

The “Principles of European Contract Law” and the Italian Civil Code: Some Preliminary Remarks

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I. INTRODUCTION

Soon after the publication of the latest version of the *Principles of European Contract Law (The Principles)*, which is a work reflecting the experience, culture, and intelligence of the “Lando Commission,”¹ public discussion of this text has taken place in the academic and professional legal world in the various Member States.² This seems to be a logical step toward the cultural and technical unfolding of the drafting of a “European Civil Code,”³ a subject about which many contributors have

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1. At Utrecht, on Dec. 16th, 1999. A commentary of this text is provided by *Principles of European Contract Law. Part I and II, Prepared by the Commission on European Contract Law* (Ole Lando & Hugh Beale eds., 2000) [hereinafter *Principles*]. About the aims and the content of the work undertaken by the Commission, the other groups, and the Steering Committee coordinated by Christian V. Bar, see TOWARDS A EUROPEAN CIVIL CODE SECOND REVISED AND EXPANDED EDITION (Nijmegen 1998).

2. Mainly in Rome and Coimbra, during the Spring and Summer 2000. In Rome, the meeting had been organized by the (Italian) National Council of Lawyers and the Institute of Private Law (University of Rome “La Sapienza”). Ole Lando sent a text on *The Spirit of the Principles of European Contract Law*; Christian v. Bar made a report on the working process, *The Study Group on a European Civil Code*; the Italian reporters (Guido Alpa, Adolfo di Majo, Luigi Rovelli, Vincenzo Roppo) commented upon the style and content of the Italian translation of the “Principles” provided by the Department of Justice in *Rivista critica di diritto privato* n.3 (2000).

3. Among the last contributions, see Hondius, *European Private Law –Survey 1998–2000*, in 8 EUR. REV. PRIV. L. 385 ff. (2000); Grundmann, *General Principles of Private Law and Ius Commune Modernum as Applicable Law?*, in CORPORATIONS, CAPITAL MARKETS AND BUSINESS IN THE LAW 213 ff. (Baums, Hopt, Horn eds., London, 2000); Basedow, *Codification of Private Law in the European Union: The Making of a Hybrid* (inaugural address delivered at the

now turned their attention. The aims of this article are to understand, in a very simple and synthetic perspective, what are the convergences and the differences between *The Principles* and the Italian Civil Code (arts. 1321 and ff.).

II. GENERAL PROVISIONS

The Principles do not contain a definition of *contract*. The definitions which are included deal with other terms, in particular that of *act*, but only inasmuch as this term includes "omission" (art. 1.301). A definition is given of *promise*, but only in the sense that "[a] promise which is intended to be legally binding without acceptance is binding" (art. 2.107). The definition of "contract" is therefore left to interpretation.

The *commentary*⁴ specifies that the notion of contract utilized in *The Principles* includes agreements through which two or more parties undertake an obligation to perform (a certain task), agreements in which the offeree accepts the offer by performing the act or by tolerating the act which the offeror desires to be performed, agreements in which only one party assumes obligations and his promise requires acceptance on the part of the offeree, promises in which the party legally bound does not require acceptance of the other party (e.g., art. 2.107).

The omission of the definition contained in article 1321 of the Italian Civil Code does not create particular problems, in so far as article 2.101 does not exclude the possibility that the contract may be intended not only to create obligations, but also to transfer property. It will be necessary to verify the text which will be prepared by the Commission currently working on the project of drafting a "European Civil Code," chaired by Christian von Bar, on the transfer of property and on the regulation of sales and of the other contracts which transfer property rights, to ascertain the actual extent of the notion of contract. In any case, the fact that a contract may be intended to modify or terminate legal relations is envisaged, in more restricted terms, because reference is made to an already existing contract, in article 1.107, which sets forth

Erasmus University, Rotterdam, May 9, 2000); Whittaker, *Unfair Contract terms, Public Services and the Construction of a European Conception of Contract*, in 116 L.Q. REV. 95 ff. (2000); Campana, *Vers un langage juridique commun en Europe?*, in 1 EUR. REV. PRIV. L. 33 ff. (2000).

4. *Principles of European Contract Law*, *supra* note 1, at 157. About the concept of contract, see Sacco, *Contract*, in 7 EUR. REV. PRIV. L. 237 (1999); Alpa & Delfino, *Towards a New European Common Law of Contracts*, in TOWARDS A NEW EUROPEAN IUS COMMUNE 5759 (Gambaro, Rabello eds., Jerusalem, 1999).

that *The Principles* are applicable, in so far as they are compatible, to agreements intended to amend or terminate a contract.

The requisites for a contract to be “deemed to have been concluded” (in accordance with Italian legal categories, we would rather say that the contract was *valid* or *validly concluded*) do not correspond precisely to the requisites envisaged in article 1321 of the Italian Civil Code. The following in fact are given as conditions: (a) the *intention to be legally bound* and (b) that the parties have reached a *sufficient agreement*. Requirement (a) may be compared to the “agreement” as per Article 1321, n.1, of the codice civile and requirement (b) may be compared to the “object” or the “content” as per n.3. In any case, however, *causa* and “prescribed form” are omitted.

The *commentary* to requirement (a) says that “intention to be legally bound” is not to be read in the subjective, intimist, sense of the word, but in the objective sense, that is in the reliance created in the co-contracting party. The meaning is inferred from the specification set forth in article 2.102, which refers, among the criteria to ascertain the intention to be legally bound, to the statements of the party whose intention is to be ascertained, and that party’s conduct, as both were reasonably understood by the other party.⁵ A promise which creates reliance is binding also in the Italian legal system, therefore there is no incompatibility with *The Principles*.

Requirement (b) is spelled out in article 2.103, to the effect that the content must be sufficiently defined between the parties for the contract to be enforceable, or must be capable of being determined under *The Principles*. Two problems are therefore solved in one requirement whereas these two problems are distinct in our own experience: the so-called “completeness” (or sufficiency) of agreement, and the determination or determinability of the object of the contract. The formula, however, is not in contrast with the solutions adopted by Italian courts and legal scholars.

Some examples could be useful to explain this point. When a contract is entered into after long negotiation, its content can be progressively traced, step by step. The judge then can be requested to verify whether the parties had already attained sufficient definition or not. In the Italian legal experience, this situation is called the “progressive formation of contract.”

5. *Principles*, *supra* note 1, at 143.

Again, an agreement is valid if it contains all the "essential elements" of a contract, required by law. The judge must verify whether all these essential elements of the contract are present in the agreement.

What appears useful is paragraph 2 of article 2.103, which sets forth that if one of the parties refuses to conclude a contract unless agreement is reached with the other party on a specific matter, there is no contract, unless it is ascertained that an agreement had actually been reached on that specific matter. The impact of such a refusal, however, is tempered by the evaluation of the conclusion of "in idem" agreement; and in any case, it must be unequivocally clear which item was deemed to be essential by one party, a sort of "element" so vital as to exclude that party's intention to create legal relations, and to exclude the possibility that the other party could rely on an agreement having been reached.

The Principles lay down no requirement of form, but instead adhere to the principle of freedom of form. The omission of any requirement as to form is justified by paragraph 2 of article 2.101, but this principle contrasts with the legal form required for conventions by the Italian Civil Code or by special laws. But the Italian Civil Code includes another provision (art. 1352), dealing with so-called "agreed form": if the parties through a written statement agree to a special form, no contract is valid except in that form. We may wonder, furthermore, whether the conventional form of the Italian Civil Code complies with article 2.101. Nevertheless, given that article 2.101 does not claim to be "mandatory," and given that in the *commentary* to article 1.103, article 2.101 is not quoted among the "mandatory" principles, we may assume that the conventional form is accepted by *The Principles*.

As to the form required by law, the matter is different. As *The Principles* are not expressions of national laws, article 1.103 does not seem to give effect to rules of form which are imperative, unless the same norms are mandatory under the principles of international private law.

III. FORMATION OF A CONTRACT AND REPRESENTATION

We have been speaking about the essential elements of agreement. The rules governing the formation (or conclusion) of a contract (arts. 2.201 et seq.) are quite similar to those contained in the Italian Civil Code (arts. 1327 et seq.).

As regards proof of contract, we note that some friction exists between *The Principles* and the provisions of the Italian Civil Code (art. 2721), notably that article 2.101, paragraph 2, second part, of *The Principles* also accepts proof by witnesses. The Italian Code is deemed

to be mandatory when the contract must be in written form "ad substantiam," in the event also of riders and added clauses, and when one party is opposed to the testimonial evidence requested by the other party. There are, however, exceptions regarding the events listed in article 2724 and in particular unilateral declarations of will, promises to pay, acknowledgments of debt and the reasoning for the interpretation of a contract. Another new concept envisaged by *The Principles* is found in article 2.104, which deals with terms "not individually negotiated." These are binding only if the party invoking them reasonably brought them to the attention of the other party, either previously or during the conclusion of the contract.⁶ These requirements are not fulfilled by a party making a mere reference to these terms in a contract document, even if the document is signed by the other party. The *commentary* refers to two instances: to the distinction between "express" and "implied terms," which is a feature of common law, and to terms prepared by one of the parties. As to the first distinction, it is unheard of in our own experience for the contents of an agreement to be distinguished and divided into "express" and "implied" terms. Interpretation of the contract may, however, go beyond the actual wording employed by the parties, and the judge may establish the circumstances common to the parties in order to understand their presuppositions, etc. We shall return to this later on. As to the second instance, this is envisaged for terms prepared and printed by one party and submitted to the other party, but the Italian Civil code is more liberal in this regard, because it deems such terms effective if they could be known through ordinary diligence. The party invoking them need not have taken particular steps to bring them to the attention of the other party. The two positions coincide when the signing of the terms in and of itself is deemed to be knowledge of the same, provided that (as regards *the Principles*) the signing is separate and refers to a document and not the same contract text and (as regards the Italian Civil Code) the terms are not unfair, because in this case the terms must be formally signed separately (arts. 1341 and 1342); if they are not, the terms are not effective.

Two references are conspicuous in this provision of *The Principles*. Reference is made to the EC Directive on Unfair Terms in Consumer Contracts (E.C. dir. N. 93/13), even if there is no mention here of the unfairness of the terms, and reference is also made to contractual good faith, which forbids one party from taking advantage of the inattentiveness of the other.

6. *Id.* at 149 ff.

The *commentary* adds that neither party can exclude an obligation to disclose information through the terms of the offer or by other means. The other party, however, before or during the conclusion of a contract, may renounce its right to such disclosure. Usages, however, are still binding, and these may exclude an obligation of disclosure (art. 1.105). The expression "terms individually negotiated" carries with it the problems which arose in the application of directive no.13 of 1993, as regards the procedures of negotiation and the drafting of terms negotiated separately and subsequently to printed clauses. To put this question in different terms, "individual negotiation" could mean that both parties should agree on a "new term," not already included in printed forms used by one party and submitted to the other; or that the parties decide to derogate from a term included in the printed form used by one party and submitted to the other. The novelty of *The Principles* is to transplant this rule from the EC directive, which is devoted to consumer contracts, to the regulation of any kind of contract, even when neither of the parties is a consumer.

Another new concept is introduced in the provisions on so-called "merger clauses" (art. 2.105). These are regulated in analytical terms in *The Principles*, whilst, in our own Code, an added clause is deemed to prevail over a printed clause only in respect of contracts concluded by means of forms or printed texts (art. 1342)]. We should, however, note that in practice, especially as regards contracts concluded between businessmen, it is customary to find a clause that binds the parties only to what has been expressly agreed by them in the contract text. The "merger clause" is, however, attenuated by article 2.106 which refers to a presumption that the contract cannot be amended or terminated except in writing, and also refers to precluding the use of a merger clause when one party has reasonably relied upon certain statements or conduct by the other side.

As regards the rules relating to the conditions for the formation of a contract (arts. 2.101 et seq.) we may say that they are substantially similar to the provisions of the Italian Civil Code (arts. 1326 et seq.).

Also as regards the rules on dealings there are, with the exception of a few minor details, no great differences with the same provisions of the Italian Civil Code, as enhanced by various Court rulings (art. 2.301 PECL, art. 1337 It. Civ. Code). We should note, however, that *The Principles* contain a rule on breach of confidentiality that corresponds to clauses habitually inserted in commercial agreements (art. 2.302).

The same applies to the authority of agents (art. 3.101) and to contracts concluded on behalf of an unidentified principal (art. 3.203).

IV. VALIDITY

As to validity, *The Principles* do not deal, for the time being, with the problems relating to unlawfulness, immorality and legal incapacity of the parties, which are subjects left to further investigation to determine whether it is feasible to draft European principles on these subjects.

It is interesting to note, instead, that initial impossibility (art. 4.102) does not render a contract invalid, but the parties may avoid the contract if, after it was concluded, performance becomes impossible. According to Italian legal scholarship and jurisprudence, on the contrary, the impossibility of the object of a contract, which renders a contract invalid, arises when performance cannot be objectively carried out due to hindrance "ab origine" of a material or legal nature which totally impedes the result which said performance aims to achieve.⁷ By the same token, an impossible condition, if it is a condition precedent, renders the contract void (art. 1354). This rule is connected with the idea that the initial impossibility of performance affects the will of the parties, and therefore the agreement of the parties: the agreement is then void. *The Principles* follow a different perspective: they want to preserve the agreement if at all possible. So if the condition precedent concerns an impossible performance, but the initially impossible performance becomes possible prior to the expiration of time, the agreement is valid.

There is a difference in wording between the English and the French versions of *The Principles* as regards invalidity. On the subject of mistake, the English version utilizes a formula which is akin to avoidance, in as much as article 4.103(1) sets forth that: "a party may avoid a contract for mistake," whilst the French version uses an expression which is close to invalidity ("la nullité du contrat pour un erreur"). Bearing in mind the "possibility" of voiding the contract, it appears more appropriate, to Italian eyes, to refer to this category as one of "avoidability," instead of "avoidance." The Italian Civil Code reflects the German doctrine which makes a distinction between: "avoidance" (lack of agreement, lack of essential elements, violation of the law, violation of public order, violation of moral values), "avoidability" (mistake, duress, fraud); and ineffectiveness (the contract is valid, but it does not have any effect).

As regards the regulation of mistake, particular note is to be taken of article 4.103(2) which does not consider an "inexcusable mistake" to be fundamental, that is, such as to render the contract void. The *commentary* specifies that a party cannot burden the other with the risk

7. Cass. 1987, n.6362.

deriving from the consequences of the first party's negligence, and that a party must not bear the burden of checking if the other party has committed any mistakes due to its negligence.⁸

The fundamental concept of the Italian Civil Code of 1942, as opposed to the Code Napoléon, rests on the prevalence of reliance on the expressed will, instead of appreciating the subjective will of one party not expressed to the other party. Hence our law requires that a mistake, in order to render the contract invalid, should be (not only fundamental, but also) recognisable. A mistake must be obvious, and it "must be such as to appear evident to a person using normal diligence and without requiring greater inquiries than those which that person would normally carry out to ascertain the other party's will." It therefore follows that excusability changes its impact and is transferred from the subject making the vitiated representation or statement to the recipient of the same; the object also changes, because reference is no longer made to the formation of the mistake, but to the failure to discover it.⁹ In our system, therefore, an excusable mistake of one party, by itself, is not relevant unless it is recognisable by the other party, and the feature of excusability is absorbed by that of recognisability. However, as appears from the text of *The Principles*, the purpose is similar to that pursued by the Italian Civil Code, in the sense that it is not allowed to burden the other party with negligent behaviour attributable to the party who is mistaken.

The Principles do not deal separately with contracts entered into under duress or in a state of need. "State of necessity," or "being in peril" are features assumed in the Italian civil code to lead to the rescission of a contract (arts. 1447-1452), while duress causes avoidability of a contract. However, article 4.109 refers to somewhat similar assumptions in rules dealing with "excessive benefit" (*un profit excessif*) and unfair advantage (*avantage déloyal*). The circumstances referred to in article 4.109 regard a state of dependency, a relationship of trust with the other party, economic distress, a state of need (urgent needs), improvident behaviour, ignorance, inexperience, or absence of bargaining skills *vis-à-vis* the other party. For these circumstances to render a contract voidable, they must have been known to the other party, or the other party ought to have known of them, and must have taken advantage of the situation in a way that was grossly unfair or reaped an excessive benefit.

The Italian Civil Code requires that, in a contract entered into under a state of necessity or peril, the contract conditions must be unfair; in the

8. *Principles*, *supra* note 1, at 241 ff.

9. *Relazione al Re*, n.119.

event of "laesio enormis," it requires the other party to have taken advantage of the situation. In any case these conditions are far more restrictive.

The consequences are, however, quite different. Under *The Principles* a court may, upon the request of the party entitled to avoidance, proceed to adapt and amend the contract so as to bring it into accordance "ab origine" with the requirements of good faith and fair dealing. It may intervene upon the request of the party receiving the unfair advantage if the latter offers to amend the contract and the party entitled to avoidance has not yet acted upon its entitlement.

A totally innovative concept is expressed in article 4.110. This provision brings into the fold of general rules the regulation of unfair terms contained in consumer contracts. Here it is envisaged that a term which has not been individually negotiated, and which is contrary to the requirements of good faith and fair dealing, may cause a significant imbalance in the rights and obligations of the parties arising under the contract. In this event the term (and that term alone) may be avoided.

The *commentary* to this provision, however, underlines that the authors have chosen not to provide a list of unfair term and that judicial control may extend to questioning the "iustum pretium." It is further noted that this particular article, though similar to the previous article dealing with excessive benefit or unfair advantage, differs in that the former concerns an unfair advantage which was obtained as a result of the personal situation of the party entitled to avoidance, whilst the latter merely concerns the drafting of a contract prepared by the party receiving the unfair advantage.

From our point of view, we believe that article 4.115, which concerns the effect of avoidance or, in other words restitution, is quite useful. I use the term "useful" because the Italian Civil Code does not specifically deal with this issue. This issue falls within the scope of actions for money had and received and of unjustified enrichment, which are regulated under quite general provisions (arts. 2033 and ff., arts. 2041-2042). In addition to the remedy of avoidance, *The Principles* envisage bringing about restitution through damages. Even this provision (art. 4.117) appears quite useful. It is not envisaged in our own Code, which distinctly separates two types of remedies, the first concerning only the circumstances which influence the formation of contract, and the second the circumstances which influence the performance of the same. It is obvious that, in litigation, a party may pursue either of these remedies, but these are alternatives, therefore the latter must (logically) be subordinate to the former.

V. INTERPRETATION, CONTENTS, EFFECTS

There are no particular problems posed by the provisions of chapter 5 of *The Principles* on the interpretation of a contract (arts. 5.101 et seq.), which are substantially similar or akin to those of our own legal system (arts. 1362 et seq.). There are also no problems with the rules governing contracts for the benefit of third parties (art. 6.110, art.1411 It. Civ. Code). Nevertheless three principles contained in Chapter 6 on the contents and effects of contracts contain interesting innovations: article 6.102 on implied obligations or terms ("implied terms," "*obligations implicites*"); article 6.103 on "simulation;" and article 6.111 on "change of circumstances" (*changement des circonstances*).

Article 6.102, without defining "implied" terms, lists the sources from which they stem, that is, the intention of the parties, the nature and purpose of the contract, and good faith and fair dealing. These are gap-filling sources (so called "integration") of a contract which, in our own Code, are listed as the law, usages and "aequitas." Whilst good faith and fair dealing, as per article 6.102, may be comprised within the scope of the "law," the nature and purpose of the contract may, by extension, be comprised within usages. For sure, the difference between "implied" and "express" terms is alien to the Italian experience.

In the *commentary*,¹⁰ one is given to understand that the purpose of article 6.102 is to fill in the "gaps" of the contract which cannot be resolved by means of interpretation or by means of other principles, such as those relating to price (art. 6.104), to the quality of performance (art. 6.108), to the fixing of a term by a third party or a court (arts. 6.105-6.107) or by means of usages and practices (art. 1.105). When the other integrating sources are not sufficient, a court may "fill in the gaps in an appropriate manner." In order to limit possible abuse on the part of the interpreter, article 6.102 recalls three specific sources, that is the intention of the parties, the nature and purpose of the contract, good faith and fair dealing. The authors intend for this provision to satisfy both the English lawyers, who reason on the basis of the distinction between terms implied by fact and terms implied by law, and the French lawyers, who distinguish between "*obligations de résultat*" and "*obligations de moyens*."

By comparison to our own experience, the integrating sources would be considerably extended. However, we should recall, in this respect, the very extensive court rulings which have derived from the

10. *Principles*, *supra* note 1, at 302 ff.

principle of good faith, obligations of protection and obligations of other kinds complementary to those expressly envisaged by the parties.

Article 6.103 very succinctly provides that the "covert act" or "true agreement" shall prevail over the "apparent contract." The *commentary*¹¹ is far more explanatory, indicating that the adopted formula brings together both absolute and relative simulations, and identifies the secret contract, as the counter-declaration (*contre-lettre*). The Italian system draws a distinction between the simulated agreement, the counter-declaration (which declares that the agreement is simulated and is secret) and the agreement which may exist under the simulated contract. An example of this could be a simulated donation which is in reality a sale, provided it is an expression of the free will of the parties and satisfies the requirements of a sale. Moreover, the ostensible contract is not in and of itself considered void, unless it is illegal or pursues a fraudulent purpose. One party cannot use the ostensible contract as a defence to its obligations under the true or covert contract. The effects of ostensible contracts *vis-à-vis* third parties are left to the individual national laws.

Article 6.111 deals with change of circumstances. The assumptions dealt with here come close to a form of supervening unconscionability which, in accordance with our own system, is cause for termination of a contract (arts. 1467 et seq. Italian Civ. Code). However, the consequences envisaged by the Italian legal system are different: the Italian court has no power to interfere with the allocation of risks or with the advantages and disadvantages stipulated in the contract, since only the party to whom notice of termination has been served can avoid the termination by offering to amend in a fair way the terms of the contract (art. 1467 c. 3).

Under *The Principles*, however, two devices are designed to bring the contract back within the realm of "aequitas" without necessarily resorting to termination: firstly, an obligation to renegotiate the terms (art. 6.111(2)) and failing which, secondly, an intervention by the court, which, at its own choice may terminate the contract or amend it in a just and reasonable manner to distribute losses and gains caused by the change of circumstances (art. 6.111(3)(a)(b)). If either party refuses to negotiate or breaks off negotiations contrary to good faith, the court may award damages against that party.

Renegotiation by the parties and judicial amendment of the contract may take place upon three conditions: when the change of circumstances occurred after the conclusion of the contract, when the change of circumstances could not reasonably have been taken into account at the

11. *Id.* at 306.

time of conclusion of the contract, or when the party affected was not required to bear the risk of the change of circumstances (art. 6.111(2)(a)(b)(c)).

These operating conditions do not diverge from the provisions of the Italian Civil code, but the courts have allowed in the theory of pre-supposition (deriving it from the German "Geschaeftsgrundlage"). According to the theory of pre-supposition, as interpreted, reference is made to objective good faith and to the type of contract employed by the parties. If it is ascertained that the parties at the time of formation took into account (even without express reference in the text) a certain situation in fact or at law, and considered the same as a requirement of the contract, then the disappearance of this essential element would be relevant to the question of enforceability of the contract itself, provided the requirement is objective, external, common to both parties and does not depend upon their wills.¹² Some scholars and judges prefer to solve the problem by applying the rules concerning the validity of contracts. It is possible that the failure of pre-supposition was "ab origine," rather than supervening, but in that case under Italian law we would be back in the domain of lack of "causa."

The obligation to renegotiate is often provided for in the wording of the contract and such clauses are common practice in the drafting of international commercial contracts. The judicial adaptation of the contract to changed circumstances is advocated by the most recent scholarship, but the idea is still resisted by the courts and the more traditional authors.

Another rule which is in contrast with our own system concerns early performance (*exécution anticipée*) (art. 7.103). *The Principles* provide that a party may decline a tender of performance made before it is due, except where acceptance of the tender would not unreasonably prejudice its interests. Absent such prejudice, a refusal to accept early performance would be in effect abusive.

Execution, nonperformance and compensation for damages involve rules which are not in contrast with the Code's regulations and could be treated in subsequent analyses.

VI. CONCLUSIONS

Briefly, what are the significant features of *The Principles*? In addition to the more obvious models, which we find both in the Vienna Convention on the Sale of Goods of 1980, and in the UNIDROIT

12. Cass. 1995, n.5460.

Principles on International Commercial Contracts of 1994, we can also easily see in many of the provisions the recent trends in bridging differences between continental systems and the English common law.

Though frequent reference is made to the intention of the parties, a contract is considered objectively. It is obvious that the authors seek to save economic transactions through the intervention of the court. Furthermore, it is self-evident that there is an intent to "clean up" contractual behaviour through frequent resort to principles of good faith and fair dealing and with remedies aimed at suppressing the abuse of bargaining power. The contract's function prevails over the will of the parties. The contractual balance struck between the parties is not completely off limits to the courts where extraordinary and unforeseeable external circumstances or serious imbalances "ab origine" place the parties in a substantially different position. The court's intervention, aimed at "re-writing" the contract in lieu of renegotiation by the parties, confirms the inexorable decline of the "sanctity of contract."

Certain devices and aspects which are found in the Italian Civil Code have not been included in *The Principles*. The omissions cover not only all the general regulation of obligations, which the Steering Committee may in part rectify in future drafting, but also the regulation of "causa," although the latter is in part covered in the regulation of the subject matter of the contract and contractual remedies, the "purpose of the contract," the problems relating to the type of contract (often referred to under the "nature of the contract"), preliminary contracts, conditions, withdrawal and repudiation, the regulation of contracts for the transfer of property and of real contracts, assignment of contracts, consumer contracts (even if left to the enforcement of EC directives on the subject matter).

For those aspects, and there are many, which are inspired by the Vienna Convention and the UNIDROIT Principles, we may envisage that the application of *The Principles* will be met with the same favour that greeted these two texts.

But what is worth noticing, in conclusion, is that many of the principles accepted in international commercial contracts and considered adequate for economic transactions between parties having the same status and operating in a business environment, may be activated also in the sector of relationships between parties who do not carry out a professional economic activity. *The Principles* are devoid of any social inspiration except the notions of reasonableness, good faith and fair dealing and, where these are appealed to, the amendment by way of

“aequitas” of the contractual terms may replace, at least in part, the “neutral” concept of contract accepted here.