French law, which allows the possibility of retraction within seven days, does not apply to an order for services.

59. *See* Proposal in Respect of Contracts Negotiated at a Distance, *supra* note 10, art. 4.

60. *See id.* art. 6.

61. *See id.* art. 8. The directive refers to this sales practice as inertia selling. *See id.*

62. *See id.* art. 9 (providing that consumer must be recredited in event of fraudulent use of consumer's payment card); *cf.* H.R. 3685, 104th Cong. (1996). This bill requires the U.S. Federal Trade Commission and the U.S. Federal Communications Commission to take action, as necessary, to protect consumer privacy in light of the convergence of communications technologies (wherein one goal is that the FTC ensure that online marketers and businesses do not engage in deceptive or fraudulent practices, and another goal is to promote ways consumers can control dissemination of personal information over the internet).

Concerning card payment, the scope of protection has evolved unfavorably for the consumer: the initial draft of the legislation provided that "all questions by the titleholder of a credit/debit card concerning the validity of an operation in which the number of the card has been revealed without the method of payment being presented or identified electronically shall be voided" and that "the account of the issuer is then debited and that of the cardholder is re-credited" *See* Initial Draft, art. 12. However, the text issued according to the common position of Parliament states that the consumer "may ask for the annulment of a payment in a case of a fraudulent use of the card" so that any "sums paid are re-credited" *See* Common Position, art. 8.

63. Council Directive 85/374, *supra* note 12. For the Community view on this Directive, see *Liability for Defective Products*, with the text of the Directive, see JCE 2025 (1991).

64. *See* Council Directive 85/374, *supra* note 12, art 1.

provide the safety which a person is entitled to expect.”<sup>65</sup> There is no need to prove fault on the part of the manufacturer. This legislation represents one of the Community’s most aggressive attempts to protect the consumer.

The products liability Directive is not limited in its application to the contractual relationship with the purchaser of the product. Instead, the Directive protects any third party who may be harmed by the defect even if the relationship falls outside of the bounds of the contract and is based, therefore, in tort.<sup>66</sup> This legislation greatly increases the liability of the product distributor. This Directive was to be followed by another pertaining to liability of a service provider, creating a duty to repair damage caused by inadequate service based on a presumption of fault.<sup>67</sup>

Next, the Directive of April 5, 1993, on unfair terms in consumer contracts,<sup>68</sup> sets down a guiding principle of consumer law for the Community. In a contract concluded between a professional and a consumer, “a contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes significant imbalance in the parties’ rights and obligations arising under the contract to the detriment of the consumer.”<sup>69</sup> One provision of the Directive lists the types of clauses which may be considered unfair,<sup>70</sup> using the technique of a grey list.<sup>71</sup> The legislation also includes a few original provisions, notably one providing that “terms offered to the consumer . . . must always be drafted in plain, intelligible languages”<sup>72</sup> and one that states “[w]here there is doubt about the meaning of a term, the interpretation most favorable to the consumer shall prevail.”<sup>73</sup> Nonetheless, the Directive became increasingly diluted in later versions,

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65. *Id.* art. 6.

66. *See* C. CONSOM. art. L. 132-1.

67. This Directive has been the object of a proposal by the Commission that has not yet been formalized; *see also, infra*, text accompanying note 121.

68. Council Directive 93/13, *supra* note 9. *See also Consumer Economic Interests, supra* note 46, JCE 2-25. The Directive has been transposed into national law by the French Law of February 1, 1995, soon to modify the Consumer Code which adopts almost verbatim the language of the Directive.

69. Council Directive 93/13, *supra* note 9, art. 3-1.

70. *See id.* art. 3-3. This list is not exhaustive.

71. A grey list includes possibilities and employs tentative language such as may; *cf.* VALENTINE KORAH, AN INTRODUCTORY GUIDE TO EEC COMPETITION LAW AND PRACTICE §§ 8.3.2 & 8.3.5 (1990) (giving examples of a white list (permitted behavior) and a black list (prohibited behavior)).

72. Council Directive 93/13, *supra* note 9, art. 5.

73. *Id.*

and the grey list has lost many of its most important entries, resulting in a less forceful piece of legislation.<sup>74</sup>

### III. The Influence of Community Norms on Particular Types of Contracts

In addition to general contract law, EC Law also influences specific types of contracts, such as those concerning sale, distribution, and agency. These contracts are important mechanisms in the economy. Two interests combine within the framework of these types of contracts, those of the consumer and those of maintaining a competitive marketplace. There is, therefore, a substantial need for Community intervention. In addition to the legal basis of Articles 100 and 100A, which underlie EC legislation pertaining to consumers, Article 85 of the Treaty also ensures free market competition.<sup>75</sup>

At the same time, the legislation under examination in this section is of a different nature than that seen to have an influence on general contract law. These legislative provisions do not aim to maintain a minimum level of public order. Instead, these provisions, which focus on providing a framework for relations between suppliers and retailers, take the form of regulations directly applicable in the Member States, and for the most part, are obligatory in nature.

On the other hand, legislation on the Community level sometimes has only a temporary effect. The initial intention is to leave time for reflection and if necessary, a new version of the legislation will be elaborated. This was the case with the distribution regulations.<sup>76</sup> The Regulation pertaining to automobile distribution, for example, was modified in 1995 following the expiration of the legislation previously instituted.<sup>77</sup>

#### A. Sales and Distribution Contracts

The Community provides a framework for distribution with a series of regulations providing certain exemptions based on category.

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74. See Jérôme Huet, *Propos amers sur la directive du 5 avril 1993 relative aux clauses abusives* [Bitter Remarks on the Directive of April 5, 1993 Relating to Unfair Terms in Consumer Contracts], JCP I 309 (1994) (Eur. ed.). However, a part of what was included in the "gray" list of the original text of the Directive can also be found in the proposed Directive on the sale and the warranties of consumer goods. See *infra* Part III.

75. EC TREATY, arts. 85, 100, 100A. Article 85 of the Treaty served as the legal basis for the regulations adopted on the subject of distribution by the Commission itself. The Council was not responsible for adopting such regulations.

76. See Commission Regulation 1984/83, *supra* note 16, Commission Regulation 1983/83, *supra* note 17; Commission Regulation 1475/95, *supra* note 17.

77. See Commission Regulation 1475/95, *supra* note 17.

The Commission took the initiative for these regulations using Article 85(3) of the EC Treaty as a legal basis.<sup>78</sup> The idea is that distribution agreements, without exception, constitute restrictive covenants preventing free competition. However, such agreements may create positive economic effects, especially to end users. Thus, it is better to allow such agreements under certain conditions rather than to simply eliminate them. Among the regulations that set out such conditions are the Regulations on exclusive purchasing<sup>79</sup> and exclusive distribution agreements,<sup>80</sup> the Regulation on franchising agreements,<sup>81</sup> and the Regulation on motor vehicle distribution and servicing agreements of June 25, 1995.<sup>82</sup> These provisions, which are often drafted with great attention to detail, have direct effect in Member States.<sup>83</sup> Harmonization of laws is therefore very advanced in this area.

The first example, the Regulation on exclusive distribution agreements, significantly restrains competition and is the subject of Commission Regulation 1983-83 of June 22, 1983. This provision does not authorize a re-seller to benefit from absolute territorial protection.<sup>84</sup> However, it does address agreements which impose on the exclusive distributor either the obligation not to manufacture or distribute goods which compete with the contract goods<sup>85</sup> or to obtain the contract goods for resale only from the other party.<sup>86</sup> The Regulation also provides that the exclusive distributor may be required to purchase complete ranges of

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78. EC TREATY. For discussion on various legislation adopted on the Community level concerning distribution, see, for example, Marie-Chantal Boutard-Labarde, *La Distribution [Distribution]*, JCE 1450 (1990).

Selective distribution is not the objective of a Community Regulation: the Commission makes individual determinations on this issue in the form of decisions. A reading of such decisions sheds light on the conditions imposed on this type of distribution: uniform objective conditions imposed on retailers who are then free to determine their prices. For examples of cases interpreting such Decisions, see Cases 56 & 58/64, Establishments Consten S.A.R.L. and Grundig Verkaufs-GmbH v. EC Commission, 1966 E.C.R. 299; Case 26/76, Metro v. Commission I, 1977 E.C.R. 1875; Case 75/84, Metro v. Commission II, 1986 E.C.R. 3021; Case 322/81, Heintz van Landewyck S.A.R.L. v. Commission (FEDETAB), 1980 E.C.R. 3125; Case 107/82, Allgemeine Elektrizitäts-Gesellschaft AEG-Telefunken AG v. Commission, 1983 E.C.R. 3151.

79. Commission Regulation 1984/83, *supra* note 16 (concerning the categories of exclusive purchase agreements (notably beer and service station contracts)).

80. Commission Regulation 1983/83, *supra* note 17 (relating to categories of exclusive distribution agreements).

81. Commission Regulation 4087/88, *supra* note 18.

82. Commission Regulation 1475/95, *supra* note 17.

83. See *Costa v. Ente Nazionale per L'Energia Elettrica (E.N.E.L.)*, 1964 E.C.R. 585.

84. See Commission Regulation 1983/83, *supra* note 17, art. 2(1).

85. See *id.* art. 2(2)(a).

86. See *id.* art. 2(2)(b).

goods or minimum quantities.<sup>87</sup> However, if the exclusive distributor practices excessively high pricing, the Regulation stipulates that the exemption may be withdrawn.<sup>88</sup> This constitutes an original mechanism for controlling the content of the contract.

It is to be noted that several of these regulations contain limits on the duration of the distribution contract. This attention to duration enhances the French Contract Law which pays little attention to this detail. Concerning motor vehicle distribution and servicing agreements, the Regulation of June 28, 1995, provides that exclusive distribution agreements included under the exemption must have a duration of at least five years.<sup>89</sup> For exclusive supply contracts for service stations or beer, Regulation 1984-83 of June 22, 1983, allows a maximum duration of ten years.<sup>90</sup> In the first instance, the point is to avoid uncertainty on behalf of the distributor; in the second, the goal is to prevent the distributor from staying dependent on any one supplier for too long. The Community's enactment of this legislation raises the question of whether a preoccupation with protecting the weaker party to the contract has come to predominate, and whether these protective measures are truly justified by a desire to assure competition in the Community marketplace.

The next example is the Directive on self-employed commercial agents,<sup>91</sup> which was implemented into French Law in the Law of June 25, 1991, relative to self-employed commercial agents and principals.<sup>92</sup> This Directive constitutes an intervention on the European level into the law of agency contracts. The Directive devotes several articles to the rights and obligations of the agent and principal<sup>93</sup> and to the method for determining the agent's level of remuneration.<sup>94</sup> Most importantly, however, the Directive recognizes that the agent is entitled to compensation at the end

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87. See *id.* art. 2(3).

88. See *id.* art. 6.

89. See *id.* art. 5(2)(2). If the contract has an unspecified duration, it shall include a notice period of at least two years; however, certain exceptions apply. See *id.*

90. See Commission Regulation 1984/83, *supra* note 16, art. 8-d (pertaining to beer) and 12(c) (pertaining to service stations). However, the contract may have an unspecified duration. See *id.* art. 8(d), 12(c). The general rule for all exclusive supply contracts is a maximum duration of five years. See *id.* art. 3(d).

91. Council Directive 86/653, *supra* note 15.

92. See F. Jaze-Dekeuwer, *Commentaire de la loi du 25 juin 1991 relative aux agents commerciaux et leurs mandants* [Commentary on the Law of June 25, 1991, Relating to Commercial Agents and Their Principals], 1992 A.L.D. 131. See also JÉRÔME HUET, LES PRINCIPAUX CONTRATS SPÉCIAUX [THE PRINCIPAL SPECIAL CONTRACTS] 1096 (1996) [hereinafter SPECIAL CONTRACTS].

93. See Council Directive 86/653, *supra* note 15, arts. 3-4.

94. See *id.* art. 6 (pertaining to remuneration); arts. 7-12 (pertaining to commissions).

of the contract, to the extent the agent has developed a clientele.<sup>95</sup> This solution existed at French Law,<sup>96</sup> but the Directive reinforces the scope of the agent's right. Again it seems that the objective is to protect the weaker party to the contract rather than to promote competition in the internal market.

In promoting their products, professional sales agents conclude contracts with end users who, in most cases, are average consumers. Community Law also plays a role at this stage. For a long time, in order to promote free movement of goods, the manufacturer's warranty for a sale within the Community was held to be valid throughout the Community.<sup>97</sup> The Proposal for a Directive on the sale of consumer goods and associated guarantees also merits particular attention.<sup>98</sup> Its enactment was preceded by public consultation using the method of a green paper.<sup>99</sup> This piece of legislation will likely lead to important changes in French Law. The rights of the buyer focus around the central notion of conformity. Conformity depends upon the description of the goods that the seller gives the buyer, the purposes for which goods of the same type are normally used, and any particular purpose for which the consumer requires them and which he has made known to the seller.<sup>100</sup> The Directive provides a two year period during which the buyer may make a complaint concerning a lack of conformity.<sup>101</sup> Ways in which the buyer may seek reparation include repair, replacement, a reduction in

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95. See *id.* art. 17

96. See SPECIAL CONTRACTS, *supra* note 92, at 1096-97 (citing the French Décret of Dec. 23, 1958).

97. See, e.g., Commission Decision of December 13, 1974, exemption procedure, 1975 O.J. (L 29) 1 (regarding BMW dealers); see also Jérôme Huet, *Clauses aménageant la garantie (la "garantie contractuelle")* [Clauses Affecting Warranty (contractual warranty)] JURIS-CLASSEUR CIVIL 1641-1649 (1994). The requirement has since been repeated in exemption rules for distribution agreements. See, e.g., Regulation of 1995, art. 5-1-a (regarding the sale of automobiles, service offered at no cost, and product recall initiatives); Regulation of 1988, art 4-b (regarding franchise agreements).

Recently, the Court of Justice has specified that the manufacturer has the right to limit the warranty to products sold through the intermediary of an approved distributor. See Case 376/92, *Metro v. Cartier*, 5 C.M.L.R. 331 (E.C.J. 1994).

98. Proposal on Consumer Goods and Associated Guarantees, *supra* note 11.

99. Green Paper on Warranties of Consumer Goods and After-Sale Services, *supra* note 11.

100. See Proposal on Consumer Goods and Associated Warranties, *supra* note 11, art. 2. A sample or model may also form the basis for warranty under this article. See *id.*

101. See *id.* art. 3.

price, or rescission of the contract.<sup>102</sup> The seller is prohibited from seeking to waive or restrict his responsibility under this Directive.<sup>103</sup>

*B. Timeshare and Travel-Related Contracts*<sup>104</sup>

The main directive of interest is the one on package travel, package holidays, and package tours.<sup>105</sup> The application of this Directive is vast because it protects not only individual consumers but also professional parties to the contract.<sup>106</sup> This Directive applies to pre-arranged packages sold at an inclusive price.<sup>107</sup> The package must exceed twenty-four hours in length or include an overnight stay.<sup>108</sup> Finally, the package must include at least two of the following elements: transportation, lodgings, or additional services.<sup>109</sup> When a brochure is made available prior to acceptance by the consumer, the documentation must include detailed information concerning: services to be provided, destination, methods of transportation, itinerary, lodgings, and meals.<sup>110</sup> The provider is bound by the information given.<sup>111</sup> The provider must also inform the consumer before departure concerning visa requirements, health formalities, schedules, connections, and the provider's address and phone number at the destination (or, in the alternative, an emergency

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102. *See id.* Consumer must exercise right to rescission or replacement within one year. *See id.*

103. *See id.* art. 6.

104. Contracts other than sales and distribution are also influenced by EC Law, for example time share contracts for real estate. However, such contracts fall more under the category of Company Law. *See, e.g.,* Council Directive 94/47, *supra* note 13 (concerning purchase agreements for time-share on real estate). For the French text of the Directive, see *Protection des consommateurs* [*Protection of Consumers*], JCE 2015-2 (1995).

105. Council Directive 90/314, *supra* note 14. *See* Tenreiro, *Consumer Economic Interests*, JCE 26-66; *see also* Annick Batteur, *La protection illusoire du consommateur par le droit spécial de la consommation: réflexions sur la réglementation nouvelle régissant le contrat de vente voyages* [*The illusory protection of the consumer by special law of consumers: reflection on the new regulations governing sales contracts for package vacations*], DALLOZ 82 (1996). The Directive has been transposed into French national law by the Law of July 13, 1992, on the organization and the sale of vacations or excursions, which takes several liberties with the text of the Directive. *See* SPECIAL CONTRACTS, *supra* note 92, at 1393-94.

106. *See Consumer Economic Interests*, *supra* note 46, JCE 35.

107. *See* Council Directive 90/314, *supra* note 14, art. 2.

108. *See id.*

109. *See id.*

110. *See id.* art. 3.

111. *See id.*



contact).<sup>112</sup> Fortunately, the Directive severely limits opportunities to revise the initial price<sup>113</sup> and to modify the elements of the vacation.<sup>114</sup>

The Directive also provides a great deal of protection to the client in the event personal injury is suffered during the excursion.<sup>115</sup> In French Law, the liability of the provider is strictly stated.<sup>116</sup> Similarly, under the Directive, the provider is liable unless there is proof that the improper execution of the contract is not attributable to either the provider or any third party service provider.<sup>117</sup>

In addition, the provision states that if the client is unable to participate in the vacation, she may transfer her rights to a third party<sup>118</sup> on the sole condition that the third party fulfill all requirements for the package.<sup>119</sup> This provision constitutes an excellent example of a new application of assignment contracts.

#### IV. ANALYSIS AND CONCLUSION

Given the increasing grasp of Community legislation on contract law, what conclusions may be drawn in light of the descriptive study undertaken thus far?

Community Law has adopted a policing function regarding contract law and has harmonized the regulation of certain types of contracts, such as consumer credit, insurance, and commercial agency. Nonetheless, these harmonizing elements are only partially effective. They do not form a sufficient basis on which to found a truly unified legal system, especially since the embryonic body of common legal principles which exists suffers from a lack of autonomy in relation to national laws. This lack of autonomy is due to the almost constant reference back to national judicial orders.<sup>120</sup> In a less critical light, there are several

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112. *See id.* art. 4-1.

113. *See id.* art. 4-4 (unless the contract expressly provides for revision and explains in detail how such revision shall be calculated).

114. *See id.* arts. 4-5 & 4-7.

115. *See id.* art. 5-2.

116. *See* Bateur, *supra* note 105, at 82 (citing French Law No. 92-645 of July 13, 1992, art. 23).

117. *See* Council Directive 90/314, *supra* note 14, art. 5-2. For damages other than physical ones, clauses limiting financial responsibility are applicable, but on the condition that they are not unreasonable. *See id.*

118. *Compare* article 18 of the Law of 1993 which does not include this restriction and allows for the possibility of transferring the contract in all circumstances.

119. *See* Council Directive 90/314, *supra* note 14, art. 4-3.

120. *See* B. Oppetit, *Droit commun et droit européen des contrats* [*General Principles of Law and European Law of Contracts*], in *MELANGES LOUSSOUARN* 311, 315, 316 (1994)

positive aspects of the harmonization movement which provide better functioning of the internal market and which enhance the approximation of European judicial systems.

In fact, the development of European legislation has gone hand in hand with increased study of comparative law and legal systems in the areas of law affected by Community legislation. This comparative approach encourages mutual understanding. This is certainly the case with contract law. With increasing regularity, draft directives are accompanied by comparative research published alongside the draft legislation. Even before the drafting stages, legal experts from different states, meeting in work groups to prepare legislation, have been able to exchange ideas and points of view providing a great source of enrichment. Moreover, the legislation adopted is improved by such exchange. A concept is borrowed from one body of law, a rule from another. The Community incorporates the best from each legal system.

For example, various aspects of the sales warranty from the proposed Directive—the warranty of merchantability and the warranty of fitness for a particular purpose—are derived from the warranties of merchantability and fitness in the English Sale of Goods Act.<sup>121</sup> These same notions of warranty exist in the American sales provisions of the

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[hereinafter *General Principles of Law*]. The comments of Professor Oppetit, in original French, read as follows:

“dans le domaine contractuel, le droit européen a posé une véritable police du contrat,” et “a harmonisé la réglementation de certains contrats, tels le contrat de crédit à la consommation, le contrat d’assurance et le contrat d’agent commercial,” néanmoins “ces éléments d’unification . . . présentent un caractère partiel et ne suffisent pas à fonder un véritable système juridique commun,” d’autant que cet “embryon de droit commun” souffre “de son manque d’autonomie à l’égard des droits nationaux” car “il y a, de manière quasi permanente, renvoi entre les ordres juridiques en présence.”

121. Sale of Goods Act, 1979 ch. 54 (Eng.). Proposal on Consumer Goods and Associated Guarantees, *supra* note 11, art. 2. Article 2(2)(b) and (c) of the Proposal state:

2. Goods shall be deemed to be in conformity with the contract if, at the moment of delivery to the consumer: . . .
  - (b) they are fit for the purposes for which goods of the same type are normally used;
  - (c) they are fit for any particular purpose for which the consumer requires them and which he had made known to the seller at the time of conclusion of the contract, except where the circumstances show that the buyer did not rely on the seller’s explanations . . . .

The presentation in the Directive is much clearer than in French law where warranty is the result of different bodies of regulations, conformity (obligation of delivery), the warranty against defects (special obligation), and the duty to advise (general law of contracts).

Uniform Commercial Code.<sup>122</sup> In the Directive pertaining to unfair terms in consumer contracts, the provisions target any “contractual term which has not been individually negotiated.”<sup>123</sup> This focus in the Directive also implies that “a term shall always be regarded as individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term.”<sup>124</sup> This kind of reasoning is clearly inspired by the German analysis applied to general contract conditions.<sup>125</sup> Finally, the Products Liability Directive,<sup>126</sup> where consumer protection reigns supreme, is strongly influenced by French doctrine.<sup>127</sup> Certainly it is true that Community regulations are molded under the force of political pressures exerted by one Member State or another. The Proposed Directive on suppliers of services is a good example. Unfortunately, due to resistance by certain interest groups, this legislation which was to be the counterpart to that pertaining to liability of professionals for products has only been enacted in part.<sup>128</sup>

The harmonization of contract law remains partial, even superficial. Only certain types of contracts have been affected. As demonstrated, the general theory of contracts remains largely unchanged. Nonetheless, these slight changes constitute a great achievement in a modern Europe which is slowly being constructed.

Harmonization of laws in Europe is far from being achieved. It is tempting to see only the insufficiencies in the current system, or to see only the community of ideas which existed on the “old continent” at the time when the inherited Roman “law of persons” reigned.<sup>129</sup> It took centuries to forge the unity achieved thus far. It will certainly take many more long years for a unified law of contracts to develop in Europe.

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122. Uniform Commercial Code [U.C.C.] §§ 2-313 to 2-315 (1995). For a parallel between the U.C.C. and the Vienna Convention of 1980 on the International Sale of Goods, see SPECIAL CONTRACTS, *supra* note 92, 518-19.

123. Council Directive 93/13, *supra* note 9, art. 3-1.

124. *Id.* art. 3-2.

125. For discussion of this approach, see MICHEL PÉDAMON, LE CONTRAT EN DROIT ALLEMAND [THE CONTRACT IN GERMAN LAW] 51-61 (1993).

126. Council Directive 85/374, *supra* note 12.

127. See Jérôme Huet, *Liability for Defective Products*, *supra* note 12, at 2020.

128. See Commission Proposal for a Council Directive on the Liability of Suppliers of Services, COM(90)482 final; see also SPECIAL CONTRACTS, *supra* note 92, at 1232.

129. See B. Oppetit, *General Principles of Law*, *supra* note 120, at 311.