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European and Estonian Law of Obligations — Transposition of Law or Mutual Influence?

1. Estonian Law of Obligations Act in the context of unification of European law

Changes in the legal system do not always result from the countries' free choice but from international competition and political coercion countereffects.¹ Besides the export of culture and goods, globalisation has brought about also the transformation of law. The success of transformation of society largely depends on how effectively the existing legal system can be reformed, the role that transplants from other legal orders and systems acquire in the existing legal framework, and how they are understood in the context of generally recognised legal traditions and the developed legal culture.² Mapping of the existing traditions has sometimes been regarded as a crucial prerequisite for harmonisation of law³, but in a situation where globalisation has transformed the legal culture into a very rapidly changing and dynamic phenomenon, this task seems unfeasible and difficult to follow. Today, it is not only the methods and scope of transposition of rules that are of interest but also the substance of the rules or the meaning that a particular provision has acquired in a specific cultural environment. The following discussion covers some of the most important legal transplants in the Law of Obligations Act (LOA), their sources, and the issues that have arisen and may arise in the future in giving substance to these provisions. Estonia has an intriguing chance of influencing the formation of common European civil law by introducing its experience in the transformation of unified civil law principles and rules into the national legal system.

¹ A. Jettinghoff. *State Formation and Legal Change. – Adapting Legal Cultures*. D. Nelken, J. Feest (eds.). Oxford: Hart Publ. 2001, p. 107.

² See P. Legrand. *What 'Legal Transplants'? – Adapting Legal Cultures*. D. Nelken, J. Feest (eds.). Oxford: Hart Publ. 2001, p. 59; P. de Cruz. *Comparative Law in a Changing World*. London, Sydney 1999, p. 31; P. Legrand. *Against a European Civil Code. – The Modern Law Review* 1997 (60), Jan., pp. 425–428.

³ S. Paasilehto. *Challenges for Legal Cultural Change: Innovations and Traditions. From Dissonance to Sense*. International Conference in Porvoo, Finland. August 28–31, 1997, p. 10 (unpublished material).

The Estonian Civil Code comprises, according to the pandect system, five basic acts, which, though not codified, make up a systematised set of rules consisting of single legislative acts⁴. The choice for the Continental legal system had already been made in 1988, when preparations started for Estonia's own civil law system and when it was found that historical consistency should be restored also in legal drafting.⁵ Historical consistency primarily meant the decision to prepare the new Civil Code on the basis of the draft Civil Code of 1940, which was never passed as time ran short at the end of Estonia's first period of independence. But in contrast to the portions of the draft Civil Code of 1940 dealing with property law and law of succession, the regulation concerning the law of obligations had become hopelessly outdated and its provisions were unsuitable for a modern act on the law of obligations, due to their inefficient regulatory methods and issues of substance.

The Baltic Private Law, on the example of which the Civil Code of 1940 was drafted, was prepared so as to provide regulation as detailed as the law and legal dogmatics of the time allowed. A peculiarity of the Estonian legal drafting culture, associated with the Baltic Private Law and persisting to this day, lies in the idea that if we write down in law everything that is covered in the developed countries by the laws and the legal dogmatics outside written law, we will avoid disputes over the application and substance of law.⁶ The Law of Obligations Act that entered into force on 1 July 2002 is thus also characterised by very detailed regulation and a great number of sections.⁷ The number of sections in the Law of Obligations Act may be chiefly justified by Estonia's unique opportunity to draft a single law covering consumer contracts, obligations arising in economic or professional activities, and obligations arising between 'ordinary subjects'. Unfortunately, there is still no answer to the question about the efficiency of civil law reform in a situation where laws are casuistic and superfluous and leave little room for legal theory and the general principles of law.⁸

A great advantage in the creation of the civil law system of Estonia as a groundbreaking form contrasted against systems in states with an established legal system and historical traditions was the possibility to create a system of rules free of the forced solutions and outdated, inflexible dogmatics that do not satisfy the needs of today. In a transformation society where prior legislation and legal dogmatics are almost non-existent or carry the ideology of a different political and social system, it is possible to write the entirety of civil law from scratch, to create one's own system and avoid the mistakes that other countries have made in the development or reformation of their law. Throughout history, the transplantation of laws and legal institutes from one legal system to another has been the most efficient and simplest approach, because legal transplants usually do not concern the interests of individuals.⁹

The activities of proponents and implementers of model laws¹⁰ and the convergence of rules for the harmonisation of law and the idea of a European Civil Code¹¹ have had a very direct and strong influence on the reformulation of the member states' national law. Besides the work of study centres addressing the uniformity of European civil law, the newer legislation of European countries has had its impact on the development of the legal systems of transformation societies. The German reform to the law of obligations, largely resulting from the need for harmonisation with the relevant European Union legislation¹², and the new Civil Code of the Netherlands¹³ should be given primary mention. The US Restatements system and the US Commercial Code, particularly the part dealing with sales contracts, have served as good examples for Europe. The model laws prepared for the harmonisation of contract law, such as the UNIDROIT Principles of International Commercial Contracts (PICC) and the Principles of European Contract Law (PECL)

⁴ Tsiivilseadustiku üldosa seadus (General Part of the Civil Code Act), passed 27.03.2002; asjaõigusseadus (Law of Property Act), passed 9.06.1993; võlaõigusseadus (Law of Obligations Act), passed 28.09.2001; perekonnaseadus (Family Law Act), passed 12.10.1994; pärimisseadus (Law of Succession Act), passed 15.05.1996.

⁵ P. Varul. Legal Policy Decisions and Choices in the Creation of Estonian Private Law System. – *Juridica International* 2000 (5), p. 104.

⁶ M. Luts. Textbook of Pandects or New Style of Legislation in Estonia? – *Juridica International* 2001 (6), pp. 152–158.

⁷ The Law of Obligations Act contains 1068 sections.

⁸ M. Luts (Note 6), p. 158.

⁹ A. Watson. *Legal Transplants: An Approach to Comparative Law*. Athens, Georgia: University of Georgia Press 1993, p. 96.

¹⁰ O. Lando, H. Beale (eds.). *The Principles of European Contract Law. Parts I and II*. Prepared by the Commission on European Contract Law. The Hague: Kluwer Law International, 1999; Commission on European Contract Law, 1997; UNIDROIT Principles of International Commercial Contracts. International Institute for the Unification of Private Law. Rome: Unidroit, 1994.

¹¹ Namely, supranational study groups of researchers engaged in the harmonisation and unification of European civil law, such as the Study Group on a European Civil Code, led by Christian von Bar; the European Centre of Tort and Insurance Law (ECTIL) in Vienna; the Research Unit for European Tort Law (ETL) at the Austrian Academy of Sciences; and various other research centres.

¹² P. Huber, F. Faust. *Schuldrechtsmodernisierung. Einführung in das neue Recht*. München: C.H. Beck 2002, p. 1.

¹³ *Burgerlijk Wetboek (Civil Code of Netherlands)*. Book 6. *Algemeen Gedeelte van het verbintenissenrecht*. Book 6. General Part of the Law of Obligations. Beck: München 1992. For information about the contribution of the Dutch Civil Code to the unification of European civil law, see: *The Genesis of the Principles of European Contract Law and Modern Dutch Private Law. The Principles of European Contract Law and Dutch Law: A Commentary*. D. Busch, E. H. Hondius (eds.). The Hague: Ars Aequi Libri, Nijmegen&Kluwer Law International 2002, pp. 13–27.

prepared by the Lando Commission, reflect the current discussions about contract law to a very large extent. By transposing and systematising, to some extent in a unique way, the results of the work done in the harmonisation of civil law, Estonia has the opportunity to participate in these discussions and also offer new solutions itself.

Since the time of Cicero, differences between legal systems have been considered an inconvenience that should be overcome. The differences between the systems of common law and civil law are clearly distinguishable not only as regards historical heritage and developments but also as regards the issues of the structure of the legal profession, legal education, classification of the areas of law, the judicial system, and fundamental positions on law and legal philosophy. But we can also see a number of similarities between these two legal systems in areas such as sales contracts, contracts in general, non-contractual liability, and business organisation. The understanding that these two legal systems, different in their historical development and nature, are coming closer to each other stirs up less and less emotion these days. Such a tendency toward convergence has been observed in attitudes to both written laws and court decisions as precedents, which themselves may serve as a source of law. While the number of areas regulated by law has increased in common law, the role of judicial practice as a source of law in the legal system has substantially changed in countries applying civil law.^{*14} Besides that, European countries have started to rely more on case law, which is especially noticeable in the activities of the German Constitutional Court and the French administrative courts. Gaps in law have forced courts to extend law and assume the role of lawmakers. But whether these are signs of convergence is not always so clear.^{*15}

After regaining independence, Estonia has mainly relied on Western European models for its development. Estonia's wish to accede to the European Union and hence develop as a democratic state based on the rule of law and social market economy has greatly influenced the development of law. The unification of legal systems through special programmes and projects (e.g., the activities of the Lando Commission and UNIDROIT) as a result of transposition or natural convergence of law is effective only when the structures, institutes, and procedures of the national legal systems are able to ensure unity in both the application and interpretation of the rules.^{*16} The first task is to word the provisions in a uniform manner; then, the rules can be interpreted and applied in a uniform manner.

According to Alan Watson, legal transplants have been known in the form of legal loans since Roman times.^{*17} As in Ancient Rome, so in the newly independent Estonia, which aimed at reforming its legal system. The most prominent lawyers were sent to foreign countries to study what was good and transplantable from the other legal orders, what their relevant judicial practice was, and what the law of a specific state presented in the widest sense. Legal transplants have a long history. The reception of Roman law in Europe even extended to the USA via the English colonies. History also knows the extensive impact of the French Civil Code on the legal codes of the European countries. Much of US law has spread to Europe, particularly Switzerland. There are still mixed jurisdictions, which vividly exemplify the effect of transplants on common law, civil law, and local common law.^{*18}

The following discussion describes certain areas where the provisions of the Estonian Law of Obligations Act contain solutions that are generally recognised yet not expressly provided in the legislative acts of European countries, and solutions that are essentially exceptional and hence of interest as alternative solutions alongside those widely known.

2. General principles of law

Harmonisation of European private law, including contract law, poses various complicated and less complicated problems for the legal systems. One of the main issues that have been raised is the question of the level on which private law needs to be unified for efficient functioning of the common market. It may be said that the unification and harmonisation of both provisions and general principles is generally considered to be necessary; another question is the scope in which this should be done.^{*19}

¹⁴ P. de Cruz. *Comparative Law in a Changing World*. Cavendish Publishing Limited 1999, 14.3.

¹⁵ *Ibid.*, 14.3.

¹⁶ *Ibid.*, 14.5. Unification of law normally makes use of international instruments that are created for that purpose and whose activity is aimed at only that, such as UNIDROIT, the Hague Private International Law Conference, and UNCITRAL. The aim of these organisations is to formulate common rules and shape common practice in a certain territory (the PECL in the European Union, CISG in countries that have joined the convention, etc.). The list could also include the International Labour Organisation (ILO), the European Commission of Human Rights, and the Organization of American States.

¹⁷ A. Watson (Note 9), p. 95.

¹⁸ P. de Cruz (Note 14), 14.5.1.

¹⁹ P. Varul (Note 5), p. 112.

The trend of legal formalism and the sociological trend can be distinguished in the approach to private law in the context of harmonisation. Under the legal formalist approach, a legal system is a set of integrated principles, concepts, and rules, which together determine the mutual rights and obligations of subjects in private law. Legal discussions boil down to consideration of the rights and obligations of the subjects in a specific legal system.^{*20} Estonia has so far taken the legal formalist approach to harmonisation, seeing the main task as ensuring uniform rights for all citizens of European Community member states. This task in Estonian law was formally completed by the adoption of the new Law of Obligations Act.

In the harmonisation process, legal formalists find themselves in a situation where the principles and concepts applicable in a legal system may obstruct the harmonisation of the legal system. Optimists find that, as terminology in the national and supranational systems is largely equivalent, it is not difficult to recognise single concepts. Pessimists find that, as the concepts are interrelated, their actual substance is only revealed in a specific context that could be dealt with quite differently in the legal practice of another member state.^{*21} For example, the transplant of directives to a legal system cannot be successful if specific provisions are transposed without transposition of new concepts to the national legal systems or if the existing provisions are not adjusted to account for the new ones. Estonia implemented the directive on unfair contractual conditions in the Law of Obligations Act, defining unfair harm not by using the principle of good faith as the directive does but through the institute of voidness of transactions that are contrary to good morals. The aim was to ensure the integrity of the existing legal system and avoid unnecessary problems in delimiting the application of the two institutes of law and the relevant general principles of law.^{*22} The Law of Obligations Act also discarded the concept of the right of a consumer to withdraw from his or her declaration of intention as prescribed in the EU directives, choosing instead to regulate the consumer's right to step out a contract by way of withdrawal or cancellation of the contract (see, *e.g.*, LOA §§ 49, 56 ff.). The principle of the binding force of a declaration of intention was thus not touched upon, while the consumer's right to withdraw from a contract during the 'cooling off' period was still ensured.

Unification of law is a process rather than a record of ready-made teachings and legal solutions. Unification may have a negative impact on the uniqueness of a legal system and its attachment to the cultural context. However, innovative provisions may lead members of society to establish and follow acceptable rules of behaviour before they are formed in formal legal practice, and thus influence the development of the legal culture.

Estonian law, like the law of other Eastern European countries, has been reproached mainly for its ignorance or incorrect application of the general principles of law.^{*23} Principles are characterised by their deliberation value, or the possibility to deliberate which principle is applicable in the given circumstances. Principles as commands aimed at an ideal status require compliance as far as possible. Thus, principles may be applied only in part, in order of importance, and content may be provided in specific rules of conduct via the judicial practice that develops. In a transitional society, principles are constantly reassessed and their content is further specified. The formulation of a general principle from single cases, however, requires stable and long-term judicial practice.

The impact of principles is bidirectional, meaning that a principles recognised in a member state may be adopted in EU legal practice and legal drafting. As soon as a general principle is adopted, formulation of the rules for application of the principle becomes especially important. Rules can be applied only on a voluntary basis and they make it possible to arrive at uniform implementation of EU law and eliminate the differences in implementation of the general principles of contract law in the national law of the member states.

When analysing the effect of the Principles of European Contract Law and the UNIDROIT Principles of International Commercial Contracts on the formation of the content of the Estonian Law of Obligations Act and the effect of legal transplants in society, one should not forget that both these model laws, referred to as 'Principles', are actually sets of rules that also contain important principles of contract law.^{*24} Uniform recognition of the general principles of contract law ensures the legal certainty needed by the contracting partners that the conditions formulated for the contract are uniformly recognised throughout the legal area

²⁰ C. von Bar, M. Barendrecht, J. Basedow *et al.* The Private Law Systems in the EU. Discrimination on Grounds of Nationality and the Need for a European Civil Code. Luxembourg: European Parliament, L-2929, Legal Affairs Series, JURI-EN 13, 1999.

²¹ *Ibid.*

²² LOA § 42, 'Invalidity of standard terms':

(1) A standard term is void if, taking into account the nature, contents, and manner of entry into the contract; the interests of the parties; and other fundamental circumstances, the term causes unfair harm to the other party, particularly if it causes a significant imbalance in the parties' rights and obligations arising from the contract to the detriment of the other party or if the standard term is contrary to good morals.

²³ See F. Emmert. Editorial: The Independence of Judges — a Concept Often Misunderstood in Central and Eastern Europe. — European Journal of Law Reform 2001, Vol. 3, No. 4, pp. 405–409.

²⁴ H. M. Flechtner. The CISG-S Impact on International Unification Efforts: The UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract Law. — The 1980 Uniform Sales Law. Old Issues Revisited in the Light of Recent Experiences. F. Ferrari (ed.). Verona Conference, European Law Publishers 2003, p. 171.

in which the parties act. In a transitional society, often lacking the tradition and judicial practice needed for solving specific disputes, it is inevitable for the general principles of law to be applied in solving legal disputes. Uniformly recognised general principles of law help the courts of the member states to understand the nature and aims of regulations when applying the laws of other countries and to take these into account when new legislation is being drafted.

3. Principle of freedom of contract

The most important principle of private law is the principle of private autonomy, expressed in contract law as the **principle of freedom of contract**. Freedom of contract mainly means the freedom to decide on the entry into and content of the contract and to choose the other party to the contract. The Law of Obligations Act applies the idea of contractual fidelity in its classical sense, setting out as its guarantee the general principle that a contract is binding on the parties (LOA § 8 (2)). As is typical in modern-day contract law, contracts are binding according to the Law of Obligations Act only if the conditions of the contract are understandable by the parties and the parties can actually choose whether or not to enter into the contract. The goal of ensuring the substantive and procedural fairness of contracts as a restriction on freedom of contract allows a legislature to choose whether to interfere with contractual relations by the institute of voidness of contract or, instead, pay the most attention to regulation of negotiations and the contracting process or procedural freedom of contract.^{*25} A contract is thus deemed to be binding and mandatory for the parties only if it is concluded on the basis of free will and informed consent.^{*26} Unless these requirements are fulfilled, a party to the contract may seek the remedies prescribed by law for stepping out of the contract. The prevailing trend in Estonian law is for the law to ensure the procedural fairness of contracts and interfere with the substantive fairness of a contract only under special circumstances.

The general principles of law, just like freedom of contract, are not applicable to a specific case directly but, rather, only via rules giving content to the principle. The resolution of a specific case often requires weighing of different general principles. The application of one principle to a specific case, however, does not mean that other principles are fully abandoned, for the conditions and scope of application of the general principles of law are not restricted by law.^{*27}

Common recognition of certain ethical rules of conduct — in part supported by non-legal arguments such as ethics, good morals, and justice — serves as the basis for the efficient functioning of the principle of freedom of contract in contractual relations. The issue of consideration for the principle of freedom of contract has arisen in Estonian judicial practice in connection with usurious interests in contracts. The Supreme Court has assumed the position that excessively high interest in comparison to the average interest rate agreed upon does not provide reason to hold the relevant transactions to be contrary to good morals on account of elements of usury. The Supreme Court has considered it necessary since 2002 to test the usurious nature of a transaction not only on the basis of the disproportional nature of the obligations but also taking into account other circumstances, such as one party's inexperience, a forced situation, lack of decisive power, substantial weakness of will, and other difficult circumstances. In such circumstances, it has interpreted usurious contracts not as contrary to good morals but as contracts voidable by one of the parties, concluded under extremely unfavourable conditions, taking advantage of the coincidence of difficult circumstances. The liberal attitude to the autonomy of contractual partners has thus been maintained, because the Supreme Court has considered interference with contractual relations merely on grounds of disproportionateness of obligations as contrary to the intent of the law. However, condemnation has been expressed for contracts concluded by one party contrary to the requirements of morals, taking advantage of the difficult situation of the other party. When analysing the practice of the Supreme Court in cases where parties have based their claims on the disproportionateness of obligations, one could say that the decisive concept is that of fairness, according to which a party may step out of a contract only if it has been established that advantage was taken of the poorer position of the weaker party for unfair purposes.^{*28} As regards extremely high interest, the Supreme Court has not considered it necessary to impose social liability for the difficult economic situation on institutions under private law, as is often done in need-oriented contract law, which is characterised by greater attention to consumer protection and the social aspects of performance of contracts.^{*29}

²⁵ P. Atiyah. *An Introduction to the Law of Contract*. Oxford: Clarendon Press 1989, p. 36.

²⁶ R. Brownsword. *Freedom of Contract, Human Rights and Human Dignity*. – *Human Rights in Private Law*. D. Friedmann, D. Barak-Erez (eds.). Oxford, Portland, Oregon: Hart Publ. 2002, p. 186.

²⁷ Schmitthoff's *Export Trade*. *The Law and Practice of International Trade*. 10th ed. L. D'Arcy, C. Murray, B. Cleave (eds.). London: Sweet & Maxwell 2000, p. 164.

²⁸ CCSCd 3-2-1-80-02. – RT III 2002, 27, 302.

²⁹ C. Sandgren. *A Social Law of Contract?* – *Scandinavian Studies in Law* 1993 (37), p. 167.

The Supreme Court has regarded contracts that subject one party to full control via restrictions on economic activity or rendering economic activities impossible as immoral and condemnable according to the general opinion of society. For example, the Supreme Court has considered it to be against good morals to enter into a contract in a situation where the management of a company was aware of upcoming bankruptcy (a warning concerning bankruptcy had been issued)^{*30} and a contract bound a party to a lease relationship for 99 years without the right of reviewing the rental terms.^{*31}

The legal order has to follow the developments of society, and the court has to consider society's changing opinions in its judgements and shape its position on the meaning of good morals accordingly.^{*32} Today, contracts are declared to be contrary to good morals in order to protect public interests, one of the parties to the contract, or the rights of third parties. As the complexity of social processes and pluralism in society renders it increasingly difficult to formulate any dominant moral or standard usage, the protection of individuals' interests, not of the whole society's interests, has become the main objective of legal practice when it comes to voiding a contract on grounds of good morals.^{*33}

Although freedom of form is not considered to be an element of freedom of contract, freedom of form can still be viewed as an attribute of modern contract law. In the law of obligations, formal requirements are established only in cases where they are necessary for protecting a party or for another purpose accepted by society. For example, formal requirements have been established for the declaration of intention of a consumer before (*e.g.*, informing a passenger of the circumstances listed in LOA § 870) or during (*e.g.*, a statement by a consumer by which the consumer agrees to assume the obligations of surety under LOA § 144 (2)) entry into a contract. Contracts may be concluded in any form in economic or professional activities, except for contracts involving immovables. An important change was made by the Law of Obligations Act Implementation Act to the CISG Ratification Act of 16 June 1993, repealing § 2^{*34} of the Ratification Act, which prohibited the conclusion of sales contracts and the making of offers or other declarations of intention in oral form. Estonia has thus taken an important step toward the generally accepted view of freedom of form in international transactions as well.

4. Principle of good faith

While the recognition of most general principles of law, such as contractual fidelity, freedom of contract, reliance liability, and the principle of party autonomy, are no longer the subject of contract law discourse, the recognition of the principle of good faith and its transfer to European private law as a unified open provision is still topical today. The transposition of any principle of law raises the question of the essence of the legal system and of the suitability of that principle of law for the given legal culture, legal practice, and legal dogmatics. The principle of good faith is the most important principle of private law, the consensual recognition of which makes it possible to account for different understandings in the creation of institutes relevant to common European contract law and in the shaping of legal practice.

Despite the general recognition of the principle of good faith in international commercial law and the contract law of EU member states, the approaches to the principle are not identical.^{*35} These differences are due to the different legal traditions and cultures, and the varied methods of application of principles of law.^{*36} In common law, in contracts made in the course of economic activities, a contextual approach to good faith, based on the reasonable expectation of the parties that the generally accepted rules of the economic area are complied with, may ensure adherence to the rules and thus increase the predictability of contractual behaviour.

³⁰ CCSCd 3-2-1-102-02. – RT III 2002, 27, 301.

³¹ CCSCd 3-2-1-29-02. – RT III 2002, 14, 164; CCSCd 3-2-1-76-01. – RT III 2001, 19, 204.

³² B. Rüthers. Die unbegrenzte Auslegung. Zum Wandel der Privatrechtsordnung im Nationalsozialismus. Heidelberg 1997, pp. 216–217.

³³ B. Markesinis. The German Law of Obligations. Vol. I. The Law of Contracts and Restitution: A Comparative Introduction. Oxford: Clarendon Press 1997, p. 182.

³⁴ Võlaõigusseaduse, tsiviilseadustiku üldosa seaduse ja rahvusvahelise eraõiguse seaduse rakendamise seadus (Law of Obligations Act, General Part of the Civil Code Act and Private International Law Act Implementation Act). Passed 5.06.2002. – RT I 2002, 53, 336 (in Estonian).

³⁵ CISG Art. 7 (1) sets out the obligation to consider the principle of good faith in the interpretation of the convention. However, it is found that the wording of the article does not prevent the attribution of a wider meaning to the principle of good faith. See P. Schlechtriem. Einheitliches UN Kaufrecht. Tübingen: Mohr 1981, p. 25; P.J. Powers. Defining the Undefinable: Good Faith and the United Nations Convention on Contracts for the International Sale of Goods. – JLC 1999 (18), p. 348. PECL Art. 1:201 and PICC Art. 1.7 set out the direct duty to act in accordance with good faith and fair dealing.

³⁶ See also Art. 3:12 of the Dutch Civil Code, according to which a court, when deciding on what reasonableness and justice demand under the given circumstances, has to refer to generally accepted principles of law; to the contemporary theoretical positions in Dutch law; and, depending on the circumstances, to weighty social and private interests.

However, regulatory good faith must remain outside the realm of economic activities so as to avoid the application of contractual fairness concepts not appropriate for economic activities. The principle of good faith is accepted in common law countries via the mutual approximation of the regulatory and contextual concepts of good faith.^{*37}

Application of the principle of good faith to a contractual relationship makes it possible in decision-making to take account of the important values of society and determine the objectives of applying positive law in each specific case.^{*38} Acting in good faith is the highest regulatory obligation and also a principle of law in Estonian law. The regulatory nature of a principle of law means acting within the existing legal order and in compliance with other principles of law and the types of values on which the legal order is based. At the same time, the applicable law is not a limit to the application of the principle of good faith, because the principle of good faith is considered to be superior to other provisions of positive law.

Acting in good faith is understood as honesty, keeping one's word, loyalty to the other party as avoidance of unreasonable or unjustified behaviour and of damaging the other party, co-operation with the other party, reliability, readiness to withdraw from a contractual agreement whose content has become unreasonable, and due performance of one's obligations.^{*39}

In comparing the role and functions of the principle of good faith in the law of European countries, it may be said that the differences in legal method have influenced the attitude to recognition of the principle of good faith as a general principle of law. German law, most similar to Estonian law in its method, has been the main model for the transposition of the doctrine of good faith into the Estonian legal system. Although the Estonian general clause setting out the mandatory nature of the principle of good faith is similar to German BGB § 242, the second part of the clause, or LOA § 6 (2), is based on the example of article 6:248 of the Dutch Civil Code.

Various specific institutes deriving from the doctrine of the principle of good faith have been transposed from German law in full (such as changing the proportion of contractual obligations in LOA § 94 and contracts with a protective effect for a third party in LOA § 81) or in part by the provision of relevant rules of conduct in specific sections (*e.g.*, the provisions in LOA § 108 (3) concerning an impermissible delay in the enforcement of a right). The similarity in legal regulation between the Estonian and German law of obligations allows uniform application in practice of the principle of good faith and the comparative systematisation concerning those types of cases to which the principle of good faith applies with its various functions.

Estonian law sets forth the obligation to act in good faith as a regulatory general principle. It allows the courts to react to the changes in society and the gaps or shortcomings in the law by developing the law. Estonian law gives the principle of good faith a wider meaning than the German, French, and English law do, as, pursuant to LOA § 6 (2), nothing arising from law, a usage, or a transaction shall be applied to an obligation if it is contrary to the principle of good faith.^{*40}

The role of the principle of good faith in international commercial law has grown in connection with the globalisation of the economy and the emergence of transnational commercial law. Various institutes have been provided for in the Estonian Law of Obligations Act based on the provisions of the UN Convention on Contracts for the International Sale of Goods (CISG), containing rules derived from the principle of good faith. This allows for an assessment of the conduct of the parties to a contract, taking into account international practice based on the principles of good faith and fair dealing^{*41}.

The great volume of contractual obligations expressly stipulated by law, the rules of interpretation of contracts and the right to infer obligations based on the nature and objective of the contract, the practice developed between the parties, the usage common in the profession or trade, and the principles of good faith and reasonableness should give enough possibilities for shaping the substance of a contract without the need to refer to the general principle of good faith (LOA § 6 (1)). Application of the general principle of good faith, however, may be necessary in the determination of the content and method of performance of the obligations, unless this is directly provided by law and agreed between the parties. Protection obligations are

³⁷ For example, understanding the use of a more favourable position in the conclusion of a contract as duress. See the case *Williams v. Roffey Bros & Nicholls Contractors*, [1991] 1 QB 1; J. Wightman. *Good Faith and Pluralism in the Law of Contract. – Good Faith in Contract: Concept and Context*. R. Brownsword, N.J. Hird, G. Howells (eds.). Dartmouth: Ashgate Publishing Company 1998, p. 450.

³⁸ M. Hesselink. *Good Faith. – Towards a European Civil Code*. 2nd ed. A. Hartkamp (eds.). Nijmegen: Ars Aequi Libri 1998, p. 287.

³⁹ S. Litvinoff. *Good Faith. – Tul.L.Rev.*, 1997 (71), p. 1663. A mere description of situations in the explanation of the principle of good faith has been regarded as too narrow, since in such a case the idea of the principle of good faith would remain too one-sided. J. Stapleton. *Good Faith in Private Law. – Current Legal Problems 1999* (52), pp. 5–6.

⁴⁰ The Dutch Civil Code also allows not applying the law if application would result in a consequence that is contrary to the principle of good faith. A. S. Hartkamp, M. M. Tillema. *Contract Law in the Netherlands*. The Hague: Kluwer Law International 1995, pp. 48–49.

⁴¹ J. O. Honnold, W. A. Schnader. *Uniform Words and Uniform Application. The 1980 Sales Convention and International Juridical Practice. – Einheitliches Kaufrecht und nationales Obligationenrecht*. P. Schlechtriem (Hrsg.). Baden-Baden: Nomos 1987, p. 144.

inferred from the principle of good faith even with respect to persons who are not parties to the contract themselves.^{*42}

One of the main functions of the principle of good faith is to prevent the abuse of rights.^{*43} In Estonian law, the principle of good faith has so far been applied mainly for this purpose.^{*44} The right to waive the application of legal provisions, usage, and transaction (LOA § 6 (2)) gives the court wide opportunities to exercise their right of discretion in the selection of the provisions to be applied.

In the recognition of the principle of good faith in international commercial law, European contract law, and Estonian law, it is not the manner or method of recognition that is important but the rules of conduct supplying content to the principle of good faith, which coincide with the general understanding of honest and fair conduct. The principle of good faith may be viewed as the common element of different legal systems and legal orders, on the one hand, while the close connection of the principle of good faith with legal traditions, morals, and culture, on the other hand, may prevent the recognition of unified European contract law as a source of law by all member states of the European Union. Modern-day (or post-modern) contract law, which is based on the plurality of opinions and positions, should not endeavour to do away with the differences in the approach to the principle of good faith; rather, they should see the goal of unification mainly as in creation of a conceptual basis for the discourse of European law.^{*45}

5. Binding force of contractual promises

The binding force of contractual promises is an important premise for the efficient functioning of the economy, since only trust in the binding force of the promises of the other party can ensure that the interests and goals of the market participants are achieved. The principle of the binding force of contracts is prescribed in article 1.3 of the UNIDROIT Principles: ‘a contract validly entered into is binding on the parties’. The Estonian Law of Obligations Act codifies the binding force of contracts similarly to the UNIDROIT Principles in LOA § 8 (2). The PECL does not contain an article directly setting forth the principle of the binding force of contracts, but the principle can be derived from article 1:102, which sets out the principle of freedom of contract, and article 6:111, which regulates the legal consequences of a change in the balance of obligations (hardship). Contracts are binding only if the declarations of intention of the parties indicate their willingness to be legally bound. Declarations of intention are regulated in Estonian law by the General Part of the Civil Code Act (GPCCA)^{*46}, according to § 67 (1) of which a contract is binding on the parties only if it contains a declaration of intention directed at bringing about a certain legal consequence. The binding force of a contract is not conditional on the existence of a *causa*; neither is the offer of consideration necessary. The Law of Obligations Act (LOA § 9 (1)) has remained true, when it comes to regarding contracts as concluded, to the classical offer and acceptance system, but, similarly to PECL article 2:101 and PICC article 1.2, the act supplements the system by the principle that a contract is deemed concluded by the mutual exchange of declarations of intention in any other manner if it is clear that the parties have reached sufficient agreement.^{*47}

Flexible regulation concerning regarding a contract as concluded allows taking into account the nature of the contract and its subjects when interpreting the declarations of intention of the parties. According to LOA § 25, in the case of contracts entered into with respect to the economic or professional activities of the parties, the parties are bound by any usage they have agreed to apply and by any practice they have established between themselves, and also any usage that persons who enter into contracts in the same field of

⁴² The Estonian law, similarly to BGB § 311 (3), provides for protection obligations with respect to persons who are not parties to a contract (LOA § 81).

⁴³ See, e.g., regarding the development of the doctrine of prohibition of abuse of rights in European law: M. Schmidt-Kessel. *Rechtsmißbrauch im Gemeinschaftsprivatrecht – Folgerungen aus den Rechtssachen Kefalas und Diamantis*. – Jahrbuch Junger Zivilrechtswissenschaftler 2000 pp. 61–83.

⁴⁴ A claim for compensation of expenses by a lessee within too short a period has been regarded as an abuse of rights (CCSCd 3-2-1-101-02). A party to a contract in breach of contractual obligations must not make use of the advantages arising from the non-performance. For example, a lessee could not rely on the failure to submit invoices where a circumstance depending on the lessee prevented the lessee’s receipt of the invoices (CCSCd 3-2-1-33-00); a customer could not rely on a builder’s non-performance if the non-performance was due to the customer’s failure to obtain a building permit (CCSCd 3-2-1-43-03). The use of procedural rights in such a context has also been regarded as abuse of rights (CCSCd 3-2-1-31-03).

⁴⁵ T. Wilhelmsson. *Good Faith and the Duty of Disclosure in Commercial Contracting. – Good Faith in Contract: Concept and Context*. R. Brownsword, N. J. Hird, G. Howells (eds.). Dartmouth, Aldershot: Ashgate Publishing Company 1998.

⁴⁶ *Tsiviilseadustiku üldosa seadus* (General Part of the Civil Code Act). – RT I 2002, 35, 216 (in Estonian).

⁴⁷ As opposed to CISG Art. 14 (1), under which a contract is deemed concluded when the parties have reached an agreement on all fundamental conditions by an exchange of offer and acceptance.

activity or profession generally consider applicable and take into account, except where application of such a usage would be contrary to law or would be unreasonable under the circumstances. The Law of Obligations Act also regulates the conclusion of contracts by written confirmation as commonly known in business, similarly to PICC article 2.12 and PECL article 2:210.

The validity of a contract is not affected by the fact that, at the time of entry into the contract, performance of the contract was impossible or one of the parties did not have the right to dispose of the thing or right that is the object of the contract (LOA § 12). The impossibility of performance does not render a contract void even if it emerged after the conclusion of the contract.

6. Binding force of contractual declarations of intention

Estonian law, like German law, considers an offer to be binding as of its receipt (GPCCA § 69 (1)). A declaration of intention is received when it has been communicated to the recipient personally, or, if a declaration of intention is directed at a party not present, it is deemed to be received when it has arrived at the residence or seat of the recipient and the recipient has had a reasonable opportunity to review the declaration. An offer as a proposal for a contract is binding if it contains sufficiently definite terms to form a contract if accepted. One must respond to an offer made to a person present without delay, unless the offer prescribes a deadline for responding (LOA § 18 (1)). An offer that is not made in person and does not have a fixed term for acceptance is effective in the time that is ordinarily necessary for an acceptance to reach the offeror (LOA § 18 (2)). In contrast to what follows from PECL article 2:202, an offer can be withdrawn without exception under Estonian law. This means that even if the offer prescribes a deadline for replying, the offeror may withdraw the offer if the declaration of intention containing the withdrawal reaches the addressee of the offer before or at the same time as the offer. The trust of the addressee of the offer in the binding force of the offer is not damaged under such regulation, because withdrawal is allowed only at the time of or before the receipt of the offer. Although PECL article 2:202 generally follows the rules set out in CISG article 16 and PICC article 2.4, according to which an offer must not be revoked if it prescribes a deadline for replying or otherwise indicates that the offer is irrevocable, the Principles of European Contract Law provide that revocation of an offer is invalid if this rule is violated. Also in Estonian law, the withdrawal of a declaration of intention is void if the withdrawal declaration was made after the receipt of the declaration of intention, and the offer remains effective (GPCCA § 72).

7. Third parties in a contractual relationship

A contract may be concluded for the benefit of third parties for various reasons. Such an agreement may result from the wish to give a third party benefits from the performance of a contract to which the third party itself is not a party, a wish to support said third party, or the creditor itself owing performance to the third party. The conclusion of a contract for the benefit of third parties as a modification of an agreement for performance of contractual obligations for achieving various goals is not a new institute of law for Estonian law.⁴⁸ If performance for the benefit of a third party was agreed on, the third party may require performance of a contractual obligation only if the contract or the law so prescribes. PECL article 6:110 (1) entitles a third party to a right of claim also if this has been expressly agreed upon between the promisor and the promisee, or when such agreement is to be inferred from the purpose or the circumstances of conclusion of the contract. The general principle according to which a third party acquires the right of claim from contracts concluded for the benefit of the third party is limited in Estonian law to only two cases: contractual agreement and a relevant provision of law (LOA § 80 (2)). Thus, a relevant agreement between the debtor and creditor is the precondition for the creation of a right of claim of a third party under Estonian law. It is questionable whether the right of claim of a third party could also be inferred from the conditions of the contract or other circumstances.⁴⁹ The provisions on the interpretation of a contract, which apply to disputes over the meaning of the contractual conditions, oblige the parties to proceed from the common intention of the parties in the first instance; only if the common intent cannot be established shall the contract be

⁴⁸ Contracts in favour of third parties are known in all the European legal systems, but the rules for application of this modification of a contractual obligation have not been unified in European contract law to a satisfactory extent. See V. V. Palmer. *First Steps Toward Tomorrow's Harmonization*. – *European Review of Private Law* 2003 (11) 1, p. 8.

⁴⁹ According to PECL Art. 6:110 (1), the right of claim of a third party may be inferred from the purpose of the contract or the circumstances of the case.

interpreted according to the meaning that reasonable persons who are peers of the parties would give to it in the same circumstances (LOA § 29 (4)). In interpretation of a contract, regard shall be paid to the circumstances in which the particular contract was entered into, such as the pre-contractual negotiations, previous interpretation of the same term or condition of the contract, the conduct of the parties before and subsequent to entry into the contract, the meaning commonly given to terms and expressions in the field of activity or profession concerned, and the usages and practices established between the parties (LOA § 29 (5)). Thus, in the application of narrowly formulated grounds for the creation of a right of claim of a third party, if a dispute is settled under the provisions concerning the interpretation of the contract, the right of claim may be inferred from the purpose and the circumstances of conclusion of the contract similarly to what is seen with PECL article 6:110 (1).

If the parties to the contract have not provided for the right of claim of a third party upon the conclusion of the contract and such a right does not arise from the interpretation of the contract, a party not participating in the contract may file a claim for compensation of damage under, *e.g.*, LOA § 81.

Besides the general protection obligation (LOA § 2 (2)), the Law of Obligations Act provides for the specific duty of considering the interests or rights of third parties to an extent equal to the interests or rights of the creditor (LOA § 81). Protection obligations in respect of third parties are mainly created in the case of experts.⁵⁰ The Law of Obligations Act provides for the liability of an expert both if the expert's activity is based on a contractual relationship, from which protection obligations with respect to third parties can be inferred, and if the situation is one in which a third party may have trusted an expert's opinion and therefore suffered loss without the expert being aware, when expressing the opinion, of its impact on the proprietary or other interests and rights of the third party. The obligation to take into account the interests and rights of a third party gives the third party who has suffered damage the right to claim compensation for the damage from the person thus obliged. The granting of this right today, when professional assistance has become extremely important in the conclusion of transactions, is especially important. Knowledge of different areas of life has become increasingly specific; hence, trust in professional advice should be justified and also legally protected. The liability of experts in today's legal systems has become more and more specific (doctors' liability, lawyers' liability for their professional activities, auditors' liability, etc.). As opposed to adopting the general wording of the German BGB § 311 III 2, Estonian law has attempted to formulate the prerequisites for liability in contracts as specifically as possible with respect to the obligation to protect third parties. According to LOA § 81 (1), a protection obligation with respect to a third party is presumed if, in the course of performance of the contract, the interests and rights of the third party are at risk to the same extent as the interests and rights of the obligee; the intent of the obligee to protect the interests and rights of the third party can be presumed; and the third party and the intent of the obligee to protect the interests and rights of the third party are identifiable by the obligor. Judicial practice has to provide more exact answers to the questions that may arise in practice when checking the requirements and conditions provided by law — *e.g.*, whether the intent of the creditor and the third party have to be personally identifiable by an expert or whether it may also be inferred if these circumstances were foreseeable, since the damage subject to compensation in the event of non-performance of contractual obligations has to be foreseeable by the person causing the damage. It is questionable whether an expert him- or herself could preclude or limit liability by agreement with a party to a contract under LOA § 106. Such an agreement would in any case be void as unreasonably precluding or restricting liability.

Knowledge has become increasingly more available in today's information society, which is why persons participating in ordinary social intercourse often rely on expert opinions without the latter being aware of it or having given their opinion on that particular relationship.⁵¹ The Law of Obligations Act provides for an expert's opinion not only on the basis of contract law but also on the basis of the provisions of tort law (LOA § 1048).⁵² One may thus say that a person should be protected under Estonian law if the person relies on an expert opinion given under or outside a contractual relationship. In contrast to German law, where the provisions of tort law restrict the right of a third party who has suffered damages to claim compensation for purely economic loss⁵³, there are no restrictions in Estonian law that would preclude such a claim in the case of tort.

⁵⁰ See P. Huber, F. Faust. *Schuldrechtsmodernisierung. Einführung in das neue Recht.* München: C.H. Beck 2002, p. 72.

⁵¹ M. Coester, B. Markesinis. *Liability of Financial Experts.* – The AJCL 2003 (51), p. 275.

⁵² The inclusion of these grounds for liability in the Law of Obligations Act could be questioned, as damage caused by reliance on an expert's opinion as liability based on an expert's position of trust is not merely a specific problem of the law of obligations. See T. Uusen-Nacke. *Kolmandat isikut kaitsev leping. Asjatundja vastutus kolmandate isikute ees (A contract protecting a third party. Liability of an expert to third parties).* – *Juridica* 2003/8, p. 541 (in Estonian). As the Law of Obligations Act is applicable to any transactions provided for by law as well as transactions that are not covered by law but are not contrary to the content and meaning of law, claims arising from the reliance liability of an expert may also arise from other legal relationships.

⁵³ M. Coester, B. Markesinis (Note 51), p. 278.

8. Liability for non-performance of obligations

If a debtor does not perform its obligations or meets them in a manner not in accordance with the requirements, the legal order has to regulate whether the creditor may receive remedies, which ones, and in which cases the debtor in breach is released from liability.

There are many ways to regulate non-performance of obligations and liability — based on the kind of non-performance, the legal remedies, or the kind of obligation not properly performed.^{*54} Estonian law regulates liability for non-performance based on the type of legal remedy applied. A debtor is released from liability in a contractual relationship only if there are circumstances of *force majeure* (LOA § 103 (1)). The LOA has thus transposed the principle of so-called control liability^{*55} prescribed in CISG article 79, PECL article 8:108, and PICC article 7.1.7, according to which a party to a contract is released from liability for non-performance if he proves that it is due to an impediment of *force majeure* — *i.e.*, circumstances that are beyond the control of the obligor and which, at the time of the conclusion of the contract or the non-contractual obligation arose, the obligor could not reasonably have been expected to take into account, avoid, or overcome the impediment or the consequences thereof which the obligor could not reasonably have been expected to overcome.^{*56}

According to LOA § 100, non-performance is failure to perform or defective performance of an obligation, including a delay in performance. Estonian law thus recognises the unitary concept of non-performance of obligation^{*57} similarly to PICC article 7.1.1, which is why it is generally irrelevant from the viewpoint of application of legal remedies which obligation was not performed or how, although the right of application of a legal remedy may depend on the nature of the non-performance (*e.g.*, the right to legal remedy may depend on whether the breach was fundamental or not; see LOA § 222 (2)). The definition of a non-performance as formulated in LOA § 100 covers both excusable and inexcusable non-performance. Non-performance is an objective fact and has to be assessed only on the basis of whether the contract has been duly fulfilled or not. The reasons for which a contract was not duly performed, whether objective or subjective, are irrelevant. The central concept of the legal regulation of breach of contract is fundamental breach, which basically corresponds to what is stated in CISG article 25.^{*58}

In the event of a non-performance, the creditor may be granted legal remedies, whose application may depend on other prerequisites besides the non-performance. In contracts where the creditor has obligations to the other party, the creditor may exercise the right to refuse to fulfil the contract (LOA §§ 110, 111). The main legal remedies granted to a creditor by law are requiring specific performance and claiming compensation for damage, the right to withdraw from the contract, and the right to reduce the price. In certain contracts, a party may make a new and conforming tender to cure the non-performance itself, or causing others to do this, and claim from the party in breach compensation for reasonable expenses.^{*59}

The importance of requiring specific performance in the field of contractual obligations arises from LOA § 8 (2), according to which a contract is binding on the parties. Besides what is stated in the aforementioned provisions, LOA § 76 (1) also obliges the debtor to performance. LOA § 108 sets out the prerequisites for requiring specific performance as a legal remedy. According to LOA § 108 (1), a party may require specific performance without limitation in the case of non-performance of a monetary obligation, but the debtor may require the performance of a non-monetary obligation only if there are no circumstances precluding it. LOA § 108 (2) specifies the cases when a claim for performance of a non-monetary obligation must not be filed — *i.e.*, the debtor's arguments, which the debtor may submit also extrajudicially.

Requiring specific performance is balanced in Estonian law with other legal remedies, from among which the party to the obligation who has suffered damage may choose the one best suited to the circumstances. Requiring specific performance also covers a request for remedying the non-performance and substitution, which may be allowed in the case of certain contracts only in the event of a fundamental breach (*e.g.*, non-performance of a sales contract if the purchaser is not a consumer, LOA § 222 (1)). The performance of

⁵⁴ See, *e.g.*, The Principles of European Contract Law and Dutch Law. A Commentary. D. Busch, E. Hondius (eds.). The Hague: Ars Aequi Libri, Nijmegen&Kluwer Law International 2002, p. 325 ff.

⁵⁵ T. Wilhelmsson. Towards a (Post) modern European Contract Law. – *Juridica International* 2001 (6), pp. 26; P. Schlechtriem. Commentary on the UN Convention on the International Sale of Goods (CISG). Oxford: University Press 1998, p. 600 ff.; The Principles of European Contract Law and Dutch Law (Note 54), pp. 341 ff.

⁵⁶ See P. Schlechtriem (Note 55), p. 600 ff.

⁵⁷ The unitary concept of non-performance is also recognised by the PECL (Art. 8:101 (1)), PICC (Art. 7.1.1.), and the new Dutch Civil Code (Art. 6:74).

⁵⁸ The CISG has played a decisive role in the development of the concept of fundamental breach in European law. L. Graffi. Divergences in the Interpretation of the CISG: The Concept of 'Fundamental Breach'. – The 1980 Uniform Sales Law. Old Issues Revisited in the Light of Recent Experiences. Verona Conference 2003. F. Ferrari (ed.). Sellier: European Law Publishers 2003, p. 310.

⁵⁹ For instance, a customer's right to improve the work under LOA § 646 (5) or have the work improved.

monetary obligations may be required in the case of non-performance of obligations without the debtor having the right to object (LOA § 108 (1)). In the case of mutual contracts, the party in breach may demand performance by the other party even if the party in breach cannot be required to perform its obligations because of the objections described in LOA § 108 (2). The most important change from the stipulations of the pre-reform law, however, lies in the debtor's objections prescribed using the example of PICC article 7.2.2 and PECL article 9:102, upon the making of which the debtor is no longer entitled to require specific performance (LOA § 108 (2)). The Civil Code that regulated obligation until 1 July 2002 provided that an obligation ended upon impossibility of performance. The Law of Obligations Act has created a situation where the impossibility of performance, regardless of the time of its emergence, does not terminate the obligation but entitles the creditor to choose the legal remedy suited to him or her under the particular circumstances. Distinction between the impossibility of performance of an obligation (LOA § 108 (2) 1)) from the prohibition on requiring specific performance where performance is unreasonably burdensome or expensive for the debtor as prescribed in LOA § 108 (2) 2) may prove to be complicated in practice. When should it be decided whether performance is impossible for some objective reasons — *i.e.*, circumstances beyond the control of the debtor — or whether the impossibility is subjective and relates to the unreasonably great expense of potential performance? Where impossibility is of a temporary nature and the creditor has not exercised the right to terminate the contract, the requirement of specific performance may be submitted to the debtor when the impossibility ceases to be. Impossibility of performance under LOA § 108 (2) 1) should cover instances of objective impossibility, which do not fall under LOA § 108 (2) 2)–4).

Withdrawal from a contract as a legal remedy entitles a party to unilaterally step out of a contract if the other party is in breach of the contract so that there is no interest in continuing the performance of contractual obligations. This is an important contractual legal remedy. Estonian law provides for two kinds of termination of contracts: termination with retroactive power or *ab initio* (*Rücktritt*) and termination aimed at the future (*Kündigung*). The latter is possible in long-term contracts on general preconditions, which are set out in the general part of the Law of Obligations Act for all types of contracts, and the prerequisites set out in the special part of the act that relate to particular types of contracts. A contract may be cancelled, as a rule, only by granting an additional period for performance, except in the case of a fundamental breach. The right to cancel a contract for good reason has caused problems in practice. Courts have admitted as good reason the duties of a local government in ensuring school attendance in situations where it is compulsory, which has served as justification for extraordinary cancellation of a lease contract, as well as any personal interest in using the leased premises for reasons other than leasing.

Most problematic, however, is the definition of fundamental breach set out in the Law of Obligations Act, whose wording is based on PICC article 7.3.1.⁶⁰ This particularly concerns LOA § 116 (2) 1), according to which a breach of contract is fundamental if a party is substantially deprived of what the party was entitled to expect under the contract, except in cases where the other party did not foresee such consequences and a reasonable person could not have foreseen such consequences under the same circumstances, and LOA § 116 (2) 2), according to which a breach is fundamental if, pursuant to the contract, strict compliance with the obligation that has not been performed is the precondition for the other party's continued interest in the performance of the contract. LOA § 116 (2) 2) should be interpreted as restricting here, by limiting the fundamental nature of a breach by the condition that a party may have foreseen a loss of interest in performance upon non-performance of the obligation. Despite strict regulation limiting the right to withdraw from a contract only to fundamental breaches, it is possible under Estonian law to interpret the provisions so that withdrawal from the contract is possible in the case of practically any violation. This would expose the party in breach of the contract to an indefinite risk when performing the contractual obligation. The example of BGB § 323 (2) 2) should be considered, under which the right of withdrawal is limited to only a breach of the terms for the time of performance.

Another problem is considering a breach fundamental when it is due to intentional and gross negligence (LOA § 116 (2) 3)). The introduction of a subjective criterion to the assessment of a non-performance of a contractual obligation is not in line with the doctrine of fundamental breach and would substantially reduce the opportunity of a debtor to improve his or her situation during an additional period for performance. Neither the German nor the Dutch Civil Code, nor the CISG, contains a regulation similar to the Law of Obligations Act. The PICC is closest to the regulation of the LOA, but the PICC provides for an additional period for performance only in the event of delay in performance, and it also presumes the non-performance of a fundamental obligation. Thus, the situation has not been regulated anywhere in the same way as in Estonian law.

The law of obligations prescribes the general obligation to provide an additional period for performance upon withdrawal from a contract. However, the broad regulation of cases of fundamental breach substantially reduces the role of the additional period among the debtor's objections. An addition to LOA § 116 should be considered, based on the example of the second sentence of BGB § 323 (5), and the possibility to

⁶⁰ See the concept of fundamental breach in CISG Art. 25. P. Schlechtriem (Note 55), p. 174 ff. The CISG had great influence on the wording of the PICC regulation.

terminate a contract by granting an additional period even in the case of a non-fundamental breach should be precluded.^{*61} For example, the CISG ties the grant of an additional period to only failure to perform an obligation by the prescribed time, not any other non-performance of a contractual obligation.^{*62} The PICC and PECL also stipulate a delay in performance as the only prerequisite for granting of an additional period.^{*63}

The issues of unilateral termination of a contract should be elaborated upon where sales contracts and contracts for services are concerned, particularly based on the EU directive regulating consumer sale. Although the requirements should be met formally, the relation between the general part and special provisions requires elaboration. An addition should be considered based on article 401 (2) and article 404 (2) and (3) of the draft contract for the regulation of the sale of goods in the European Union by the Study Group on the European Civil Code, which limit the application of the general grounds for withdrawal to sales contracts. Similar principles are contained in a draft pertaining to many other types of contract.

The LOA regulates termination of contract as a legal remedy in a non-mandatory capacity. Judicial practice has to draw the line here as to the kinds of contracts for which and the extent to which agreements on the limitation of liability are allowed.

The draft European Civil Code, which should cover the entirety of private law through uniform rules, allows for the development of the common part of different legal orders so that the competition between fora would lose its special topicality. Unification on the level of provisions is probably attainable in the near future. Application of the content of the provisions and of rules under specific circumstances, however, will continue to depend largely on the legal culture and legal methods of the particular state. Estonia's contribution to the development of a unified civil law should lie not so much in extensive legal practice as in the proposal of a system of well-formulated rules and efficient regulation.

⁶¹ See P. Huber, F. Faust. *Schuldrechtsmodernisierung. Einführung in das neue Recht*. München: C.H. Beck 2002, p. 188.

⁶² P. Schlechtriem (Note 55), pp. 395–398.

⁶³ A. Hartkamp. *The UNIDROIT Principles for International Commercial Contracts and the Principles of European Contract Law*. – *European Review of Private Law* 1994/2, p. 351; *Principles of European Contract Law: Parts I and II*. Prepared by the Commission on European Contract Law. O. Lando, H. Beale (eds.). The Hague, London, Boston: Kluwer Law International 2000, pp. 123 ff., 359 ff.