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REASONABLENESS IN EUROPEAN AND CHINESE CONTRACT LAW A COMPARATIVE LAW STUDY

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INTRODUCTION

Contemporary private law, in the last few decades, has been increasingly characterized by the spread of general clauses and standards and by the growing role of interpreters in the framework of the sources of law[1]. This process has also consistently affected those systems that are not typically centered on judge-made law. In particular in contract law general clauses and standards have assumed a leading role and have become protagonists of processes of integration and harmonization of the law[2]. Within this context, the reasonableness clause has come to the attention of scholars[3], emerging as a new element of connection between different legal systems -first of all between common law and civil law – and even between different legal traditions.

The broad, undetailed content and the flexibility of general clauses and standards serve well the legal harmonization processes, satisfying the quest for uniform criteria leaving room for local differences. However, it is precisely in the encounter with the differences that the effectiveness of the harmonization process is measured. Indeed, reasonableness is a concept which has deep roots both in the Western Legal Tradition, in particular in the common law subtradition, and in the Eastern Legal

[1] See S. GRUNDMANN, D. MAZEAUD (eds), *General clauses and standards in European contract law: comparative law, EC law and contract law codification*, The Hague, *Kluwer Law International*, 2005, Private law in European context series. For a wider reflection on the change of legal dimension in contemporary law, focusing on the emergence of a new pluralism, also in the field of the sources of law, see O. ROSELLI, *The Ever Changing Legal Dimension and the Controversial Notions of Law and Science*, in *Informatica e diritto*, year XXXIX, Vol. XXII, 2013, p. 27

[2] In addition to S. GRUNDMANN, D. MAZEAUD (ed.), *General Clause and Standards in European Contract Law*, cit., see, also O. LANDO, *Is Good Faith an Over-Arching General Clause in the Principles of European Contract Law?*, in *European Review of Private Law*, 2007, p. 841 ff. E. NAVARRETTA, *Good Faith and Reasonableness in European Contract Law*, in J. RUTGERS and P. SIRENA (Eds.), *Rules and Principles in European Contract Law*, Cambridge, Intersentia, 2015, p. 135.

[3] See S. TROIANO, *To What Extent can the Notion of Reasonableness Help to Harmonize European Contract Law? Problems and Prospects from a Civil Law Perspective in European Review of Private Law,* vol. 17, n. 5, 2009, p. 752.

Tradition, where it has emerged as a typical element of the Chinese legal culture[4]. Thus, a comparative study in this concept seems worthy of interest, especially in a context such as the present one, characterized by an increasingly intense interrelation between different and even very distant legal systems.

This research aims at reconstructing the patterns of emersion and evolution of the principle of reasonableness in contract law both within European Union Law and in the Chinese legal system, in order to identify evolutionary trends, processes of emersion and circulation of legal models and the scope of operation of the principle in the two contexts.

In view of the increasingly intense economic relations between Europe and China, within the framework of the new project called Belt and Road Initiative[5], a comparative survey of this type can foster mutual understanding and make communications more effective, at the level of legal culture and commercial relations, and to support the processes of supranational harmonization of contract law rules.

The first chapter of the thesis will be dedicated to identify the origin of the concept of reasonableness in the Western Legal Tradition. To this regard it will be analyzed, first of all, the common law system in which this notion was originally formulated in the XII century, and still today plays a central role. Through a study of the evolution of the case law on the subject, and the exam of the relevant statutory law (namely the Unfair Contract Terms Act), it will be outlined the main features of this concept as expressed in the common law tradition. Another significant development of the concept of reasonableness can be spot in the field of the international commercial law. In this part of the research, therefore, it

[4] See, in the first instance, G. P. FLETCHER, *The Right and the Reasonable*, *Harvard. Law Review*, 1985, p. 930; M. TIMOTEO, *Vague Notions in Chinese Contract Law: The Case of Heli*, *European Review of Private Law*, 2010, p. 939.

[5] China's Belt and Road Initiative (BRI), sometimes referred to as the New Silk Road, was launched in 2013 by President Xi as a massive infrastructure project that would stretch from East Asia to Europe and able to shape a new framework of trade and development processes for economies in Asia and beyond.

will be carried out a thorough investigation of conventions (such as the United Nations Convention on Contracts for the International Sale of Goods), and other soft law instruments (such as the UNIDROIT Principles on international commercial contracts) that have adopted reasonableness as a standard in their rules.

The second chapter will focus on the European Union in which, within the ongoing process of harmonization of the private law among Member States, the notion of reasonableness is increasingly employed in legislation (especially directives regarding the consumer law), case law of the European Court of Justice, and in other important soft law instruments (such as the Draft Common Frame of Reference). After an exam of the hard law and soft law instruments adopted in the field of the harmonization of contract law, the research will provide a reconstruction on how the reasonableness has been integrated in the EU contract law, also by studying the use of this concept made by the European Court of Justice in some significant decisions.

The last chapter will take into consideration the notion of reasonableness in China and its evolution starting from the traditional Chinese law. An introductory exploration into the philosophical and ethical background of the concept will be made in order to outline the specific local traits of this concept. Then a reconstruction of the complex evolution of the Chinese contract rules in modern and contemporary era will be made. As we will see this evolution has been characterize by the entry of Western legal models into the Chinese legal system and by massive operation of legal transplants. In this context I will reconstruct the entry of the concept of reasonableness in the modern Chinese legal system and the most recent developments about this concept both at the legislative and the judicial level will be analyzed.

CHAPTER I

AT THE ROOTS OF REASONABLENESS IN EUROPEAN LAW

SECTION 1 - REASONABLENESS IN CONTRACT LAW AS A CONCEPT OF THE COMMON LAW TRADITION

1. The concept of reasonableness in Common Law: General aspects

1.1 Semantic and cultural elements of reasonableness in the Western Legal Tradition

The etymological origin of the word reasonableness and the corresponding expressions in other European languages (i.e. ragionevole, raisonnable, ecc…), although filled with ambiguities, is to be found in the Latin term *rationabilitas* whose roots derives from the verb *reor*, to think, as opposed to the verb *computo*, to count[6]. Beside this etymological reconstruction, another one has raised the attention of modern scholars. In this second approach, the Latin term *ratio* is used to translate the Greek terms *logos*, *dianoia* and *noima*: reason, intellect, meaning, i.e. identifies both a characterization of phenomenal reality and a connotation of the human intellect. In this perspective, the latin word *ratio* recalls both the object of the learning activity and the activity itself[7].

Reasonableness as a concept also recalls Aristotle's Nicomachean Ethics and its specific reference to the virtue of *phronesis*, by which "the means are calculated to obtain a good goal in things that are not the object of art"[8]. It is very well known that Aristotle's philosophy can be classified,

[6] In this reconstruction, reasonableness is seen as a form of rationality as opposed to logical calculus and deduction: it takes place naturally in the public sphere. See. S. ZORZETTO, *Reasonableness*, in *The Italian Law Journal*, vol. 1, n. 1, 2015, pp. 112-113.

[7] See A. RICCI, *Il criterio della ragionevolezza nel diritto privato*, Cedam, Padova, 2007, p. 2 ff. The author recalls also the work of E.G. SARACENI, *L'autorità ragionevole. Premesse per uno studio del diritto canonico amministrativo secondo il principio di ragionevolezza*, Giuffré, Milano, 2004.

[8] ARISTOTELE, *The Nicomachean Ethics*, edited by L. BROWN, translated by D. ROSS, Oxford world's

in very general terms, in two parts according to the existence of two basic types of intellectual virtues by which human beings live their lives: wisdom and *phronesis*. The first, wisdom, is used to discover and comprehend the external world, physical and metaphysical; in fact, it can be gained and increased throughout one's life through experience and time. Aristotle's wisdom is more similar to a scientific knowledge that potentially is a feature of any intellect. On the contrary, the second intellectual virtue, *phronesis*, cannot be acquired through education, i.e. cannot be drawn from books or any other form of codified source of information, because it is learned and built through the exercise of social interaction and everyday life experiences[9].

Phronesis "is concerned with human affairs"[10] and it therefore depends on time and experience in the context of every individual's life and his/her social encounters thus granting to human beings the ability to make good judgements and decisions throughout life. Reasonableness, in Aristotele's idea is expression of practical wisdom, that adapt to reality and changes in harmony with the changing of circumstances, therefor to act with reasonableness means to search for the "golden mean"[11]. However, *phronesis* does not only refer to the idea of taking good decision in one's self interest only, but it also regards the human virtue of being able to take the best decision so as to grant the general welfare. In order to do this, the wise man will take a final decision only after having analysed all the facts[12]. These aspects of the intellectual virtue of *phronesis* are probably the most interesting to those investigating its legal implications; it identifies the capability of men and women to act according to a balance between its personal interest with that of mankind[13]. Indeed, the judge in

classics, Oxford, 2009. The words are in book IV, introduction.

[9] As has been outlined by S. PENNICINO, *Legal Reasonableness and the Need for a Linguistic Approach in Comparative Constitutional Law*, in *Comparative Legilinguistics*, vol. 2, 2012, p. 27.

[10] ARISTOTELE, *The Nicomachean Ethics*, cit., book IV.

[11] See G. FASSÒ, *Storia della filosofia del diritto*, vol. I, *Antichità e medioevo*, Il Mulino, Bologna, 2001, p. 86 ff.

[12] A. RICCI, *Il criterio della ragionevolezza nel diritto privato*, cit., p. 4.

[13] S. PENNICINO, *Legal Reasonableness and the Need for a Linguistic Approach in Comparative Constitutional Law*, cit. p. 27.

order to decide a case, will consider all the possible interpretative solutions, eliminating one by one until only one will remain: the one that is justified on the basis of factual circumstances[14]. Moreover, *phronesis*, operates according to the contingency typical of real life experiences; as a consequence it implies that the same "good and correct goal" cannot be reached with the same means and the same behaviours at any time and in all places[15].

The contrast between wisdom and *phronesis* also lies in the different aim they have. One is finalised to find the true and only answer to describe a state of facts, or to solve an issue, and such an answer could not, as a necessity, be different; on the contrary, the latter does not have the aim of finding a single answer which corresponds to the truth, but rather it takes under consideration the specific differences and the unpredictable sides of life, i.e. *phronesis* refers to the margin of discretion belonging to individuals in deciding how to act, even in those cases where they lack freedom. In other words, *phronesis* is, according to Aristotle, that specific form of wisdom which allows men and women to decide, in all sorts of situations, what are the best means to reach a determinate goal[16].

In the semantic evolution of the word *ratio* and its derivatives, some other meanings were introduced, some linked to the technical nature of the term (count) and other related to the more theoretical one of "thought". Under the latter aspect, the term was then adopted and reinterpreted by the Christian culture.

This is evident in Saint Augustine's distinction between *rationalis* and *rationabilis* where the first refers to rationality as a (potential) human

[14] See G. BONGIOVANNI, C. VALENTINI, *Reciprocity, Balancing and Proportionality: Rawls and Habermans on Moral and Political Reasonableness*, in G. BONGIOVANNI, G. SARTOR, C VALENTINI (eds.), *Reasonableness and the Law*, Springer-Dordrecht, Berlin, 2009, p. 79 ff.
[15] See C. PERELMAN, *The Rational and the Reasonable*, in *The New Rhetoric and the Humanities. Essays on Rhetoric and its Applications*, Reidel Publishing Company, Berlin, 1979, p. 117 ff.; A. ARNIO, *The Rational as Reasonable. A Treatise on Legal Justification*, Reidel, Frankurt, 1987.
[16] S. PENNICINO, *Legal Reasonableness and the Need for a Linguistic Approach in Comparative Constitutional Law*, cit. p. 27.

feature, while the second is rather to be used to value the quality of actions and statements, thus qualifying reason with a divine connotation[17]. Saint Augustine affirms that law is supreme reason and only to the rational soul is the natural law manifested. This idea can be found also in the perspective of St. Thomas, who affirms that law and reason go hand in hand[18].

From these common cultural premises, a different evolution affected the principle of reasonableness in Civil and Common law legal traditions. While in the former, notwithstanding the presence of this principle both in canon law and in medioeval *ius commune*[19] the modern civil codes make little room to reasonableness in the discipline of the law of obligations, in Common law, reasonableness has been embodied in the legal reasoning of the Courts, giving rise to some paradigmatic uses of this concept in Contract law and more in general in what the civil law tradition calls law of obligations.

According to one of the most well-known scholars who worked on this topic this is the outcome of a difference in the "patterns of discourse" in the two legal traditions. "The reliance on the concept of reasonableness reveals a holistic style of legal thought. The opposition of civil law methodology relies on structured or layered principles to achieve the same result. (…) Holistic legal thought is based on the use of force in self-defense. The word 'reasonable' facilitates this way of thinking"[20].

1.2 Definition of reasonableness

As a matter of fact, in the English law reasonableness is a core and commonplace concept[21]. We can find this expression, for example, in tort

[17] A. RICCI, *Il criterio della ragionevolezza nel diritto privato*, cit., p. 6.
[18] Nature is considered created by God and in this perspective the rules that men must follow are just since created by God. See G. FASSÒ, *Storia della filosofia del diritto*, cit. p. 196 ff.
[19] See S. ZORZETTO, *Reasonableness*, cit. p. 109.
[20] G.P. FLETCHER, *The Language of Law: Common and Civil*, in B. POZZO (ed.), *Ordinary Language and Legal Language*, Giuffré, Milano, 2005.
[21] See G.P. FLETCHER, *Comparative Law as a Subversive Discipline*, in *American Journal of Comparative Law*, 1998, p. 683; the author observes that "*One of the most striking particularities of common law legal discourse is its pervasive reliance on the term 'reasonable*.' *English-speaking*

law cases in order to indicate the standard of "reasonable care" required to avoid a negligence claim; or it can be used in judicial review as a criterion to determine if an act was discretionary or not. We also find this expression in related words as the adjective reasonable/unreasonable or the adverb reasonably/unreasonably. One can also find very often in legal discourses reference to expressions such as reasonable time, reasonable delay, reasonable reliance, and so on.

The scope of application of "reasonableness" is so wide that its content is different in many aspects. Salmond said that: "*It is extremely difficult to state what lawyers mean when they speak of 'reasonableness'. In part the expression refers to ordinary ideas of natural law or natural justice, in part to logical thought, working upon the basis of the rules of law.*" [22] It has been pointed out that the reasonableness represents a standard according to which apply the rule of the concrete case, i.e., a criterion for ascertaining the judicial decision.[23] The courts therefore will apply the "test of reasonableness", in order to determine whether a person's behavior is reasonable with respect to the other opposing interests involved in the specific case[24]. Indeed, this is a typical feature of the English legal thinking "*according to which the principles of the law may only arise from experience*."[25]

The reasonableness is a very ancient concept in common law as its

lawyers routinely refer to reasonable time, reasonable delay, reasonable reliance, and reasonable care."

[22] J. SALMOND, *Book review: jurisprudence,* in Glanville L. Williams (ed.), *Modern Law Review*, 1947, p. 437.

[23] See S. PATTI, *Ragionevolezza e clausole generali*, Milano, 2016, p. 8. As G.P. Fletcher noted "*the common law does not insist upon the right answer at all times but only a reasonable or acceptable approach to the problem*" (see G.P. FLETCHER, *Comparative Law as a Subversive Discipline*, cit., p. 683).

[24] To this regard Oliver Wendell Holmes and others scholars emphasize the importance of this concept by affirming that "*law is right reason*" (see H.A. SCHWARZ-LIEBERMANN VON WAHLENDORF, *Le juge "législateur", L'approche anglaise*, in *Revue internationale de droit comparé*, 1999, p. 1110. See also S. TROIANO, *To What Extent Can the Notion of 'Reasonableness' Help to Harmonize European Contract Law? Problems and Prospects from a Civil Law Perspective*, in *European Review of Private Law*, 2009, p. 751, who pointed out that in all fields of the law English courts used the standard of reasonableness as ground for their decisions.

[25] See S. TROIANO, *To What Extent Can the Notion of 'Reasonableness' Help to Harmonize European Contract Law? Problems and Prospects from a Civil Law Perspective*, cit., p. 752.

origin can be dated back in the law of the XII century, but its major development took place during the XV century with the Courts of Equity and, more precisely, the Court of Chancery.[26] Indeed, as René David pointed out, in order to mitigate the strict application of the *stare decisis* rule, the judges resorted to the technique of the distinguishing but only if such distinctions appeared to be reasonable.[27]

Regarding the nature of this concept, it is quite debatable whether to consider the reasonableness as a general principle in the common law legal system. Indeed, we should keep in mind that in common law "principles" are not interpreted as general duty, even if judges may resort to general principles to help them with case interpretation and legal reasoning but they seldom quote general principles as the fundamental basis of their decisions. Therefore, when we deal with principles or general clauses in the common law systems, we have to be very careful.[28] In any case it has been pointed out that even if it can be defined as a legal standard it keeps a pragmatic essence so "*it does not change it to an abstract 'general clause', as it might be in the context of a codified system of civil law*".[29]

[26] On this aspect, see G. WEISZBERG, *Le "Raisonnable" en Droit du Commerce International*, thesis Paris II, 2003, Pace Database, n. 33, available at *https://www.lagbd.org/images/e/ef/Pour_le_Pr_TRICOT_%3D_Th%C3%A8se_de_Guillaume_Weiszberg_le_raisonnable_en_droit_du_commerce_international_%282%29.pdf*.
[27] *Ibidem.*
[28] J. CHITTY, H. BEALE, *Chitty on Contracts*, Sweet & Maxwell, Thomson Reuters, London 2012, p. 27. In the section named "*Fundamental Principles of Contract Law*", it notes that English law of contract considers a number of universe and significant norms as principles. However, such principles, such as the doctrine of privities of contract, the objectivity principle of agreement, the principle of interpretation of contract, are not of technical legal significance. Chitty argues that "*by the principle of freedom of contract and the principle of* pacta sunt servanda*: English law has expressed its attachment to a general vision of contract as the free expression of the choices of the parties which will then be given effect by the law. However, while the modern law still takes these principles as the starting-point of its approach to contracts, it also recognizes a host of qualifications on them, some recognized at common law and some created by legislation*". See also S. WHITTAKER, *Theory and Practice of the "general clause" in English Law: General norms and the Structuring of Judicial Discretion*, S. GRUNDMANN, D MAZEAUD (eds.), *General Clauses and Standards in European Law*, Kluwer Law International, Hague 2005, p. 59.
[29] See S. TROIANO, *To What Extent Can the Notion of 'Reasonableness' Help to Harmonize European Contract Law? Problems and Prospects from a Civil Law Perspective,* cit., p. 752. As G.P. Fletcher pointed out the reasonableness is a concept that differentiates the legal reasoning of the common law from the one of the continental civil law (see G.P. FLETCHER, *Comparative Law as a Subversive Discipline,* cit., p. 683 ff.).

Given this background, what is therefore the meaning of the reasonableness?

From a literal point of view, in the common language the definition of reasonableness is "*the fact of being based on or using good judgment and therefore being fair and practical*" [30], and also "*sound judgment; fairness: days which demand wise restraint and calm reasonableness, and quality of being as much as is appropriate or fair; moderateness: disputes about the reasonableness of certain costs*." [31] In the legal language, instead, the *Merriam-Webster's dictionary of law* explains "reasonable", as "*being in accordance with reason fairness, duty or prudence, and of an appropriate degree or kind, and supported or justified by fact or circumstance*."[32] While in the *Black's Law Dictionary* defines "reasonable" as "*Fair, proper, or moderate under the circumstances*" or "*According to reason <your argument is reasonable but not convincing>*".[33]

In the private law field, in both tort and contract, the standard of reasonableness is widely used, often making reference to a hypothetical "reasonable person" [34]. In the context of the law of obligation, the

[30] Cambridge Advanced Learner's Dictionary, 4th ed., Edited by Colin McIntosh, Cambridge University Press 2013.

[31] New Oxford English Dictionary (3 ed.), edited by Angus Stevenson and Christine A. Lindberg, Oxford University Press Print, Published online: 2011. The most obvious paronym of "reasonableness" is "reason", and in the A Dictionary of Modern English Usage, the notion of "reason" means "*be in the right*" or "*It stands to r. is a formula that gives its user the unfair advantage of at once invoking r. and refusing to listen to it*.". See H. W. FOWLER – D. CRYSTAL, *A Dictionary of Modern English Usage: The Classic First Edition*, Oxford, 2009.

[32] *Merriam-Webster's Dictionary of Law*, Merriam-Webster, Inc, USA, 2016.

[33] B. A. GARNER (eds.), *Black's Law Dictionary*, Thomson Reuters, 2004. The expression "under the circumstances" is an objective standard to determine whether someone has behaved reasonably — the circumstances should be considered, not the intent of the actor; while "according to reason" means "*every person believes to know what is or is not reasonable*." (see J. J. RACHLINSKI, *Misunderstanding Ability, Misallocating Responsibility*, in *Brook. L. Rev.*, 2003, p. 1055).

[34] G. P. FLETCHER, *The Right and the Reasonable*, in *Harvard Law Review* Vol. 98, No. 5, 1985, p949. See S. TROIANO, *op. cit.*, foot note 5 in which the author refers to Herbert who affirmed "*The Common Law of England has been laboriously built about a mythical figure – the figure of "The Reasonable Man". ... He is an ideal, a standard, the embodiment of all those qualities which we demand of the good citizen ... . This noble creature stands in singular contrast to his kinsman the Economic Man, whose every action is prompted by the single spur of selfish advantage and directed to the single end of monetary gain. The Reasonable Man is always thinking of others; prudence is his guide, and "Safety First" ... is his rule of life*" (A.P. HERBERT, *Uncommon Law*, London: Methuen Publishing Ltd, 1935, p. 2), and to MacCormick who argued that "*The reasonable man, that convenient legal fiction, is of course no paragon of virtue. He is neither saint, hero nor genius. He represents the Aristotelian virtue of prudence (prudentia, phronésis) in its ideal-typical form as a*

reasonable person behaves according to reasonable directions, i.e. he represents the "*ideal model of socially acceptable conduct, inspired by common sense and balance*".[35] Given the circumstances above described, for the purposes of the law the reasonable person is certainly not a person in flesh and blood, but "*Rather, it is a hypothetical figure (a figure of thought) that serves as a model for the judge when deciding on relevant legal issues. It measures what the legal system expects from real people and this person should behave, think, understand and react as a reasonable person (in the same situation and under the same circumstances) does*".[36] Indeed, the *Oxford dictionary of law* gives a definition of "reasonable person" as "*An ordinary citizen, sometimes referred to as the 'man on the Clapham omnibus'*[37]*. The standard of care in actions for negligence is based on what a reasonable person might be expected to do considering the circumstances and the foreseeable consequences. The standard is not entirely uniform: a lower standard is expected of a child, but a higher standard is expected of someone, such as a doctor, who purports to possess a special skill*"[38]. Moreover, it has been argued that the skills or competences that the reasonable man should not be the ones possessed by the parties, nor the ones of a "pedantic lawyer", but they must be determined objectively on the basis of the circumstances of the specific case.[39]

1.3. The shaping of the concept of reasonableness in contract law

golden mean between over cautiousness and rashness ... is represented best in philosophy as the "ideal impartial spectator" of Adam Smith, who derived the idea in part from David Hume." (see N. MACCORMICK, *On Reasonableness*, in C. PERELMAN & R. VANDER ELST (eds.), *Les notions à contenu variable en droit*, Bruylant, Brussels, 1984, p. 152).

[35] See S. TROIANO, *To What Extent Can the Notion of 'Reasonableness' Help to Harmonize European Contract Law? Problems and Prospects from a Civil Law Perspective,* cit., p. 751.

[36] P. GAUCH, W. SCHLUEP, R. SCHMID, S. JÖRGEMMENEGGER, *Schweizerisches Obligationenrecht Allgemeiner Teil*, Schulthess Verlag, 2020, p. 1.

[37] The "man on the Clapham omnibus" is an expression formulated for the first time in the 1932 case Hall v Brooklands Auto-Racing Club [1933] 1 KB 205.
In this decision Lord Justice Greer pointed out the need to refer to the average community standards when describing the "reasonable man".

[38] Oxford dictionary of law, Edited by Elizabeth A. Martin, Oxford University Press, 2003.

[39] See F. VIGLIONE, *Metodi e modelli di interpretazione del contratto, Prospettive di un dialogo tra common law e civil law*, Giappichelli, Torino, 2011, p. 122.

Contract law is one of the fields where reasonableness plays a very important role.

Indeed, in the "*Law of contract as in the law of tort, men is expected to live up to the standard of the reasonably prudent man*."[40] Professor Larry A. Di Matteo argued that, unlike the reasonable person in the law of tort, the reasonable person in contract law is a more specialized being, who precisely owns all the distinctive features of the contracting parties in the context of their interaction.[41] The notion of reasonableness in contract law therefore is more concerned with what people actually do in a specific context. Therefore, the construction of the concept of reasonableness needs to take into account the contractual context in which the parties express their intention. Thus, the substantive problem is to determine this contractual context.

On this basis, Professor Di Matteo refers that "*Courts look to a number of sources in constructing the contractual reasonable person. These sources include the characteristics of the parties, the totality of the circumstances surrounding the formation of the contract, and evidence of pertinent custom and trade usage. In essence, the reasonable person is constructed from the background of the transaction or relationship*"[42]. Thus he concluded that "*this background gives meaning to contracts and allows the reasonable person to be constructed*"[43].

Generally, a reasonable person should have the ability to assess the risk in the behavior, and to consider the adequacy of the behavior according to the possibility, the level and the foreseeability of related risk.[44] He/she usually has certain abilities and proper information and is aware of the surrounding circumstance.[45] In other words, the conducts of

[40] A. L. CORBIN, *Offer and Acceptance, and Some of the Resulting Legal Relations*, in *Yale L.J.*, 1917, p. 205.
[41] L. A. DI MATTEO, *The Counterpoise of Contracts: The Reasonable Person Standard and the Subjectivity of Judgment*，in *South Carolina Law Review*, 1997, p. 293.
[42] *Ibidem*, p. 293.
[43] *Ibidem*.
[44] J. J. FLEMING, Q*ualities of the Reasonable Man in Negligence Cases*, in *Missouri Law Review*, 1951.
[45] *Ibidem*.

the person are based on his/her own abilities, knowledge, and observation and reflection on the circumstance. In terms of the characteristics of the parties, the behaviors of the parties should therefore to be taken into account. The court should also take into account the language used by the parties when interpreting the reasonable person in concrete.

According to the circumstances the reasonable person standard may vary. From a general perspective, natural persons are divided into those with full capacity, those with limited capacity, and those without a capacity based on their age and health status. A reasonable person's capacity is therefore also centered on cognitive ability, including attention, judgment, and other elements.[46]

The reasonable person needs to be determined with reference to the position of the parties in the specific circumstances of a case. These circumstances include the object and the place of the act, or the habits that influence the way of thinking.[47] In a case of apparent authority, for example, the place where the act of agency takes place also affects the judgment of the reasonableness of reliance, and if the agent concludes a contract with the opposite party at the branch of the agent or with the employee of the agent, the reasonableness of the opposite party's reliance will be enhanced[48]. The court's interpretation of the "contractual background" based on the evidence is the process of approximation to the situation at the time of the contract, which constitutes the basis for the prediction of the behavior of a reasonable person.[49] All relevant

[46] See H.L.A. HART, *Punishment and Responsibility,* in Oxford University Press, New York, 1968, (focusing on the capacity to understand and reason).
[47] See C. M. JACKSON, *Reasonable Persons, Reasonable Circumstances,* in *San Diego Law Revie*w, 2013, p. 651.
[48] Hoddeson v. Koos Bros., 47 N.J. Super. 224, 135 A.2d 702, 1957 N.J. Super. LEXIS 631 (App. Div. 1957)
[49] See A. L. CORBIN, *Corbin on contracts*, Matthew Bender, London, 1963, p. 106, He said that "*before the court can give any meaning to the Chinese sentences in a contract and choose a meaning rather than other possible meanings as the basis for determining rights and other legal effects, it is always necessary to listen to external evidence to help the court understand applicable sentences and the surrounding circumstances that makes it necessary for relevant parties, objects and documents to apply the sentences. The meaning given to the sentences by the user, the meaning given by certain listeners and readers who discovered the sentences, the meaning given by those speaking standard English or the meaning given by rational, wise and intelligent people...No matter what the*

circumstances, therefore, must be considered by the court. [50]

Another element to define a reasonable person in the contract law field is "*evidence of pertinent custom and trade usage*" which is mentioned by Professor Di Matteo. Indeed, the relationship between customs, business practices and law are well-known in all legal systems.[51] In a commercial contract, some provisions might be difficult to understand for the common man, but not for those belonging to a specific business sector who are familiar with these customs or usages. Hence a reasonable person in commercial trading should be able to assess the language and words used in a contract as well as the meaning of the custom the words refer to.[52] As the view of Lord Diplock's in *Antaios CIA naviera SA v. salen rerierna AB (the Antaios) [1985]* AC 191201: "*If detailed and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense it must yield to business common sense*". In addition, Lord Hoffmann also put forward similar views in the case of *CO operational whole society Ltd V National Westminster Bank PLC* [1995] 1 EGLR 97, 99, "*Such a strong statement does not mean that one can rewrite the language used by both parties to make the contract conform to commercial common sense. However, language is a very flexible tool. If it can have more than one interpretation, people will choose the interpretation that seems most likely to achieve the commercial purpose of the agreement*"[53] Thus, "*If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other*."[54]

In conclusion, the reasonable person in contract law, if compared

court is trying to discover, the meaning would always be true."

[50] Rainy Sky SA v Kookmin Bank [2011] 1 WLR 2900.

[51] Some scholars believe that "*as long as the actual promises are expressed in the form recognized by the law or custom to establish effective rights among the promisees, any promisee authorized with the right of prediction shall have the right to enjoy the promise*". See G. K. GARDNER, A*n Inquiry into the Principals of the Law of Contracts*, in *Harvard Law Review*, 1932, p. 1.

[52] E. W. PATTERSON, *The Interpretation and Construction of Contracts*, in *Columbia Law Review*, 1964, p. 833.

[53] CO-operational whole society Ltd V National Westminster Bank PLC [1995] 1 EGLR 97, 99

[54] Rainy Sky SA v Kookmin Bank [2011] 1 WLR 2900

with the reasonable person in the tort law, has special characteristics. Therefore, when dealing with cases involving contract law, the court needs to refer to "a reasonable person" to explain the "meaning of both parties". This person has "*all the background knowledge that both parties could reasonably have obtained in the circumstances in which they entered into the contract".* And in doing so, this person will also consider *"the actual consequences of determining what it means*". "*Where necessary the reasonable observer can be invited notionally to take on the more active role of 'officious bystander', in order to interrogate the parties as to their common intentions*."[55]

2. Contract interpretation and the concept of reasonableness

2.1 Contract interpretation in the common law: evolutionary trends

A very close relation links reasonableness and interpretation of contracts.

From a general point of view, there have always been two different views on contract interpretation. One is linked to the subjectivist theory, which focuses on the autonomy of will and believes that the contract interpretation should aim at exploring the true meaning of the parties, instead of sticking to words. The other one is declaration theory, known as objectivism, which starts with the maintenance of legal order and believes that the inner meaning of the parties is unknown, so the contract can only be explained by the words expressed by the parties. In common law, objectivism has always occupied a dominant position in the contract interpretation. The scholars consider that almost all the issues such as the agreement and the declaration of will have been definite according to the objective attitude of the law, even though there are still disputes on those issues.[56]

Indeed, the traditional rules of contract interpretation attached great

[55] Arnold (Respondent) v Britton and others (Appellants) [2015] UKSC 36
[56] See D. M. WALKER, *The Oxford Companion to Law,* Clarendon Press, Oxford, 1980.

importance to the literal words of the contract and emphasized the interpretation according to the meaning of the words, forming the so-called literalism. According to an early authoritative case (*Roberson v. French*), the contract should be interpreted according to the literal meaning of the word and, specifically, the plain, usual and general meanings of words, unless the meaning has special understand due to business practice or other reasons.[57] If a party of the contract does not claim that any factor in the background of the contract makes an ordinary English term special, the court tends to understand it according to its ordinary meaning and make a decision based on whether the facts of the case conform to the ordinary meaning. When determining the ordinary meaning of a word, the court should take into account the contract as a whole.[58]

The traditional rules of contract interpretation may be summarized as follow. First, the purpose of contract interpretation is to find out the intention of both parties as indicated in the wording. Second, the common intention of the contract is to be interpreted according to the plain, general and literal meaning of the provisions, that is to say, it is necessary to strictly follow the literal meaning and form of expressions.[59] Third, the court does not generally accept external evidences, since the contractual interpretation should fall within the four corners of the contract, and therefore the external evidences are inadmissible[60].

However, the development of the judicial practice (and the development of the society as well) has revealed some disadvantages of these traditional interpretation rules. The main problem is that it is too

[57] Lord Ellenborough in Robertson v. French [1803] 102 E.R.
[58] Commonwealth Smelting v. GRB [1986] 1 Lloyd's Rep. 121at 126, CA. In another case it was stated that "*A contract must be interpreted as a whole, and its each clause must be recognized if possible*" (National Coal Board v. William Neill & Son [1985] Q.B. 300 at 319).
[59] Lord Hoffman said: "*It is not easy to recover the intellectual background against which the 18th and 19thcentury judges decided historical inquiry. What is, I think, beyond dispute is that their approach was far more literal and less sensitive to context than ours today*." BCCI v. ALI [2001] 1 UKHL 8
[60] Bank of Australia v. Palmer [1897] A.C. 540 at 545, PC; National Westminster Bank v. Halesowen Presswork [1972] A.C. 785 at 818, HL.

rigid to adhere to the text of the contract, and this could lead to an interpretation of the contract in the wrong perspective. Refusing to introduce external evidence makes the court unable to investigate the overall background of the contract, so it is difficult to determine the real intention of parties. This point is quite obvious in commercial contracts. In this sector only few contracts stipulate all the circumstances clearly without ambiguity. Once a dispute occurs, if the court is limited to the strict meaning of words to interpret the actual situation, it could be sometimes difficult to understand the transaction background and hence the parties' intention.

In order to avoid this shortcoming, the courts' approach to contract interpretation needs to be different whether the parties' intention is expressed or implied. [61] Therefore, if the contract terms are clear enough, the court can directly apply them[62]. On the contrary, when the contract terms are vague or conflicting, rules on contract interpretation can help the court determine the true meaning of both parties.

Lord Diplock pointed out that "*the object sought to be achieved in construing any commercial contract is to ascertain what were the mutual intentions of the parties as to the legal obligations each assumed by the contractual words in which they (or brokers acting on their behalf) chose to express them*" [63]. Therefore, English courts have been paying more attention to the background and context of the contract so that in case a term of the contract is inconsistent with the actual situation, it is possible to explore the true intention of the parties through the interpretation. Lord Diplock hereto said: "*If detailed semantic and syntactical analysis of a written contract lead to a conclusion that flouts business commonsense the contract must be made to yield to business commonsense.*"[64]

[61] Re Coward [1887] 57 L.T. 285 at 291, CA.
[62] Leader v. Duffery [1888] 12 App. Cas. 294 at 301, HL.
[63] Pioneer Shipping Ltd v BTP Tioxide Ltd (Teh Nema) [1982] AC 724
[64] Antaios Compania Naviera SA v Salen Rederierna AB [1984] 2 Lloyd's Rep. 235. In another case Lord Hoffman agreed and states that "*if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had*." (Investors Compensation Scheme

Thus, the trend in contract interpretation has moved away from strict literalist approach and the courts have gradually begun to focus on "purposive", "contextual" and "commercial" interpretation[65]. For example, in *Rainy Sky SA and others v Kookmin Bank*[66], the English Supreme Court highlighted a change in the interpretation of commercial contracts, as the courts, in order to give effect to the commercial purpose of the contract between the parties, have interpreted it in the context of the contract instead of the literal interpretation. Lord Clarke considered that the interpretation of a contract is still a return to commercial common sense and that where contractual terms have two meanings, the interpretation that is most consistent with commercial common sense should be chosen.

2.2 Reasonableness as a criterion for contract interpretation

This evolutionary trend in contract interpretation has been developing in order to better ascertain the intention of the parties. As judge Lord Nicholls wrote in the case *Hydrocarbons Great Britain v. Cammell Laird Shipbuilders* "*To the extent possible, the interpretation of the contract shall not frustrate the intent of the parties, which is the axiom of the law*."[67] The court therefore will also look beyond the wording to see the context in which the contractual terms were used and the purpose of the contracting parties why used them. The parties to the contract may provide relevant evidence identifying the persons and things referred to in the contract, as well as explaining the circumstances in which the contract was made. [68] The background information of the contract may also include previously concluded contracts, unless the parties have established that the contract has superseded the previous

Ltd. v West Bromwich Building Society [1997] UKHL 28).

[65] The "Diana Prosperity" [1976] 2 Lloyd's Rep. 621; Charter Reinsurance Co Ltd v. Fagan [1997]AC 313, HL; BCCI v. Ali [2001] 1 UKHL 8; The "Starsin" [2003] 1 Lloyd's Rep. 571; Rainy Sky SA and others y Kookmin Bank [2012] 1 Lloyd's Rep 34.

[66] Rainy Sky SA and others v Kookmin Bank [2011] UKSC 50.

[67] Hydrocarbons Great Britain v. Cammell Laird Shipbuilders [1991] 53 B.L.R. 84, CA.

[68] Shore v. Wilson [1842] 9 CL. & F. 355, HL.

contract.[69] However, it is important to note that this exception does not allow the court to look at evidence of negotiations prior to the formation of the contract or evidence of the subjective intent of the parties to the contract.[70] Moreover, when the exact wording of the contract may conduct to a misleading interpretation of the parties' intention, the reasonableness or "reasonable meaning" could have a very important role.

In order to better define how to interpret the contract going beyond the mere literal approach the standard of reasonable person has emerged as a fundamental point of reference.

In this regards, Lord Hoffmann, in the famous case *Investors Compensation Scheme Ltd. v West Bromwich Building Society*[71], expressed five factors regarding the contract interpretation, which included the need to interpret the contract according to what a reasonable person having all the background knowledge would had understood.[72] He specifically stated that "*the purpose of interpretation is to ascertain the meaning conveyed by a contractual document to a reasonable person. And that reasonable person knew the background knowledge reasonably available to the parties to the contract in the background in which the contract was mad*e."[73] He also observed that "*The meaning that contract documents convey to a reasonable person is not the same as the meaning of contract words. The meaning of words is determined by the dictionary and grammar, while the meaning of contract documents is the meaning that the parties using these words intend to have in a certain context. This context not only enables the reasonable person to choose the possible meaning of*

[69] HIH Casualty and General Insurance Ltd. v. New Hampshire Insurance Co. [2001] 2 Lloyd's Rep.161 at para. 81-84.
[70] Prenn v. Simmonds [1971] 1 W.L.R.
[71] Investors Compensation Scheme Ltd. v West Bromwich Building Society [1997] UKHL 28.
[72] These factors are: 1. What a reasonable person having all the background knowledge would understand; 2. Where the background includes anything in the "matrix of fact" that could affect the language's meaning; 3. But excluding prior negotiations, for the policy of reducing litigation; 4. Where meaning of words is not to be deduced literally, but contextually; 5. On the presumption that people do not easily make linguistic mistakes.
[73] In the same case Lord Wilberforce referred to this background, instead, as a "matrix of fact", which includes the factors that might have influenced a reasonable person in understanding the contract language.

ambiguous words but also enables them to determine the common wrong words or lexeme used by the parties for some reason." [74]

Similar remarks were made in *Re Sigma Finance Corporation [2009] UKSC 2*, where Lord Mance argued that in determining the meaning conveyed by a contract to a reasonable person with relevant background knowledge, it is more important to understand the context, and in interpreting controversial words the court should take into account the context of the contract as a whole.[75]

In a recent case *Arnold (Respondent) v Britton and others (Appellants)*, Lord Neuberger further elaborated the rules of contractual interpretation which were defined by Lord Hoffmann in *Investors Compensation Scheme Ltd. v West Bromwich Building Society*[76]. When interpreting a contract, the court is concerned to ascertain the intention of the parties to the contract through the meaning as understood by a reasonable person with the relevant background knowledge of the parties. The meaning of words in the contract "*has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions*."[77] The decision in *Arnold v Britton* makes very clear that the court will be limited to a certain extent in the exercise of its interpretive functions. It was held that where the natural meaning of a word is clear, the court cannot reinterpret it and give it a purposive meaning, even if

[74] Investors Compensation Scheme Ltd. v West Bromwich Building Society [1997] UKHL 28.
[75] Re Sigma Finance Corporation [2009] UKSC 2, paragraph 13, "*Of much greater importance in my view, in the ascertainment of the meaning that the Deed would convey to a reasonable person with the relevant background knowledge, is an understanding of its overall scheme and a reading of its individual sentences and phrases which places them in the context of that overall scheme. Ultimately, that is where l differ from the conclusion reached by the courts below. In my opinion, their conclusion elevates a subsidiary provision for the interim discharge of debts "so far as possible" to a level of predominance which it was not designed to have in a context where, if given that predominance, it conflicts with the basic scheme of the Deed*."
[76] Investors Compensation Scheme Ltd. v West Bromwich Building Society [1997] UKHL 28
[77] Arnold v Britton & Ors [2015] UKSC 36, Para 15

someone thought that the interpretation of the contract would have absurd or dire consequences.[78]

3. The use of reasonableness in case law

The use of the standard of reasonableness in English law has been mainly made in the Common law ie. in case law. Thus this concept is grounded on a body of cases which have decided particular questions arisen in litigation between parties. In this context we do not find reasonableness as a general principle. Due to the intrinsic nature of Common law, which is a case law where rules are not formulated in terms of general principles, the standard of reasonableness has been worked out for specific purposes and developed in specific applications.

The reasonableness in the case law may have several purposes such as assessing the validity of the terms of a contract, the entrustment of a party in relation to the conclusion of a contract, the identification and application of the implied terms, or the manifestation of the parties' intention with respect to the agreement signed.[79] Given the relevance of the notion of reasonableness in the contract interpretation provided by the English courts, in the following paragraph we will analyze how this concept has been applied in the case law.

3.1 Reasonableness in the "objectivity test"

As described in paragraph 2.1 the theory of objectivism in contract interpretation is usually preferred by the courts. The theory of objectivism has generated two related rules. The first one is that in case of a written contract the parties should include all matters in the agreement and consequently the court cannot allow testimony in order to prove a

[78] Based on Rainy Sky and Arnold v. Britton precedents, the Laird Resources LLP v Aumm Holdings Ltd [2015] EWHC 2615 (Comm) stated that clear provisions may lead to disputes arising from commercially unreasonable circumstances but it is unlikely that the court will twist the literal meaning of a provision for an alternative interpretation or an implied provision.
[79] See S. TROIANO, *La «ragionevolezza» nel diritto dei contratti*, Milan, 2005, p. 86.

different content of the written contract. The second one is that the contract terms should be interpreted rule according to usual standards, i.e. in the light of their common and general meanings. Therefore, when the courts seek to determine the intent of the parties, they need to rely on the content of the written contract or, in case of a non-written agreement, on the actions of the parties.

The case *Smith v Hughes* is a classic example on how courts applied the "objective test". The case was about a farmer named Smith who showed some samples of oats to a horse racing coach named Hughes who then ordered some of them. When the oats were delivered, Hughes said that the oats were not old oats (eaten by race horses) but new oats (also called green oats), so Hughes refused to pay. In fact, Smith's sample was green oats. When Blackburn J dealt with this case, he pointed out that "*The agreement of both parties should be judged by the objective standard of the bystander rather than the subjective standard of the parties: as long as the seller does not promise that the goods should have certain quality, even if the buyer thinks that the goods should have certain quality, the contract cannot be overturned. Because agreement is the objective standard of a reasonable third-party perspective: whether the objective behavior of both parties constitutes a consensus, regardless of what is in their minds. Because the subjective ideas of the parties can never be accurately framed and the scope of the content is endless and the rule of law is that stated in Freeman v Cooke. If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms.*"[80]

As shown in the case above examined, with reference to the objective test the concept of reasonableness is an essential part. Indeed,

[80] Smith v Hughes [1871] LR 6 QB 597.

the courts will assess the objectivity test according to what a reasonable person would think in the position of the other party. In assessing the intention of a reasonable person, the courts also need to take into consideration other factors such as the background of the contract and also the knowledge and experience of the interested parties. We should indeed always keep in mind that the "reasonable person" needs to be considered as an objective standard and therefore it refers to a hypothetical person and what this person would reasonably do or believe if he/she was in the same situation as the parties of the contract.

Apart from the fact that objective criteria are required in determining the reference to a "reasonable person" itself, the courts have often used the concept "reasonable person" in interpreting contracts in order to objectively identify the meaning of the words applied by the parties in the contract. For example, in *Arnold v. Britton*, Lord Hodge quoted a passage from Lord Clarke in *Rainy Sky SA v Kookmin Bank* when undertaking contractual interpretation: "*[T]he exercise of construction is essentially one unitary exercise in which the court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. In doing so the court must have regard to all the relevant surrounding circumstances. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other*" [81]. Lord Hodge further explained that the construction of the contract context, in which the concept of a "reasonable person" is applied, needs to be objective and requires a combination of relevant context and the words used, and the construction just offers the possibility of interpreting the parties' contractual meaning in terms of commercial reasonableness, rather than determining whether a reasonable

[81] Rainy Sky SA v Kookmin Bank [2011] 1 WLR 2900, para 21

tenant would have entered into the contract in the circumstances. Thus, the court, when applying the interpretation of "reasonableness (reasonable person)" to a case, the court need taking into account relevant factors such as the background, nature, form, commercial common sense and so on, and then to determine the objective meaning of the words the parties chose to use to express their agreement, not remedying these long-term contracts or restore a subjective intention of any party's.

3.2 Reasonableness and implied terms

The terms of the contract are all usually expressed, but in some occasions some terms may be implied. An implied term is a term that is not included in the agreement by the parties but its nevertheless part of the contract[82]. In practice, the parties may refer to a commercial or local practice as the background to enter into a contract, the contents whereof have been implicitly accepted by both parties as an integral part of the contract. There are different types of implied terms, namely terms implied by fact, terms implied in law, and terms implied by customs. Terms implied by fact may be included by the courts in order to give effect to the intention of the parties although it is not explicitly stipulated in the contract[83]. Terms implied in law may be included in the contract according to the law (case law and statutory law) although the parties are not willing to add the term in the agreement[84]. Terms implied by customs may be included by the courts in the contract according to the customs and

[82] For a complete analysis of the issue of implied terms see R. AUSTER-BAKER, *Implied Terms in English Contract Law*, Edward Elgar, London, 2017.

[83] In the case BP Refinery (Westernport) Pty Ltd v. Shire of Hastings [1977] 180 CLR 266 the Privy Council established a five stages test in order for the Court to establish if a term could be included in the agreement by facts: the implied term must be reasonable and equitable; the implied term must be necessary for the business efficacy of the contract; the term is so obvious that "it goes without saying"; the term must be capable of clear expression, ie. no specific technical knowledge should be required; the implied term may not contradict an express term. More recently the Supreme Court of the United Kingdom has reaffirmed the five stages test in the case Marks and Spencer plc v BNP Paribas Securities Services Trust Company (Jersey) Limited and another [2015] UKSC 72. See also The Moorcock case (1889) that will be discussed below.

[84] When implied by statute, Parliament may well make certain terms compulsory. Terms implied "in law" are confined to particular categories of contract, ie. employment contracts or contracts between landlords and tenants, as necessary incidents of the relationship. See Liverpool City Council v. Irwin [1976] UKHL 1; Crossley v. Faithful & Gould Hondings Ltd. [2004] EWCA Civ. 1466.

usages, on the persuasion that the parties relied on trade customs or practice to complete the content of the agreement[85].

Traditionally, given the principle of freedom of contract (according to which the parties are free to decide the content of the contract and it is not up to the courts to modify the contract), the courts are not inclined to rule in favor of this kind of terms. However, there are some circumstances in which the courts may decide that in a given contract there is an implied term taking into account the real intention of the parties.

This can be seen in the case of *Gardiner v. Gray*[86], in which a precedent for implied terms was firstly established. In this case, Gray showed Gardiner samples of some waste silk and offered to sell a certain amount of it to him. When the negotiation was concluded, the contract stated that "*twelve packs of waste silk are transacted at the price of ten shillings and six pence a pound*". At the time of delivery, Gardiner found that those twelve packs of waste silk were of much inferior quality compared to the samples. Hence, he brought a suit before the court for damages, but the court did not support his claim because he should have presented a written warranty proving that those twelve packs of waste silk were conform to the samples. The contract between the parties, in fact, only stated that "*twelve packs of waste silk are transacted at the price of ten shillings and six pence a pound*", so there was no written warranty regarding the quality. In earlier years, this might be the end of the case, but Gardiner argued that there should be an implied warranty in this transaction, namely that goods should have marketable quality. Based on this argument, Lord Ellenborough found that: "*He cannot without a warranty insist that it shall be of any particular quality or fineness, but the intention of both parties must be taken to be, that it shall be saleable in the market under the denomination mentioned in the contract between*

[85] Courts clarified that the party that has interest, should prove the existence of the custom, which must be certain, notorious, reasonable, recognised as legally binding and consistent with the express terms. See Hutton v. Warren [1836] 1 M&W 460; Cunliffe-Owen v. Teather & Greenwood [1967] 1 WLR 1421; Kum v. Wah Tat Bank Ltd [1971] 1 Lloyds Rep. 439; Con-stan Industries of Australia Pty Ltd v. Norwich Winterthour Insurance (Australia) Ltd. [1986] HCA 14.
[86] Gardiner v Gray [1815] 4 Camp 144.

them. The purchaser cannot be supposed to buy goods to lay them on a dunghill"[87]. The court, therefore, ruled in favor of Gardiner.[88]

With specific reference to the relationship between the implied terms and the reasonableness, the courts have used in some cases this concept to recognize the application implied terms in a given contract. This has been the case specifically for terms implied by fact that, as mentioned above, are used by courts to "fill the gaps" in the contract and give effect to the unexpressed intentions of the parties.[89] To this regard, there are in general two tests used by courts for terms implied by fact.

The first one is the business efficacy test that was formulated in the *Moorcock case.*[90] This case was about a contract according to which the ship-owner Moorcock agreed with the defendant, a wharf master, to discharge a ship at their jetty. However, when the ship of Moorcock stopped at the jetty, it was stranded because of the uneven nature of the river-bed next to the jetty and the bottom of the ship was damaged. The court held the wharf master to pay for the damages because the contract was concluded on the basis that the river bed must be safe at low water and therefore there was an implied term that the ship during discharge should be safe. The court of appeal pointed out that the wharf master should have taken all the reasonable steps to ensure the vessel could safely ground without suffering damage, and a reasonable ship-owner was entitled to assume that the wharf master should at least take actions to guarantee this circumstance. This implied term hence was necessary to give the contract a "business efficacy" and it could be assumed that it was the parties' intention to include it implicitly in the contract.

[87] *Ibidem*.
[88] Lord Denning wrote a comment of Gardiner v. Gray: "*The importance of this case is that the warranty was imposed or inferred by law. This warranty was imposed because it was fair and reasonable and not because the parties had explicitly or implicitly agreed to it*." See Lord Denning, *The Discipline of Law*, translated by Yongan LiuLaw (in Chinese), Press China, (2000).
[89] According to the common law courts, if both parties of the contract are willing to add a certain term in the contract but fail to do so due to negligence, or if both parties of the contract should add a term in the contract but actually fail to do so, the court shall add this term in the contract as an implied term to perform the contract or clarify the rights and obligations of both parties. See G. ERSEN*, The outline of Anglo-American Contract Law*, Nankai University Press, 1984.
[90] The Moorcock [1889] L.R. 14 P.D. 64

The second test used by courts is the officious bystander test. In the decision of *Shirlaw v. Southern Foundries Ltd*, [91] Lord Mackinnon established that "*Prima facie that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying; so that, if, while the parties were making their bargain, an officious bystander were to suggest some express provision for it in their agreement, they would testily suppress him with a common 'Oh, of course!'*".[92] In a following case, *Mosvolds Rederi A/S v Food Corporation of India*,[93] Lord Steyn also specified that in order to apply an implied term there was not need to verify the business efficacy test, if a reasonable businessman would say "of course" to that term since its application would be obvious.

Another example of the use by the courts of the reasonableness to recognize the application of implied terms in a contract is represented by the case *Liverpool City Council v. Irwin*.[94] This case was about a term implied in law that is, as we mentioned before, a term which can be implied into all contracts of a certain type given the nature of the contract. These terms, unlike those implied by fact, apply irrespective of the intention of the parties. The case was about a tenant who claimed some malfunctioning of the elevator and the lights in the stairs, asking therefore the court to hold the lessor responsible for the maintenance and the repair of the common parts. The lessor argued that there was no responsibility because there was no written term regarding a duty to maintain the common parts. The House of Lords ruled that even if there was no express provision in the contact, the maintenance of the common parts was an implied term so that the landlord has an obligation to take reasonable care to keep the common parts in a state of repair. On this aspect Lord Denning affirmed that "*To be specific, a contractual term can be implied when it is reasonable, regardless of necessity. His insisted that the court was obliged*

[91] Shirlaw v Southern Foundries (1926) Ltd [1939] 2 KB 206.
[92] *Ibidem*.
[93] Mosvolds Rederi A/S v Food Corporation of India [1986] 2 Lloyds Rep. 68 at 70– 71.
[94] Liverpool City Council v Irwin [1976] UKHL 1.

to find a common intention in the minds of both parties on the basis of facts, which was an excessive restriction on the court's role".[95] Lord Denning attempted to expand the scope for implied terms by arguing that a term could be implied into a contract if it was "*fair and reasonable*" to say that the contract would be a better one for its inclusion. However, the House of Lords rejected the Lord Denning's approach by stating that an implied term may be used only if the inclusion of such term is necessary.

According to comments of the former case from Professor Atiyah, he noted that although the rule that often manifests itself in the cases is "*necessity*", it ultimately seems that there is no plain difference between what is necessity and what is reasonable.[96] In the former case, elevators are not indispensable for buildings in blocks (in fact, high-rise buildings existed before elevators were invented), although the absence of elevators will undoubtedly cause inconvenience on tenants. Thus "*necessity*" by nature refers to "reasonably necessary". To be more specific, it refers to "taking into account both environment and price as is reasonably necessary". Atiyah further pointed out that within the scope of a contract's context, the issue regarding what is reasonable must be clarified by reference to the agreement reached by the parties involved, while the nature and price of the contract are correlated to this in the most prominent way.[97]

However, it can be argued that an implied term needs to be recognized on the grounds of reasonable foreseeability with reference to the parties involved in the specific contract. So, if the parties are capable of foreseeing such implied terms when signing the contract, and such terms are neither necessary nor reasonable, hence should not be included in the contract. On the contrary, if the parties were to enter into a certain contract, it would be impossible to enter into such a contract unless the contents of the implied terms were taken into account, then this

[95] Liverpool City Council v Irwin [1976] UKHL 1.
[96] P. S. ATIYAH, *Introduction to contract Law*, Clarendon Press, Oxford, 1989, p. 221.
[97] *Ibidem*.

reasonable foreseeability of the implied terms would be a requirement of necessity. In other words, the court's interpretation needs to confirm what was the parties' "agreement of intent", not what the court believes they should have reached a consensus.

3.3 Reasonableness and the termination of the contract by frustration

Generally speaking, according to the principle of *pacta sunt servanda*, once the parties of a contract have reached the agreement, they are bind to perform all the obligations provided within[98]. In this context reasonableness entered to allow termination of contract in some specific cases, giving rise to the doctrine of frustration, according to which a contract may be terminated if there are some extreme events, occurring after the conclusion of the contract, for which neither party is responsible and which the parties neither provided for in the contract nor foresaw. Traditionally the English courts were reluctant to terminate a contract as they affirmed that a party was always bound to perform his/her obligations in all the situations.[99] This approach changed after the case *Taylor v.*

[98] This is considered one of the underlining principles of contract law where freedom of contracts and sanctity of contracts or the binding force of contracts dominate the scene. See J. BEATSON, A. BURROWS, J. CARTWRIGHT (eds.), *Anson's Law of Contracts*, 29th ed., Oxford University Press, Oxford, 2010, p. 4 ff.; P.S. ATIYAH, *Introduction to the Law of Contract*, cit.; ID, *The Rise and Fall of Freedom of Contract*, Clarendon Press, Oxford, 1979; M.CHEN-WISHART, *Contract Law,* Oxford University Press, Oxford, 2018; N. ANDREWS, *Contract Rules: Decoding English Contract Law*, Intersentia, Cambridge, 2016. See also P.G. MONATERI (ed.), *Comparative Contract Law*, Edward Elgar, Cheltenham-Northampton, 2017. According to the principle of *pacta sunt servanda*, both parties shall undertake two responsibilities once their contract is signed. One responsibility is to strictly perform the obligation of the contract, and the other is the responsibility of compensation, meaning the party who fails to execute the contract shall compensate the non-defaulting party. To avoid compensation obligations arising from the failure to execute contracts due to unexpected events, parties shall include in the contract some terms of exemption. In accordance with general principle of "freedom of contract", the force of these terms is valid, enabling a defaulting party to be exempted from obligations. Logically, the defaulting party cannot be exempted without the exemption terms agreed beforehand. Such party cannot terminate the contract unless it fulfills the compensation responsibility.

[99] This rule was established in the case *Paradine v. Jane Aleyn* early in 1647 according to which "*when the party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, coz he might has provided against it by his contract*" (Paradine v Jane [1647] EWHC KB J5).

Caldwell[100]. In this case the parties concluded a contract for the use of a concert hall on a certain date; however, before that date, the concert hall burned down. The Court held that there was an implied condition according to which "*if the performance of the contract depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance.*"[101].

With specific reference to the relationship between the doctrine of frustration and the reasonableness, in 1939 Lord Wright suggested a theory, according to which the courts should impose on the parties what they think is "just and reasonable."[102] However, in English Courts, "*even if the theory of a just and reasonable result would mean that it is the foundation of the doctrine of frustration in English law, its practical importance is severely impaired by the fact that in English common law the frustration of a contract always leads to its automatic and complete discharge*"[103].

The doctrine of frustration has evolved to mitigate the literal performance of absolute promises, and to give effect to the demands of justice, so ultimately to achieve a just and reasonable result, ie to do what is reasonable and fair, as an expedient to escape from injustice where such would result from enforcement of a contract in its literal terms after a significant change in circumstances as affirmed in the case *Hirji Mulji v. Cheong Yue Steamship Co. Ltd*.[104].

In a later case, *Davis Contractors Ltd v Fareham Urban District*

[100] Taylor v Caldwell [1863] EWHC QB J1
[101] These are words of the opinion of Mr. Justice Blackburn. Ibidem, p. 18.
[102] See C. SCHMITTHOFF, *Frustration of International Contracts of Sale in English and Comparative Law, in Some Problem of Non- Performance and Force Majeure in International Contract of Sale*, 1961, p. 127 (cited by M. G. RAPSOMANIKAS, *Frustration of Contract in International Trade Law and Comparative Law, in Duquesne Law Review,* 1978, p.551, available at: https://www.cisg.law.pace.edu/cisg/biblio/rapsomanikas.html).
[103] See R.A. MOMBERGURIBE, *The effect of a change of circumstances on the binding force of contracts*, Utrecht University Press, Utrecht, 2001.
[104] Hirji Mulji v. Cheong Yue Steamship Co. Ltd. [1926] A.C.497 at 510. See also Lauritzen A.S. v. Wjsmuller B.V. (The Super Servant Two) [1990] 1 Lloyd's Rep 1, in which Lord Bingham referred to the same argument of the "just and reasonable", but the House of Lords dismissed the application of frustration.

Council,[105] Lord Reid quoted first the opinion of Lord Loreburn in *Tamplin Steamship Co. Ltd. v. Anglo Mexican Petroleum Products Co. Ltd.*[106] "*That seems to me another 'way of saying that from the nature of the contract it cannot be supposed' the parties, as reasonable men, intended it to be binding on them under such altered conditions. Were the altered conditions such that, had they thought of them, they would have taken their chance of them, or such that as sensible men they would have said: ' If that happens, of course, it is all over between us'? What, in fact, was the true meaning of the contract? Since the parties have not provided for the contingency, ought a " court to say it is obvious they would have treated the thing as at an end?*". However, Lord Reid affirmed that "*there is no need to consider what the parties thought or how they or a reasonable men in their shoes would have dealt with the new situation if they had foreseen it. The question is whether the contract which they did make is, on its true construction, wide enough to apply to the new situation: if it is not then it is at an end.*[107]" In the same case Lord Radcliffe said "*By this time it might seem that the parties themselves have become so far disembodied spirits that their actual persons should be allowed to rest in peace. In their place there rises the figure of the fair and reasonable man. And the spokesman of the fair and reasonable man, who represents after all no more than the anthropomorphic conception of justice, is and must be the Court itself. So perhaps it would be simpler to say at the outset that frustration occurs whenever the law recognises that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. Non haec in foedera veni. It was not this that I promised to do*."[108]

[105] Davis Contractors Ltd v Fareham Urban District Council [1956] AC 696 (HL).
[106] Tamplin Steamship Co. Ltd. v. Anglo Mexican Petroleum Products Co. Ltd. [1916] 2 A.C. 397, p. 404.
[107] *Ibidem* at p. 407.
[108] *Ibidem* at p. 420.

In *National Carriers Ltd v Panalpina (Northern) Ltd and Pioneer Shipping Ltd v BTP Tioxide Ltd (The Nema)*[109] Lord Simon of Glaisdale expanded Lord Radcliffe's thought by saying "*Frustration of a contract takes place when there supervenes an event (without default of either party and for which the contract makes no sufficient provision) which so significantly changes the nature (not merely the expense or onerousness) of the outstanding contractual rights and/or obligations from what the parties could reasonably have contemplated at the time of its execution that it would be unjust to hold them to the literal sense of its stipulations in the new circumstances; in such case the law declares both parties to be discharged from further performance*."

As shown in the case law described, the application of frustration can be justified to achieve a just and reasonable result between the parties. The standard of reasonableness therefore is applied in the frustration doctrine in order to avoid possible injustice arising from the enforcement of a contract in its literal terms after a significant change in circumstances[110].

4. The reasonableness in the statutory law

The notion of reasonableness is also taken into consideration in some legislative acts. This is the case, for instance, of the Unfair Contract Terms Act (UCTA) of 1977 which has the aim to limit the extent of contract terms that provide for exemption of the civil liability for breach of contract, for negligence or other breach of duty.[111]

[109] Pioneer Shipping Ltd v BTP Tioxide Ltd (The Nema) (No 2) [1982] AC 724 (HL) at 751–752.
[110] For a general reconstruction of the doctrine of frustration in English Common Law, see G.H. TREITEL, *Frustration and Force Majeure*, Sweet & Maxwell, London, 2004; E. MCKENDRIC (ed.), *Force Majeure and Frustration of Contract*, Lloyd's of London Press, London, 1995.
[111] Subsequently, other legislations were enacted in the UK to protect consumers, such as Unfair Terms in Consumer Contracts Regulations 1999, Sale of Goods Act 1979, Supply of Goods and Services Act 1982, and the newest Consumer Rights Act 2015. Other statutory laws related to reasonableness are, for examples, the Section 3 of Misrepresentation Act 1967; the section 83 of Housing Act 1996 is the "Determination of reasonableness of service charges"; and the Section 84 of Renting Homes (Wales) Act 2016.

From a general point of view, English courts divide standard terms in two categories. In the case *Schroeder Music Publishing Co Ltd v. Macaulay*, Lord Diplock said that "*there are two broad categories of standard term contract. The first type of standard term contract, of very ancient origin, is seen in regular business transactions, such as bill of lading, lease, and sales contracts. The standard terms for this type of contract, negotiated over years by representatives of interested parties, are widely used because they facilitate trade. In examining the fairness and reasonableness of such standard terms, since the contracting parties are usually equally capable of negotiation, those terms may be presumed to be fair and reasonable. The other type of standard contract, appeared in the moderation, is made between unequal subjects. Such standard terms are not the result of negotiations between the parties, and not ratified by any organization which represents the weaker party's benefits. Its content is provided by the dominant party who has the bargaining strength. If counterparty wants the goods or services, the only choice is the standard terms*."[112]

The UCTA deals with the second types of standard contract, the one between unequal subject, and it aims at eliminating the situation in which the interests of the parties are grossly out of balance, in order to avoid that that the weaker party has to agree to terms that are not in his/her interest, such as an unreasonable exemption clause[113]. The Act deals both with commercial and consumer contracts but its scope of application is limited to certain types of exemption clauses.

The main rule stated in the UCTA is that all the exemption clauses are subject to the test of reasonableness, with the exception of certain types of contracts in which the use of exemption clauses is prohibited.[114]

[112] Macaulay v Schroeder Music Publishing Co Ltd [1974] 1 WLR 1308

[113] An exemption clause is a term in a contract purporting to exclude or restrict the liability for breach of obligation of one of the parties in specified circumstances.

[114] See M. H. OGILVIE, *Reasonable Commercial Contracts and the Unfair Contract Terms Act 1977,* in *Canadian Business Law Journ*al, 1991, p. 357. According to this author the contracts in which exemption clauses are subject to reasonableness include: "*(i) liability resulting from negligence which causes loss or damage other than death or personal injury; (ii) liability arising in contract*

The reasonableness is defined in Section 11 (1) of the UCTA which provides that "*In relation to a contract term, the requirement of reasonableness for the purposes of this Part of this Act, section 3 of the M6 Misrepresentation Act 1967 and section 3 of the M7 Misrepresentation Act (Northern Ireland) 1967 is that the term shall have been a fair and reasonable one to be included having regard to the circumstances which were, or ought reasonably to have been, known to or in the contemplation of the parties when the contract was made*". Moreover Section 11 (4) of the UCTA provides that "*Where by reference to a contract term or notice a person seeks to restrict liability to a specified sum of money, and the question arises (under this or any other Act) whether the term or notice satisfies the requirement of reasonableness, regard shall be had in particular (but without prejudice to subsection (2) above in the case of contract terms) to— (a) the resources which he could expect to be available to him for the purpose of meeting the liability should it arise; and (b) how far it was open to him to cover himself by insurance*".[115] According to Section 11 (5) of the Act specifies the burden of proof concerning the requirement of reasonableness of a contract term or notice relies on the party who claims it.

As shown above the definition of "reasonableness test" provided by the Act is very general, but the Schedule 2 of the Act contains some guidelines to help the courts to determine the reasonableness test with reference to the contracts for the sale and possession of goods.[116]

*where one party either deals as a consumer or on the other's standard terms where there are exemption clauses and either no contractual performance or a contractual performance substantially different from what was reasonably expected; (iii) consumer contracts containing unreasonable indemnity clauses; (iv) contracts where there is liability for breach of the product quality and quantity provisions of the Sale of Goods Act, 1893, and the Supply of Goods (Implied Terms) Act 1973, and where the parties deal otherwise than as consumers; and (v) any other contracts where the parties are dealing otherwise than as consumers which are not regulated by sale of goods law or hire-purchase la*w".

[115] As it was noted "*the wealth of the defendant, then, appears to be a factor in assessing the reasonableness of clauses limiting the quantum of damages*". See M. H. OGILVIE, *Reasonable Commercial Contracts and the Unfair Contract Terms Act 1977,* cit., p. 365.

[116] However, section 11 (2) of the UCTA provides that "*this subsection does not prevent the court or arbitrator from holding, in accordance with any rule of law, that a term which purports to exclude or restrict any relevant liability is not a term of the contrac*t".

However, it should be pointed out that even if there are these guidelines, the application of the reasonableness test provided in the UCTA largely depends on the evaluation case by case made by the courts.

The first guideline requires to take into account "*the strength of the bargaining positions of the parties relative to each other, taking into account (among other things) alternative means by which the customer's requirements could of been met*". It hence evaluates whether the bargaining power of both parties is evenly matched. Indeed, when the parties have the equal bargaining power, and they can undertake the risks expected in the contract, English courts will rule in favor of the reasonableness of the exclusion clause. In *Watford Electronics Ltd v. Sanderson CFL Limited*,[117] Chadwich LJ said that: "*Where experienced businessmen representing substantial companies of equal bargaining power negotiate an agreement, they may be taken to have had regard to the matters known to them. They should, in my view be taken to be the best judge of the commercial fairness of the agreement which they have made; including the fairness of each of the terms in that agreement*".[118]

The second and the third guidelines are related to the customer contracts. They specifically state to consider "*whether the customer received an inducement to agree to the term, or in accepting it had an opportunity of entering into a similar contract with other persons, but without having a similar term*" and "*whether the customer knew or ought reasonably to have known of the existence and the extent of the term (having regard, among other things, to any custom of the trade and any previous course of dealing between the parties*". Generally speaking, the bargaining power between consumers and companies are unequal, therefore the criteria for the reasonableness need to be stricter. For example, in the case *Regus (UK) Ltd v. Epcot Solutions Ltd* the court held that: "*although in theory it was entirely reasonable for Regus to restrict*

[117] Watford Electronics Ltd v Sanderson CFL Ltd [2001] EWCA Civ 317
[118] The similar expression can also be seen in the case of Goodlife Foods Ltd v Hall Fire Protection Ltd. [2018] EWCA Civ 1371.

damages for loss of profits and consequential loss, the clause was unreasonable as a whole as the exclusion was so wide that it perfectively left Epcot without a remedy for a basic service such as defective air conditioning. It was therefore unenforceable, leaving Regus exposed". [119]

The fourth guideline indicates to evaluate "*where the term excludes or restricts any relevant liability if some condition was not complied with, whether it was reasonable at the time of the contract to expect that compliance with that condition would be practicable*". In *Ailsa Craig Fishing Co. Ltd v. Malvern Fishing Co. Ltd*, for instance, the court held the limitation clause is valid, because it just limited the amount of money that could be claimed.

The last guideline suggests to consider "*whether the goods were manufactured, processed or adapted to the special order of the customer*", i.e. if the party continually requests changes or additional details, the limitation or exception clause of the manufacturer from liability for breach of contract may be deemed to be reasonable.

It is noteworthy that the 2015 Consumer Rights Act[120] introduced the test of unfairness in consumer contracts which does not refer to reasonableness as it implements EU Council directive 93/13/EC on Unfair Terms in Consumer Contracts. The Act follows the language of art. 3(1) of the directive where the fairness is linked to the concept of good faith.

[119] Regus (UK) Ltd v Epcot Solutions Ltd, [2008] EWCA Civ 36

[120] The Consumer Rights Act of 2015 is an Act of Parliament of United Kingdom, entered into force on October 1 2015, that consolidates existing consumer protection legislation and gives consumers a number of new rights and remedies. In respect of contracts under which a trader provides goods or services to a consumer, the Act replaces the Sales of Goods Act, the Unfair Terms in Consumer Contracts Regulations 1999 and the Supply of Goods and Services Act 1982, making some adjustments on the rights of consumers and adding some references to the purchase of digital content. See J. SWINSON (Consumer Minister), Department for Business Innovation and Skills, *New Bill of Rights to Help Business and Consumers*, 12 June 2013, available at https://www.gov.uk/government/news/new-bill-of-rights-to-help-businesses-and-consumers; P. MAGUIRE, *Guide to the Consumer Right Act 2015*, 1 October 2015, available at https://www.wrighthassall.co.uk/knowledge-base/guide-to-the-consumer-rights-act-2015.

SECTION 2 - THE EMERGENCE OF THE PRINCIPLE OF REASONABLENESS IN INTERNATIONAL COMMERCIAL CONTRACTS LAW: THE PARADIGMATIC CASES OF CISG AND UNIDROIT PRINCIPLES

1. Reasonableness and international commercial law

A field where the use of reasonableness, mainly due to the influence of American common law, has been spreading in the last decades is that of international commercial contracts.[121] Reasonableness found place, in particular, in law instruments drafted to foster the international harmonization and unification of law in this field.

As it is well known, commercial contract law has always been at the forefront of harmonization and unification of private law, as the diversities in national laws represent an obstacle to international trade. Globalization has further enhanced this process and a wide debate has been developing on the ways to achieve a higher level of harmonization and uniformation of the rules for international commercial contracts in the new global context, also arriving to propose the drafting of a international convention covering general contract law[122].

The shaping of uniform law rules on international contracts has gone through two main tracks, that of hard and that of soft law. In the first track we find an instrument which is considered one of the most successful achievements in worldwide unification of contract law, i.e.

[121] See G. WEISZBERG, *Le «raisonnable» en Droit du Commerce International*, thesis Paris II, 2003, Pace Database, n. 33, Paris, 2003, available at www.lagbd.org/images/e/ef/Pour_le_Pr_TRICOT_%3D_Th%C3%A8se_de_Guillaume_Weiszberg_le_raisonnable_en_droit_du_commerce_international_%282%29.pdf.

[122] On the achievements of the process of unification of international commercial contract law and on its future perspectives see J. SMITS, *Introduction to Special Issue: Harmonisation of Contract Law: An Economic and Behavioural Perspective*, in *European Journal of Law and Economics*, vol. 33, issue 3, 2012, p. 475. I. SCHWENZER, *Global Unification of Contract Law*, in *Uniform Law Review*, vol. 21, issue 1, 2016, pp. 60-74. A. VENEZIANO, *The Soft Law Approach to Unification of International Commercial Contracts Law: Future Perspectives in Light of Unidroit Experience*, in *Villanova Law Review*, volume 58, issue 4, 2013, pp. 512-518.

the Convention con Contracts for International Sale of Goods (CISG)[123]. This Convention has not only been ratified by a huge number of countries, but also exerted a great influence both at domestic and international level[124]. Moreover, "it has played a major role in building a universally shared vocabulary and a common denominator of rules which have since represented the basis for any academic discourse on international contract law"[125].

Within the soft law track the most relevant tool is represented by the Principles for International Commercial Contracts, drafted by an international working group set up by the International Institute for the Unification of Private Law (UNIDROIT)[126]. These principles, originally, adopted in 1994 and subsequently revised in 2014, 2010 and 2016, are a non-binding set of rules, and represent a leading model, especially for a number of initiatives on a regional level aiming at drafting uniform contract law rules.

2. The 1980 Vienna Convention on International Sale of Goods

The CISG is the most important body of law governing international sales[127].

[123] The Convention was drafted under the auspices of the UN Commission on International Trade Law (UNCITRAL) and was approved in 1980.

[124] In Chinese domestic law, for example, the CISG extorted influence on the drafting of the first comprehensive contract law, i.e. 1999 Contract law. At the international level CISG has inspired several regulations, also at regional level, such as the Uniform Act on General Commercial Law by the Organization for the Harmonisation of Business Law in Africa (OHADA) and soft law instruments such as the UNIDROIT Principles of International Commercial Contracts, the Principles of European Contract Law, the Draft Common Frame of Reference. On this see I. SCHWENZER, *Regional and Global Unification of Sales Law*, in *European Journal of law Reform*, n. 3, 2011, p. 370 ff.

[125] These are words by A. VENEZIANO, *The Soft Law Approach to Unification of International Commercial Contracts Law: Future Perspectives in Light of Unidroit Experience,* cit., p. 522.

[126] UNIDROIT was founded in 1926 as an auxiliary organ of the League of Nations and in 1940 became an independent intergovernmental organization.

[127] The starting of a process of elaboration of uniform rules for international sale contract dates back to the first half of Nineteenth century. In 1951, Netherlands convened a diplomatic conference involving 21 countries. At the conference, discussion was made on the Draft of the Convention on the Uniform Law for the Sales of Goods prepared by the International Institute for the Unification of Private Laws. Two conventions (Convention on Uniform Law for the International Sales of Goods and Convention on Uniform Law for the Formation of Contracts for the International Sales of Goods)

As of June 2021 it has been adopted by 96 countries, including the United States and most of the world's major trading nations. Moreover, a high number of States from all continents participated in the Diplomatic Conference. Thus, this Convention was the product of negotiations between representatives from many nations with diverse legal systems and traditions and different languages which represented a very relevant step in the process of unification of international rules on the sales of goods [128] : it worked out several major impediments encountered in international transactions and facilitating the unification of legal rules for the international sales of goods and reached good results in legal harmonization processes also making tradeoffs of interests among the signing countries, thus favoring the process of ratification of the CISG by countries with different legal and social culture.[129]

At the same time CISG also shows the limits of uniformity achieved through hard law means, involving States. The need to reach a governmental consensus and the difficulties for the representatives to make compromises on some more controversial issues, such as standard terms in contracts, validity issues, change of circumstances, pre-contractual liability and transfer of property to quote a few of these issues, lead to the choice to leave some important gaps in the CISG rather than fail to agree on a final draft[130].

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were finalized and adopted at the 1964 Hague Diplomatic Conference. But for various reasons, the two conventions contracted only a few countries and hence merely exerted its influence to a limited range. In 1966 the United Nations Commission on International Trade Law (UNCITRAL) was established, and afterwards it spent years revising the two conventions. In 1978 the UNCITRAL adopted the Draft of Convention on Establishment of Contracts for the International Sales of Goods and was determined to consolidate the preceding two conventions into CISG at the 10th Annual Conference of UNCITRAL. In 1980, the United Nations held a diplomatic conference involving 62 countries and 8 international organizations at Vienna, the capital of Austria, where the draft of CISG was submitted for discussion before being duly adopted in the end.

[128] J. ZIEGEL, *The Future of the International Sales Convention from a Common Law Perspective*, in *New Zealand Business Law Quarterly*, 2000, p. 336.

[129] S. G. ZWART, *The New International Law of Sales: A Marriage Between Socialist, Third World, Common, and Civil Law Principles*, in *North Carolina Journal of International Law*, 1988, p. 109. CISG was finalized after rounds of negotiation to reach a consensus with the widest-possible coverage, making the consensus the most globally widespread to a certain extent, compared to other laws for trade contracts, offering broad applicability. J. HONNOLD, *Uniform Law for International Sales under the 1980 United Nations Convention*, Kluwer Law International, Hague, 2009.

[130] On this crucial aspect see P. SCHLECTHRIEM, *Uniform Sales Law – The UN Convention for the*

As a result CISG provisions are in some cases terse and several general clauses are inserted in its rules. Amongst these the notion of "reasonableness" has a relevant place having being widely mentioned: the CISG mentions reasonableness and its derivatives 56 times[131], which indicates that drafters considered this concept an important part to be emphasized within the CISG provisions. It was indeed pointed out that it is one of "*the general principles on which the Convention was based*"[132].

In this regard a leading rule is that provided for in Article 8 about interpretation of contracts. According to art. 8(1) "statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what the intent was"[133]. If there is no evidence of the party's subjective intent, this leads to the application of paragraph 2 and paragraph 3 of article 8, i.e. the reasonable person criterion. It was observed that this criterion is derived from the abstract standard that we find in the common law tradition.[134] Indeed in article 8, paragraph 2, the reasonable person is indicated as "*the same kind of person as the person concerned and in the same circumstances as the person concerned*". The determination of the circumstances needs to take into account all important factors that are

International Sale of Goods, Manz, Wien, p. 55 ff.

[131] The expression of "reasonableness": "reasonable reliance" Article 16(b); "reasonable time" Article 18(2) , Article33(c), Article 39(1) , Article 43(1), Article 46(2)(3), Article 48(2) ,Article 49(2) , Article 64(1), Article 65, Article 72(2), Article 75, Article 79(4); "(un)reasonable inconvenience or expense" , Article 34 88(2); "reasonable opportunity for examination" , Article 38(3); "unreasonable delay, inconvenience or expense" , Article 48(1) , Article 88(1) , Article 86(1) , Article 86(2); "reasonably expected" , Article 60(a), Article 79(1); "reasonable time for notice" Article 72 ; "reasonable time and manner" Article 75; "reasonable substitute" Article 76(2);"reasonable steps" Article 85; "reasonable measures" Article 88(2).

[132] P. SCHLECHTRIEM, *Uniform Sales Law – The UN Convention for the International Sale of Goods*, cit.

[133] See on this provision L. A. DI MATTEO, *Critical Issues in the Formation of Contracts Under the CISG*, in *Belgrade Law Review*, 2011, p. 67.

[134] J. VILUS, *Common Law Institutions in the UN Sales Convention*, in *Studios en Homenaje a Jorge Barrera Graf*, vol. II, Universidad Naciond Autónoma de México, Ciudad Universitaria, p. 1437. Vilus states that: "The criterion of 'reasonable person' which keeps recurring in the entire Convention is taken over from the common law system in its pure form. . . . Undoubtedly . . . the most significant [reference to this concept is in] Article 8 by which criteria are determined for the interpretation of the contract. According to that article 'statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was."

listed in the following paragraph 3, namely "*the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties*." The list of circumstances is just an exemplification, so other factors not included in the article may be taken into consideration according to the peculiarity of the given case. Some scholars commented that "*the understanding of reasonable person here is more like a criterion linking subjective with objective elements*".[135] The subjective element is the "same kind of person", that has average experience, knowledge, and same language, while the objective element is represented by the surrounding circumstances.[136]

Another important example of the use of the reasonableness in the CISG is "reasonable time" which, together with "reasonable period of time", is an expression very frequently employed in the contractual relationship, from the formation of contract to the avoidance of contract. For example, article 18 requires that the acceptance should be sent to the offeror within a reasonable time, otherwise the acceptance will be void.[137] Article 33, instead, provides that if the contract does not establish the certain date of the delivery, the seller must deliver the goods within a reasonable time after the conclusion of the contract.[138]

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[135] See F. ENDERLEIN, *D.* MASKOW, *United Nations Convention on Contracts for the International Sale of Goods Convention on the Limitation Period in the International Sale of Goods Commentary*, Oceana Publications, New York, 1992.

[136] *Ibidem.*

[137] CISG Article 18 (2) "An acceptance of an offer becomes effective at the moment the indication of assent reaches the offeror. An acceptance is not effective if the indication of assent does not reach the offeror within the time he has fixed or, if no time is fixed, within a reasonable time, due account being taken of the circumstances of the transaction, including the rapidity of the means of communication employed by the offeror. An oral offer must be accepted immediately unless the circumstances indicate otherwise."

[138] "Reasonable time" is also used in the notice period of "claim for specific performance" (Article 46 (3): " If the goods do not conform with the contract, the buyer may ¬require the seller to remedy the lack of conformity by repair, unless this is ¬unreasonable having regard to all the circumstances. A request for repair must be made either in conjunction with notice given under article 39 or within a reasonable time thereafter; Article 47 (1) The buyer may fix an additional period of time of reasonable length for performance by the seller of his obligations) , "avoidance of contract due to the late delivery" (Article 49 (2): in cases where the seller has delivered the goods, the buyer loses the right to declare the contract avoided unless he does so: (a) in respect of late delivery, within a reasonable time after he has become aware that delivery has been made) or "fundamental breach " (Article 73 (2) : " If one party's failure to perform any of his obligations in respect of any installment gives the other party good grounds to conclude that a fundamental breach of contract will occur with respect to future

To this regard it is significant to analyze article 39 which concerns the "reasonable time" for the buyer to send the notice in case a lack of conformity of goods happens. If we look at the solution on this aspect adopted by national legal systems we can find different choices and judicial practices: for example, German Federal Court of Justice adopts the period of four weeks[139], the Austrian Supreme Court instead requires fourteen days, [140] and the French Supreme Court makes reference to "reasonable time" rather than setting a specific period.[141] The solution adopted by the CISG is not to give a specific time, but to state that the notice needs to be addressed to the seller "*within a reasonable time after he* [the buyer] *has discovered it or ought to have discovered it*". [142] The second paragraph of the article, however, indicates that notice has to be given at the latest within a period of two years from the date on which the goods were actually handed over to the buyer, unless this time-limit is inconsistent with a contractual period of guarantee. If compared to the solution adopted at the national level, we see that the choice made by the CISG was to compromise between a flexible standard (the "reasonable time"), and a maximum period (two years from the delivery, unless this time-limit is inconsistent with a contractual period of guarantee). Regarding the interpretation of article 39,[143] Swiss scholar Schwenze pointed out that "reasonable time" must

installments, he may declare the contract avoided for the future, provided that he does so within a reasonable time. ").

[139] BGH, 3 November 1999, VIII ZR 287/98, [2000] RIW 381, available at http://cisgw3.law.pace.edu/cases/991103g1.html.

[140] OGH 27 August 1999, 1 Ob 223/99x, [2000] RdW No. 10, available at http://cisgw3.law.pace.edu/cases/990827a3.html.

[141] Société Karl Schreiber GmbH v. Société Termo Dynamique Service et autres, 26 May 1999, Cour de Cassation, [2000] Recueil Dalloz 788, http://cisgw3.law.pace.edu/cases/990526f1.html.

[142] UN Doc. A/CN.9/WG.2/WP.16, it states that "the Working Group concluded that the expression "within a reasonable time" was sufficiently flexible to adapt to the varying circumstances . . ."

[143] On the issue of giving a definition of this expression, see UN Doc. A/CN.9/52, it states that "One representative proposed that this article should refer to what would be deemed 'prompt' from the point of view of persons engaged in international trade. Since the Uniform Law applied irrespective of the commercial or civil character of the parties, the lack of this reference might lead to different approaches by courts through the application of domestic (rather than international) or subjective (rather than objective) criteria, particularly when a contracting party was of "civil" status. He further considered it necessary to have a definition of the term "reasonable time" which appeared in many articles of ULIS. In some countries, the above is not used as a legal term; the absence of a definition

be analyzed individually in each particular case and put forward the specific factors that may affect the notice period.[144] For instance, if the goods are perishable, the time to give the notice should be assessed taking into consideration the perishability or seasonality of the goods. Therefore, the purchaser needs to inform the seller promptly so that the defect can be identified before the goods perish.[145] It was, however, observed that "reasonable time" standard based on the specific case may lead to some divergencies in its application between developing and developed countries: indeed, some developing countries may lack the conditions for timely inspection of goods and this could have an impact on the determination of "reasonable time".[146]

Other expressions related to the reasonableness refer to the reliance or the expectation of a party. This is the case of the "reasonable reliance" that appears in the Article 16, which prohibits to revoke an offer even before the acceptance "*if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer*"[147]. The expectation of the party is also stated in other articles. These provisions concern the buyer's obligation to perform all the acts which could reasonably be expected of him in order to enable the seller to make delivery[148]; and the exemption from liability for a failure to perform in case "*the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the*

thus may give rise to difficulties for the courts of these countries."

[144] See P. SCHLECHTRIEM, *Uniform Sales Law - The UN-Convention on Contracts for the International Sale of Goods,* cit. See also J.O. HONNOLD, *Uniform Law for International Sales under the 1980 United Nations Convention*, cit., who affirm that: "It seems difficult to justify a buyer's failure to give notice within a "reasonable time" after he knew of the non-conformity."

[145] Similarly, Professor Ferrari also argues that the "perishability of goods" and provisions of the contract should also be taken into account. See F. FERRARI, S*pecific Topics of the CISG in the Light of Judicial Application and Scholarly Writing Journal of Law and Commerce,* in Journal of Law and Commerce, 1995.

[146] See E. E. BERGSTEN, *The Willem C. Vis International Commercial Arbitration Moot: The Perspective of the Organizer,* in Croatian Arbitration Yearbook, 1999.

[147] CISG Article 16, paragraph 2, letter b).

[148] CISG Article 60.

contract or to have avoided or overcome it or its consequences."[149]

From an overall perspective we can observe that the CISG takes into consideration the concept of reasonableness by using this standard not only to determine single aspects of the contract (such as the time or the relevance of a conduct), but also as a more far-reaching criterion to interpret the agreement. The latter goal, as we have seen, is achieved through the transposition of the notion of "reasonable person", which had a strong role in common law rules on contracts. In addition to this several scholars consider the standard of reasonableness as one of the most relevant and overarching general principles of the CISG making also reference to art. 7 and art 9 of the Convention[150]. Art 7, after having outlined that CISG has to be interpreted taking into account its international character and the need to promote uniformity it its application and good faith in international trade, directs courts to resolve questions concerning matters governed by CISG courts by applying the general principles upon which the CISG is based. Art. 9 of the CISG provides that unless the parties otherwise agree, usages that are widely known in international trade and were known or ought to have been known by the parties are applicable to the parties' contract.

Reasonableness is one of these general principles, finding expression in the usages of the relevant trade which are mentioned in art. 9 of the CISG provinding that unless the parties otherwise agree, usages that are widely known in international trade and were known or ought to have been known by the parties are applicable to the parties' contract. Following Us law, and in particular UCC and commercial laws of most

[149] CISG Article 79, paragraph 1. Part three the sale of goods, F. Exemption from liability to pay damages, 34. "When a party fails to perform any of his obligations due to an impediment beyond his control that he could not reasonably have been expected to take into account at the time of the conclusion of the contract and that he could not have avoided or overcome, he is exempted from the consequences of his failure to perform, including the payment of damages. This exemption may also apply if the failure is due to the failure of a third person whom he has engaged to perform the whole or a part of the contract. However, he is subject to any other remedy, including reduction of the price, if the goods were defective in some way."

[150] See J. O. HONNOLD, *Uniform Law for International Sales under the 1980 United Nations Convention*, cit.

common law nations, this combination of rules leads to a central role of reasonableness which refers to what is acceptable in the relevant trade emerges[151]. This interpretation is not only connected to common law legal models, but also to several soft law instruments governing international contracts, first of all the UNIDROIT Principles[152].

3. The UNIDROIT Principles on international commercial contracts

3.1 The development of UNIDROIT Principle

The Unidroit Principles have been strongly influenced by CISG even if their nature is not the same as that of CISG. Starting from 1980 the International Institute for the Unification of Private Law began to work on the Principles of International Commercial Contracts in order to formulate an instrument (namely, a soft law instrument) that could be used by the parties in international commercial transactions to provide a law for governing the contract defined as 'neutral' and inspired by the 'international' principles.[153] The soft law approach was chosen to overcome the problematic aspects of binding instruments, avoiding pitfalls of negotiations and ratification processes and allowing drafters

[151] D. J. SMYTHE, *Reasonable Standards for Contract Interpretations under the CISG*, in *Cardozo Journal of International and Comparative Law*, issue 1, 2016, p. 24 ff.

[152] About the role of reasonable commercial standards of fair dealing in providing an important baseline for commercial conduct under the UCC, the commercial laws of most common law nations, the Principles of European Contract Law, and the UNIDROIT Principles of International Commercial Contracts. See Mary E. HISCOCK, *The Keeper of the Flame: Good Faith and Fair Dealing in International Trade*, in *Loyola of Los Angeles Law Review*, 1996, p. 1059 ff., for an overview of the standard's pervasiveness.

[153] The formulation of the "UNIDROIT Principles" was based on many domestic laws, international legislations and international practices. Regarding the domestic laws its main sources of law include, for example, the United States' *Uniform Commercial Code*, *Restatement (Second) of Contracts,* the new *Dutch Civil Code*, the 1985 version *Foreign Economic Contract Law of China*, and the *New Quebec Civil Code*, the *French Civil Code* and *German Civil Code*. With reference to the international legislations, the Principles were inspired by the two versions of *Convention Relating to a Uniform Law on the International Sale of Goods (1964, The Hague)* and the 1980 version *United Nations Convention on Contracts for the International Sale of Goods*. Lastly, with reference to the international practices, there are model laws and general trading conditions formulated under the guidance of international organizations, such as the *General Rules of Interpretation* and *Uniform Customs and Practice for Documentary Credits* formulated by the International Chamber of Commerce.

to participate in the harmonization process without necessarily defend national solutions. "*The informal method minimized the political constraints and shifted the focus to the reasonably and economic soundness of the proposed rules. This enabled the drafters to develop over the years a wide set of rules covering virtually all issues which are traditionally ascribed to the general part of the law of contracts and obligations*"[154].

Thus, the UNIDROIT Principles represent "*a non-binding codification or "restatement" of the general part of international contract law*"[155] whose aim is not to unify the existing contract laws applied in different countries, but firstly to provide an alternative set of rules to the national ones to govern the contracts, and secondly to support the interpretation of other international uniform law instruments and the domestic law when dealing with international commercial transactions[156]. The application of the Principles depends upon the parties' choice; in absence of a choice adjudicators will apply them on a persuasive basis, i.e. because they are persuaded by the value of the principles[157]. Moreover, also UNIDROIT Principles's prestige as a model for contract law reforms has been growing and both national law reforms and international regulations have been influenced by them[158]. Almost twenty years after the first edition, UNIDROIT Principles for International Commercial Contracts have enjoined a considerable success.

The UNIDROIT Principles are composed of eleven chapters that

[154] These are words by A. VENEZIANO, *The Soft Law Approach to Unification of International Commercial Contracts Law: Future Perspectives in Light of Unidroit Experience*, cit., p. 524.
[155] See on this aspect, the official website available at https://www.unidroit.org/instruments/commercial-contracts/upicc-model-clauses.
[156] The UNIDROIT Principles have indeed also the purpose to be used as a guideline for judges or arbitrators when dealing with cases. On this aspect see V. H. HOUTTE, *Les Principes UNIDROIT et l'Arbitrage Commercial International,* in ICC (ed.), *The UNIDROIT Principles for International Commercial Contracts - A New Lex Mercatoria*?, Paris, 1995, p.181 ff.
[157] See M. J. BONELL, *Towards a Legislative Codification of the UNIDROIT Principles?*, in *Uniform Law Review*, n. 12, 2007, p. 237.
[158] On this aspect M. J. BONELL, *An International Restatement of Contract Law: The UNIDROIT Principles for International Commercial Contracts,* Transnational Publishers, Ardsley, New York, 2005, p. 268.

cover all the aspect of the contractual relation (formation, validity, interpretation, performance, remedies, and so on). It is important to note that the first chapter is dedicated to the "General provisions", and hence provides a list of central principles in the context of international trade. Regarding the choices made by the drafters of the UNIDROIT Principles, it is also interest to observe that some rules were the product of a compromise between various solutions adopted in different legal systems; [159] other provisions, instead, have been the product of the innovative spirit of the drafters who created several original rules.[160]

3.2 Reasonableness in the UNIDROIT Principles

With specific reference to the "reasonableness", the UNIDROIT Principles reflect the importance of this concept. Indeed in the Introduction written by the Governing Council of UNIDROIT it was expressly recognized that the UNIDROIT Principles "*are sufficiently flexible to take account of the constantly changing circumstances brought about by the technological and economic developments affecting cross-border trade practice* (…) *at the same time they attempt to ensure fairness in international commercial relations by expressly stating the general duty of the parties to act in accordance with good faith and fair dealing and, in a number of specific instances, imposing standards of reasonable behaviour*". [161] The UNIDROIT Principles therefore identify the reasonableness as a general and founding notion of the international commercial law, namely a standard to be imposed on the parties according to the situation. This approach was also confirmed in the case *Companhia de Geração Térmica de Energia*

[159] For example, Article 6.11-Article 6.1.5 respectively stipulate the time of performance, one-time performance or installment performance, partial performance, the order of performance, and the issue of early performance, which was a result of drafters' effort to combine civil law rules with some common law rules.

[160] This is the case, for example, of Article 6.1.7 and Article 6.1.8 of the UNIDROIT Principles that deal with payment by cheque and appropriation of funds.

[161] INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW (UNIDROIT), *UNIDROIT Principles of international commercial contracts 2016*, UNIDROIT 2016, Rome, 2016, p. xxix.

Elétrica – CGTEE v Kreditanstalt fur Wiederaufbau Bankengruppe[162] in which it was recognized fundamental to solve the issues related to the contract by looking at the principles that governs international commercial contracts, and specifically the ones affirmed in the UNIDROIT Principles,[163] namely the good faith as the duty of loyalty that contracting parties must keep in relation to the reasonable standards of international trade.

With regards to the specific provisions of the UNIDROIT Principles that deal with the reasonableness, we can find its derivative words appear more than 300 times. If we look more in detail at the single articles that relate to the concept of reasonableness, we can identify the following application.[164]

(1) As a criterion for contract interpretation.

Article 4.1, paragraph 1, provides that the contract has to be interpreted according to the common intention of the parties. However, paragraph 2, provides a corrective criterion by stating that if the intention cannot be established "*the contract shall be interpreted according to the meaning that reasonable persons of the same kind as the parties would give to it in the same circumstances*".[165] In a specular way, with reference to the interpretation of the statements and other conduct of the parties, the following Article 4.2 provides in paragraph 1 that they have to be construed according the party's intention if the other party knew or could not have been unaware of that intention. But

[162] Companhia de Geração Térmica de Energia Elétrica v Kreditanstalt fur Wiederaufbau Bankengruppe, Special Appeal 1.550.260.

[163] The decision also specifies, to this regard, that the UNIDROIT Principles represent "an initiative of uniformization of the rules of international trade law, aiming the effective application of the new 'lex mercatoria'".

[164] On the use of the reasonableness in the UNIDROIT Principles see also S. ZORZETTO, *The Uses of Reasonableness in the Constitutional Interpretation and Arbitration: A Comparative and Theoretical Analysis about the Law in Action*, in *Magallat Kulliyyat Al-Qanun Al-Kuwaytiyyatal-Alamiyyat*, 2017, p. 84.

[165] The "reasonableness" test provided in paragraph 2 has only one exception that regards the interpretation of standard terms, which, as mentioned in the comment to article 4.1, have their own special nature and purpose and therefore it should be given priority to interpretation according to the "reasonable expectations" of their average user, and not the understanding of the contract by some reasonable person. See INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW (UNIDROIT), *op. cit.*, p. 138.

in paragraph 2 it is specified that if this criterion is not applicable then "*such statements and other conduct shall be interpreted according to the meaning that a reasonable person of the same kind as the other party would give to it in the same circumstances*".[166] As evidently inspired by the common law notion of reasonable person, this test requires to assess the intention or the statements/conduct of the party by taking into consideration what a person of the same kind as the parties would give to it in the same circumstances. The test, therefore, "*is not a general and abstract criterion of reasonableness, but rather the understanding which could reasonably be expected of persons with, for example, the same linguistic knowledge, technical skill, or business experience as the parties*".[167]

The UNIDROIT Principles also specify in Article 4.3 which are the relevant circumstances of the case that should be taken into consideration. The list provided in the Article 4.3 is not exhaustive, but it offers only the most important ones, and it includes: the preliminary negotiations between the parties, the practices which the parties have established between themselves; the conduct of the parties subsequent to the conclusion of the contract; the nature and purpose of the contract; the meaning commonly given to terms and expressions in the trade concerned; the usages.[168]

(2) As a criterion used to consider the reliance on the conduct of the other party.

In the first chapter dedicated to "General Principles", the "reasonableness" is explicitly addressed to regulate the inconsistent

[166] According to Professor Garro, based on article 4.2, it is necessary to apply "the reasonableness check" whenever the common intention of the parties is unsure. See A. GARRO, *The Gap-Filling Role of the UNIDROIT Principals in International Sales Law: Some Comments on the Interplay between the Principals and CISG*, in *Tulane Law Review*, 1995, p. 1149.

[167] See INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW (UNIDROIT), *op. cit.*, p. 138.

[168] As explained in the comment of the Article 4.3, the most important circumstances relevant in the application of the "reasonableness" test are primarily (but not exclusively) the last three, namely the nature and purpose of the contract, the meaning commonly given to terms and expressions in the trade concerned and usages. See INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW (UNIDROIT), *op. cit.*, p. 141.

behavior of the party. According to Article 1.8, indeed, a party cannot act inconsistently with a certain understanding upon which the other party has reasonably relied. The aim of the article therefore is to avoid that a detriment is cause by the reasonable reliance of the party. According to the comment of Article 1.8, the understanding is to be intended in a broad sense: it may regard a matter of fact or of law, or the intention, or how the parties can or must act, and so on; but the fundamental prerequisite is that the understanding must be one on which, in the specific circumstances, the other party can and does reasonably rely. [169] The reasonableness of the reliance should be determine taking into consideration, specifically, "*the communications and conduct of the parties, to the nature and setting of the parties' dealings and to the expectations they could reasonably entertain of each other*".[170]

A specific application of the general provision above-mentioned is Article 2.1.4 which deals with the revocation of offer. According to this Article an offer can always be revoked before the acceptance, unless the offer was irrevocable or "*if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer*". Also in this case the reasonable reliance depends on the conduct held by the offeror, or the nature of the offer itself, such as for example an offer whose acceptance requires extensive and costly investigation on the part of the offeree.[171] Regarding the acts which the offeree must have performed in reliance on the offer, they could be of any kind (e.g. making preparations for production, buying or hiring of materials or equipment), as long as these acts represent a normal conduct in the trade concerned, or should otherwise have been foreseen

[169] See INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW (UNIDROIT), *op. cit.*, p. 22.
[170] *Ibid.*
[171] See INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW (UNIDROIT), *op. cit.*, p. 41.

by, or known to, the offeror.[172]

(3) As a standard to determine specific content of the contract.

This group of provisions covers specific aspects that form the content of a contract such as "reasonable time", "reasonable price" [173], "reasonable quality" [174] and "reasonable expenses"[175].

Reasonable time is an expression that is frequently employed, such as in case to determine: the time of acceptance if not provided by the contract [176], the period of sending the contract modification in writing in confirmation after conclusion of the contract[177], the time limit of notice of avoidance[178] and so on.[179] The way to determine "reasonable time" may vary from article to article. For example, in the case of a written offer, if no time is specified for acceptance, the promise needs to "reach the offeror within a reasonable time", and this element should be determined having regard, for example, to the means of communication used by the offeror. [180] Another example is the

[172] *Ibidem*.

[173] UNIDROIT Principles ARTICLE 5.1.7 (Price determination) (1) Where a contract does not fix or make provision for determining the price, the parties are considered, in the absence of any indication to the contrary, to have made reference to the price generally charged at the time of the conclusion of the contract for such performance in comparable circumstances in the trade concerned or, if no such price is available, to a reasonable price.

[174] UNIDROIT Principles ARTICLE 5.1.6 (Determination of quality of performance) Where the quality of performance is neither fixed by, nor determinable from, the contract a party is bound to render a performance of a quality that is reasonable and not less than average in the circumstances

[175] UNIDROIT Principles ARTICLE 3.2.15 (4) Compensation may be claimed for expenses reasonably required to preserve or maintain the performance received, and art. 7.4.8 (1) The non-performing party is not liable for harm suffered by the aggrieved party to the extent that the harm could have been reduced by the latter party's taking reasonable steps.

[176] UNIDROIT Principles ARTICLE 2.1.7 (Time of acceptance) An offer must be accepted within the time the offeror has fixed or, if no time is fixed, within a reasonable time having regard to the circumstances, including the rapidity of the means of communication employed by the offeror. An oral offer must be accepted immediately unless the circumstances indicate otherwise.

[177] ARTICLE 2.1.12 (Writings in confirmation) If a writing which is sent within a reasonable time after the conclusion of the contract and which purports to be a confirmation of the contract contains additional or different terms, such terms become part of the contract, unless they materially alter the contract or the recipient, without undue delay, objects to the discrepancy.

[178] UNIDROIT Principles ARTICLE 3.2.12(1) Notice of avoidance shall be given within a reasonable time, having regard to the circumstances, after the avoiding party knew or could not have been unaware of the relevant facts or became capable of acting freely.

[179] UNIDROIT Principles ARTICLE 2.1.7, 2.2.7 (2) (b), 2.2.9 (2), 3.2.12 (1), 5.1.7 (1), 5.1.8, 6.1.1 (c), 6.1.12 (2), 6.1.16 (1), 7.1.5 (3), 7.1.7 (3), 7.2.2 (e), 7.2.5 (1), 7.3.2 (2), 7.3.4, 7.4.5, 9.1.12 (1)).

[180] UNIDROIT Principles ARTICLE 2.1.12*(Writings in confirmation)* If a writing which is sent within a reasonable time after the conclusion of the contract and which purports to be a confirmation of the

termination of a contract for an indefinite period according to which a contract for an indefinite period may be terminated by either party by giving the notice within a reasonable time in advance.[181] In this case the "reasonable time" needs to take into account factors such as how long the parties have been engaged in the contractual relationship, or how much time it will take to find a new trading partner, and so on. As indicated in the comment of this article the rule not only provides a gap-filling provision in cases parties do not include the duration of their contract, but also, more generally, it represents an expression of the commonly recognized principle that contracts may not bind the parties eternally.[182]

(4) As a justification to recognize an implied obligation or to supply an omitted term.

The UNIDROT Principles acknowledge that the obligations can be expressly stipulated in the contract, or otherwise can be implicit. To this regards Article 5.1.2 states that such implied obligations can be derived from the nature and purpose of the contract, the practices established between the parties and usages, the good faith and fair dealing, or the reasonableness. Still related with the integration of the contractual content, Article 4.8 provides that if the contract is missing of an important term for the determination of the rights and duties of the parties, a term which is appropriate in the circumstances needs to be supplied. The criteria to determine the appropriate term among the factors to be taken into consideration there are the intention of the parties, the nature and purpose of the contract, the good faith and fair dealing, and the reasonableness[183].

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contract contains additional or different terms, such terms become part of the contract, unless they materially alter the contract or the recipient, without undue delay, objects to the discrepancy.

[181] UNIDROIT Principles ARTICLE 5.1.8 *(Termination of a contract for an indefinite period)* A contract for an indefinite period may be terminated by either party by giving notice a reasonable time in advance. As to the effects of termination in general, and as to restitution, the provisions in Articles 7.3.5 and 7.3.7 apply.

[182] See the comment of the article in INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW (UNIDROIT), *op. cit.*, p. 164 f.

[183] As it was observed "reasonableness" applies according "how the parties would reasonably have

(5) As a ground for avoidance (or non-avoidance) of the contract.

There are several provisions in UNIDROIT Principles that gives relevance to the "reasonable commercial standards" in order to obtain the avoidance of the contract. For example, "reasonable commercial standards" are relevant in case of fraud. Article 3.2.5 provides that the contract may be voidable if the party has been led to conclude the contract on the basis of fraudulent non-disclosure of circumstances which, according to reasonable commercial standards of fair dealing, the latter party should have disclosed. The "reasonable commercial standards", however, are also used in some provisions to prevent the avoidance of the contract. In Article 3.2.5, regarding the case of gross disparity, it set that the party entitled to avoidance may ask the court to adapt the avoidable contract or term in order to make it accord with reasonable commercial standards of fair dealing. The same possibility is also accorded to the party receiving notice of avoidance but in this case the party needs to promptly inform the other party of its request of adaptation in order to avoid the latter to reasonably rely on the notice of avoidance sent.

(6) As a criterion to determine the certainty of harm.

In case a party has failed to or cannot perform a contract, the other party is entitled to claim for compensation. However, according to Article 7.4.3, compensation is recognized only for harm, including future harm, that is established with a reasonable degree of certainty. In this context reasonable means that it is required for the harm to be sufficiently certain, not only with respect to its existence but also to its extent.[184]

If we examine the overall application of reasonableness in the UNIDROIT Principles, it was observed that this concept is a common and important standard that can be used in providing for the correctness

agreed if they had known about the loophole". See H. BROXIS, W. D. VOLCKE, *General Essay on German Civil Law (33rd edition)*, translated by Zhang Yan, Yang Dake School, Renmin University of China Press, Beijing, 2014, p. 70.

[184] See INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW (UNIDROIT), *op. cit.* 275.

and justice of the contractual obligations.[185] Indeed, "*The flexibility and soupiest of the standard of reasonableness also reflects its major virtue: it allows arbitrators and judges to focus on the search for a fair and equitable solution and to take account of the different commercial interests underlying each individual case*."[186] To this regards we can see that in the approach to reasonableness in the UNIDROIT Principles we find the echo of the common law tradition. The adoption of the "reasonable person" standard and the resort to the reasonableness in order to recognize implied terms are symptomatic in this regard. Similarly, if we compared the use of reasonableness in the UNIDROIT Principles and in the CISG we can see that its use and meaning are alike[187]. In some cases the rules have adopted the same solution, such as for instance in the revocation of offer in which both Article 16 of the CISG and Article 2.1.4 of the UNIDROIT Principles do not allow in case there was reasonable for the offeree to rely on the offer as being irrevocable. The only difference that can be noticed is that the UNIDROIT Principles seem to recognize a even broader scope to the reasonableness with respect to the CISG, as in the Introduction of the UNIDROIT Principles this standard is expressly indicated as a general and founding notion of the international commercial law.[188]

[185] See S. SCHIPANI, *The UNIDROIT Principles of International Commercial Contracts*, available at http://lmydlf.cupl.edu.cn/info/1021/1109.htm. This is a speech written by Professor Schipani for an international seminar co-hosted by the Ministry of Foreign Economic and Trade Cooperation of China and the International Institute of Private Law (UNIDROIT).

[186] See K.P. BERGER, *The Lex Mercatoria Doctrine and the UNIDROIT Principles*, in *Law and Policy in International Business*, 1997, p. 943 ff.

[187] M.J. BONELL, *An International Restatement of Contract Law: The UNIDROIT Principals of International Commercial Contracts*, cit., p. 217. Bonell states that "To the extent that the two instruments address the same issues, the rules laid down in the UNIDROIT Principals are normally taken either literally or at least in substance from the corresponding provisions of CISG; cases where the former depart from the latter are exceptional"

[188] However, Professor Bonell argued that "reasonableness" could be taken as a general duty also in the Vienna Convention on the basis that the UNIDROIT Principles may support the interpretation of other international uniform law instruments: See M.J. BONELL, *An International Restatement of Contract Law: The UNIDROIT Principals of International Commercial Contracts*, cit., p. 217.

CHAPTER II

EU CONTRACT LAW AND REASONABLENESS

SECTION 1 - HARMONIZATION OF CONTRACT LAW IN EUROPE

1. Reasonableness and contract in European civil law: a changing perspective

"The reasonable is a buzz concept in continental private law and in particular in the law of obligations (both contracts and torts)"[189].

As it has been briefly outlined in the previous chapter, the notion of reasonableness has strong philosophical, religious and moral roots in the Western thinking. Moreover, "there is no technical problem in translating 'reasonableness' into Western languages that draw on the Hellenistic understanding of reason as a source of truth"[190]. In modern civil codes, and in particular in the two most important civil code models, i.e. the French civil code and the German civil code, we find very few references to reasonableness.

The French civil code refers to the reasonableness in article 1112 that defines the influence exercised on one of the contracting parties by referring to the impressions of "*une personne raisonnable*". [191] Moreover, as a criterion for assessing the diligence the French code civil uses the traditional figure of the "*bon père de famille*" (article 1176), which certainly refers to a reasonable person.[192]

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[189] The words are by S. ZORZETTO, *Reasonableness*, in *The Italian Law Journal*, vol. 1, n. 1, 2015, p. 112-113.

[190] G.P. FLETCHER, *The Language of Law: Common and Civil*, in B. POZZO (ed.), *Ordinary Language and Legal Language*, Giuffré, Milano, 2005, p. 95.

[191] Article 1112: "*There is violence when it is of such a nature as to make an impression upon a reasonable person and when it can inspire in him a fear of exposing his person or his wealth to considerable and present harm. In such an instance, the age, the sex, and the condition of the persons shall be taken into consideration*" (for the translation in English of the French civil code see D. GRUNING, A. R. LEVASSEUR, J. R. TRAHAN, E. ROY, *Traduction du code civil français en anglais version bilingue*, 2015, available at *https://halshs.archives-ouvertes.fr/halshs-01385107*).

[192] See S. PATTI, *Ragionevolezza (diritto civile)*, in *Digesto delle discipline privatistiche*, UTET,

In the Italian civil code, the reasonableness is mentioned in Article 49 that provides "... anybody who reasonably believes to have claims on the absent person's assets which depend on the death of the absent person may"; or in Article 1711 according to which "the agent may differ from the instructions received if the circumstances unknown to the principal, that cannot be communicated to him in time, make it reasonable to believe that the principal would have given his approval."

In the German civil code we find references in Section 276, BGB, Verantwortlichkeit des Schuldners (Standard of Reasonable Care) and Section 138(1), BGB, Boni Mores (reasonable time). According to some scholars German lawyers, notwithstanding the silence of the code, apply the concept of the reasonable person in a very similar way as the American lawyers.[193] For German lawyers, the reasonable person always plays a role as a particular character rather than a fictitious individual, that is to say a reasonable person always appear with knowledge of the case, such as the driver in a traffic accident or the carrier in the delivery.[194] Moreover, German lawyers may often use approximated words to estimate the behavior of the parties who can be seen as reasonable person. In addition, although the German words corresponding to "reasonableness" cannot be found in the German civil code, it still can be found in some provisions.

In the Dutch civil code, "reasonableness and fairness"

Turin, 2014, pp. 517 - 527.

[193] SEE W.E. JOACHIM, *The Reasonable Man in United States and German Commercial Law*, Comp. L. Yb. Int l Bus., 1992, available at: https://www.trans-lex.org/124800/_/joachim-willi-e-the-reasonable-man-in-united-states-and-german-commercial-law-15-complybint-l-bus-1992-at-341-et-seq/. In the conclusion Joachim states that: "*There are no basic differences in the United States and German civil and commercial law as far as the characterization and the application of the reasonable man are concerned. The reasonable man test contains various legal aspects and serves legal purposes; in particular this unique scheme functions:(1)As a discretionary, necessary, and helpful fiction or an artifice or instrumental idea in the evaluation of human legal conduct;(2)As a pool for juristic argumentation;(3)As a necessary device in both legal systems;(4)As a means to finding the "golden middle" for the judicial evaluation of human behavior;(5)As a general and flexible pattern used by the legislator to provide for adequate application of law;(6)As a general and flexible pattern used by lawyers, especially judges to achieve the adequate result in a lawsuit;(7)As a means to apply the present law; and(8)As a means to express social developments and changes into law.*"

[194] *Ibidem*.

(Redelijkheid en billijkheid) is a core concept that is mentioned: Article 6:2 regarding the reasonableness and fairness within the relationship between the creditor and debtor;[195] in Article 6:248 regarding the legal effects arising from law, usage or the standards of reasonableness and fairness;[196] in Article 7:904 regarding the conflict with reasonableness and fairness; absence of a valid determination[197]. It has been noted that "For (Dutch) lawyers, these concepts may seem a beacon of stability in an ever-changing legal environment". [198] In accordance with the aforementioned articles, it can be seen that the Dutch Civil Code includes fairness and reasonableness as a very important principles, to which the creditor and the debtor must act accordingly.

However, it has been stressed that there is a diverse approach to the concept of reasonableness between the civil law and the common law traditions. The difference depends from the distinctive style of legal reasoning of these two legal families.[199] Specifically, the legal discourse of the common law can be described as "flat" while the one of the civil law can be defined as "structured". It was, indeed, observed that "Flat legal discourse proceeds in a single stage, marked by the application of a legal norm that invokes all of the criteria relevant to the resolution of a dispute. Structured legal discourse proceeds in two stages: first, an

[195] Dutch civil code Article 6:2: "*Reasonableness and fairness within the relationship between the creditor and debtor 1. The creditor and debtor must behave themselves towards each other in accordance with the standards of reasonableness and fairness. 2. A rule in force between a creditor and his debtor by virtue of law, common practice or a juridical act does not apply as far as this would be unacceptable, in the circumstances, by standards of reasonableness and fairness*."

[196] Dutch civil code Article 6:248: "*Legal effects arising from law, usage or the standards of reasonableness and fairness 1. An agreement not only has the legal effects which parties has agreed upon, but also those which, to the nature of the agreement, arise from law, usage (common practice) or the standards of reasonableness and fairness*."

[197] Dutch civil code Article 7:904: "*Conflict with reasonableness and fairness; absence of a valid determination 1. An assessment made by one of the parties or a third party is voidable if its binding force, in view of its content or the way in which it was made, would in the given circumstances be unacceptable according to standards of reasonableness and fairness*."

[198] See C.G. B. VOOGD, A.G. CASTERMANS, M.W. KNIGGE, T. VAN DER LINDEN, H.A. TEN OEVER (eds.), *The Introduction Core Concepts in the Dutch Civil Code Continuously in Motion,* Kluwer Publisher, The Hauge, 2016, available at: HTTPS://OPENACCESS.LEIDENUNIV.NL/BITSTREAM/HANDLE/1887/42930/000_04_BWKJ_30_17-03-2016.PDF?SEQUENCE=1.

[199] G. P. FLETCHER, *The right and the reasonable*, in *Harvard Law Review*, 1998, p. 949.

absolute norm is asserted; and second, qualifications enter to restrict the scope of the supposedly dispositive norm". The consequence is that in civil law countries the standard of reasonableness applies only in the second part of the legal reasoning, while in common law the legal reasoning starts – in its first and only stage – with the concept of reasonableness.

However, the notion of reasonableness has been at the center of a new wave of studies which on the one side have been redefining the role of these notions in the history of continental legal thinking and practice[200]. A strong contribution to this new attention to reasonableness in Civil law systems has been given by the emersion of the notion of reasonableness in the new legal framework of European Union contract law. As a matter of fact reasonableness has entered both in directives and soft law instruments elaborated to harmonise contract law in Europe.

To this regard it was argued that the differences between civil and common law systems tend to reduce due to the new meaning attributed in European directives to general concepts and clauses.[201] For example, the Italian law that implemented the Directive 93/13/EEC considers unfair the terms which "despite good faith cause a significant imbalance of the rights and obligations deriving from the contract for the consumer". This definition goes beyond the traditional reading of the good faith clause, and it was observed that the European-derived rule imposes a "test of reasonableness on the content of the clause" and therefore attributing to the civil law judge a task of balancing interests according to an equitable nature.[202]

[200] See S. ZORZETTO, *Reasonableness*, cit.; S. PATTI, *Ragionevolezza (diritto civile)*, cit.; A. RICCI, *Il criterio della ragionevolezza nel diritto privato*, cit.; S. TROIANO, *La «ragionevolezza» nel diritto dei contratti*, Cedam, Milan, 2005.
[201] See S. PATTI, *Ragionevolezza (diritto civile)*, cit.
[202] *Ibidem*.

2. Instruments of harmonization

2.1 European Directives in the contract law field

Directives are legislative documents adopted by the European Parliament, the Council of the European Union and the European Commission that are binding for the member states but are not directly applicable. The member states, in fact, have to implement the contents of the directives into domestic legislation.[203] The founding EU treaties provide the cases in which the EU institutions may adopt a directive.[204] In practice, EU institutions may issue directives under two circumstances.[205] First, when there are divergencies in the laws of member states in a certain law field, and such divergencies affect the establishment of the common market or have adverse effects on the functioning of the common market. Second, when the directives enable member states to lift restrictions on the freedom of goods, people, services and funds.

Directives play a unique role in the process of European integration, as a tool to implement the EU treaties and their objectives.[206] Indeed, generally speaking, EU treaties only provide for the overall principles and goals of EU activities. Therefore, the realization of the objectives stipulated in EU law still needs the support of a large number of other legal instruments. The directives facilitate the development of European integration. Within the EU, the differences in legal systems, legal traditions, and economic development among member states determine that it is unrealistic to adopt only a single legislative form of regulations in all the EU matters. Directives make up for this shortcoming.

Among the law fields in which the EU has adopted the directives, the contract law is one very important. Starting from the year 2000, the

[203] See C, BARNARD, S. PEERS, *European Union Law, Oxford University press*, Oxford, 2017.
[204] See G.A. BENNACCHIO, B. PASA, *A Common Law for Europe,* Central European University Press, Budapest, New York, 2005.
[205] H. S. NÖLKE, C. T. FLESNER, M. EBERS, *EC Consumer Law Compendium: The Consumer Acquis and its transposition in the Member States*, Walter de Gruyter, Munich, 2009.
[206] See G. A. BENACCHIO, B. PASA, *A Common Law for Europe,* cit.

EU begun an increasingly focus on the establishment of a possible European contract law;[207] in fact, in that year the European Parliament issued a resolution that aimed at engaging the Commission to elaborate a study on the issue of the unification of the contract law in Europe.[208] In the following year the Commission hence issued a Communication[209] which provided four different options to develop a possible European contract law, namely: (a) no EC action and let the market developing its own solutions; (b) promote the development of common contract law principles leading to more convergence of national laws (such as drafting guidelines or specific codes of conduct for certain types of contracts or standard contracts); (c) improve the quality of legislation already in place (for instance, by modernizing and simplifying the existing directives); (d) adopt new comprehensive legislation at EC level (such as new directives). In the following year the latter two options prevailed, hence the EU started to issue several directives in the field of contracts, and reorganize some of the old ones. This approach, that can be defined as sectorial one, led to a harmonization that concerned just single areas of the contract law, avoiding therefore an overall approach to the matter.

The most relevant directives related to contract law can be summarized as follow.

The Doorstep Selling Directive (85/577/EEC) aims to protect the consumers when the retailing activities take place outside the premises. Doorstep Selling could take place at the consumers' house, the corridor and stairway of the house, the public aisle, or the workshop entrance and dining hall. According to the Directive, consumers are defined as the natural person involved in the retailing negotiation and the retailing activity does not take place as the consumers' work or business activity.

[207] On this aspect see G. CORDERO MOSS, *Commercial contracts and European private law*, in C. TWIGG-FLESNER (Ed.), *The Cambridge Companion to European Union Private Law*, Cambridge University Press, Cambridge, 2010, p. 147 ff.
[208] See Resolution of 16 March 2000, OJ C377, 323.
[209] See COM (2001) 398 final.

Trader refers to the natural or legal person who make transactions within the occupational or business scope, or the person who sells in the name of business runner or for the benefits of the trader. Non-store retailing as a new marketing approach does not allow the consumers to learn enough about the products timely, or cause the consumers to enter into the contract quickly. This Directive therefore provides the consumers with the right of renunciation.

The Distance Selling Directive (97/7/EC) deals with the situation in which the consumers place orders or enjoy services by signing the contracts with the producers via distant communication methods, including letters, product or service catalog, phone, fax, email, radio, magazine or newspaper. This Directive allows the consumers to obtain information in advance, in writing, and if the case withdraw the contract.

The Price Indication Directive (98/6/EC) provides that the price indication needs to be recognizable and easy to understand, since an improper price indication could harm the interests of the counterparty, particularly the consumer. The trader should offer both the total price and the unit price of the products or services.

The Unfair Terms Directive (93/13/EC) deals with the asymmetry in the economic power, expertise and trading capability between the trader and the consumer. It is therefore necessary to leverage the legal approaches to regulate the transactions. According to the Directive a *"contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer*." The legal consequence of the unfair standard terms is that such term has no binding force on the consumers. In Annex III the Directive also provides a non-exhaustive list of terms which may be regarded as

unfair.[210] This directive is very important in the contract law field: indeed, it was stressed that this is "*the first step that EU touches the core of the contract laws of the member counties, and a milestone to 'Europeanize' the contract law*." [211]

The Consumer Sales Directive (1999/44/EC) allows the consumers to enjoy the free repair, free change and price reduction of the defect products, or to cancel the contract. It also stipulates the burden of proof between the traders and consumers. The Directive also lists the principles on the quality guarantee of second-hand goods.

The Unfair Commercial Practices Directive (2005/29/CE) (that amended the previous Misleading Advertising Directive (84/450 EEC)) prohibits unfair commercial practices in transactions between operators and consumers. The aim of the Directive is to gives a frame of common rules for the Member States concerning unfair commercial practices on the ground that such commercial practices are detrimental to the interests of consumers and therefore represents an obstacle to the proper functioning of the European internal market. The Directive is currently one of the most stringent in the world in prohibiting unfair commercial practices, including misleading commercial advertising. [212] It specifically lists more than 30 unfair commercial practices that fall under the absolute prohibition, including false free products, false prizes and misleading advertising that misleads particular consumer groups such as children.

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[210] For example, it is unfair excluding or limiting the legal liability of a seller or supplier in the event of the death of a consumer or personal injury to the latter resulting from an act or omission of that seller or supplier; or requiring any consumer who fails to fulfill his obligation to pay a disproportionately high sum in compensation; or enabling the seller or supplier to alter unilaterally without a valid reason any characteristics of the product or service to be provided.

[211] S. ORLANDO, T*he Use of Unfair Contractual Terms as an Unfair Commercial Practice, European Review of Contract Law*, 2011, p. 45. In note 38 it is cited P. KOTLER, J. ARMSTRONG, V. WONG, J. SAUNDERS, *Principles of marketing* (5th ed.), Pearson, London 2008, p. 32.

[212] *Consumers: New EU rules crackdown on misleading advertising and aggressive sales practices*, available at: https://ec.europa.eu/commission/presscorner/detail/en/IP_07_1915. EU Consumer Commissioner, Meglena Kuneva said: "*Unfair practices rip-off consumers and distort competitive markets. There can be no place in Europe's Single Market for traders who pressure, bully or mislead people, particularly at Christmas the busiest shopping time of the year. That's why Europe is taking the lead; these are some of the toughest rules on misleading and pressure selling in the world.*"

The directive on consumer rights (2011/83/EU), issued in 2011,[213] focuses on the obligation of the operator to provide information about the subject matter of the consumer contract, which should be stored and made available to the consumer on a "tangible medium".[214] The other focus of this Directive is to provide for a right of withdrawal for consumers and to extend the withdrawal period to 14 days. The right of withdrawal can also be exercised through a website if the consumer has purchased the goods online. If the consumer has already used the goods to a greater extent than necessary, the consumer can still withdraw from the contract, but will have to compensate for the loss of value of the goods.

Recently, the European Parliament and the Council have adopted the Directive concerning contracts for the supply of digital content and digital services (DIR EU 2019/770).[215] This Directive has the purpose to provide for a high level of consumer protection, by laying down common rules on certain requirements concerning contracts between traders and consumers for the supply of digital content or digital services, in particular, rules on: (a) the conformity of digital content or a digital service with the contract, (b) remedies in the event of a lack of such conformity or a failure to supply, and the modalities for the exercise of those remedies, and (c) the modification of digital content or a digital service. Digital content includes computer programmes and mobile applications, as well as video and audio files in digital form. Digital services include, for instance, cloud computing services and social media.

From the above-described main directives in the contract law, it can be observed that the EU legislator has opted for a clear distinction between the discipline of commercial contracts and consumer contracts.

[213] This Directive amended Directives 93/13/EC and 1999/44/EC, and repealed Directives 85/577 /EC and 97/7/EC.
[214] "*Tangible medium are storage media for information that consumers want, including paper, USB sticks, CDs, D V Ds, memory cards, hard drives and email*."
[215] The directive is part of the digital single market strategy for Europe.

The latter plays an important role in the harmonization process, as it was one of the main objects of the past directives. Moreover, if we look at the content of the directives, we can note that it unequivocally emerged the sectorial approach chosen by the EU. The regulation of the contract is addressed by single aspects (unfair terms, price indication, peculiar contracts concluded by the consumer, and so on) and there is not an overall or general discipline. This process, hence, has been resulting in a fragmentation of the regulation of the contractual matter.

2.2 The Principles of European Contract Law and the Draft Common Frame of Reference

Besides the Directives regulating specific areas of contract law, there is also another important source of the European contract law that is represented by soft law instruments.

The first initiative in this regard started in 1982 when the Commission on European Contract Law was established under the chairman of prof. Ole Lando.[216] As a non-governmental organization, sponsored by the European Community, the Commission was composed of 22 legal experts coming from 15 member states. The main goal of the Commission was to formulate the Principles of European Contract Law (PECL). The PECL were formulated to a greater extent for the harmonization of the private law, and to pursue the legal reform and the promotion of legal development in the contract law field. The work of the PECL is not based on the legal system of one single state but it attempts to combine the different solutions adopted by the various legal systems.[217]

Part I of PECL were released in 1985; later in 1998 it was added Part II, and lastly Part III in 2002. From the point of view of the structure, the PECL are divided into three parts (17 chapters): the first

[216] Indeed, the commission is also known as the Lando Commission.
[217] *Introduction to the Principles of European Contract Law (PECL)*, available at: https://www.cisg.law.pace.edu/cisg/text/peclintro.html.

part is dedicated to the general provisions; the second parts deals with issues relating to the formation, validity and interpretation of the contract, execution and non-performance of the contract, the remedies available; the last part focuses on issues related to joint and several obligations, the assignment of credits and the contract, compensation, condition, interest and prescription. According to the chapter on "General provisions", the Principles are intended to be applied as general rules of contract law in the EU on a voluntary basis, i.e. when the parties have agreed to incorporate them into their contract, or as a source of integration in case the party have not opted for a specific law governing the contract. It is interesting to note that the PECL includes also a commentary on the application of single articles and on relevant domestic legislation of member states and international treaties, especially the United Nations Convention on Contracts for the International Sale of Goods.[218]

After the release of the PECL, in order to speed up the unification of EU private law, the Commission issued in 2003 a Communication on "A more coherent European contract law - An action plan." In this document, the Commission stressed that, with reference to the field of contract law, the differences between the legal framework of the member states and the inconsistencies in the EU legislation were an obstacle to the proper functioning of the common market. In order to achieve a more coherent European contract law and facilitate the functioning of the internal market, the Action Plan set up, on the one hand, to retain the "sector-specific approach" applied in legislation, and, on the other hand, to promote a combination of regulatory and non-regulatory measures (i.e. a combination of "hard law" and "soft law"). The Action Plan opened the way to develop the Common Frame of

[218] The European Contract Law Principles, like UNIDROIT principles, are is inspired by the restatement of American law. See *Introduction to the Principles of European Contract Law (PECL)*, available at: https://www.cisg.law.pace.edu/cisg/text/peclintro.html. See also *Observations on the use of the Principals of European Contract Law as an aid to CISG research*, available at: https://www.cisg.law.pace.edu/cisg/text/peclcomp.html.

Reference (CFR), a document that was supposed to provide the best solutions in terms of common terminology and rules, to serve as a guide or tool for legislators to ensure greater coherence between existing and future European contract law, and to promote a higher degree of coherence in the contract law of the Member States.

Right after this Communication, the Study Group on a European Civil Code (the 'Study Group') and the Research Group on Existing EC Private Law (the 'Acquis Group')[219] started to work on the Draft of a Common Frame of Reference (DCFR) that was published in its final version in 2009.[220] The DCFR has specifically three separate purposes:[221] the first one is to be a possible model for a "political" CFR, the second one is to promote legal science, research and education in the field of private law within Europe, and the third one is to provide a possible source of inspiration for legislative drafters.

If we examine the content of the DCFR, we can see that the scope of the DCFR is quite broad, even wider that the PECL. In fact, it covers, for example, the area of obligations, specific contracts, non-contractual obligations, movable property, and so on. There are, however, some excluded matters indicated in article 1:101 which are the status or legal capacity of natural persons, wills and succession, family relationships, negotiable instruments, employment relationships, immovable property law, company law, and the law of civil procedure and enforcement of claims.

Regarding the organization of the subject included in the text, the DCFR is divided in three parts: principles, definitions and model rules. The principles represent the main value of the private law, and they are indicated in freedom, security, justice, and efficiency. The definitions have the function of developing a uniform European legal terminology.

[219] It is worth mentioning that the members of the two research groups were all academics with expertise in private law, comparative law and EU law.
[220] There was a previous Interim Outline Edition in 2008.
[221] The purposes are expressly indicated in the Outline Edition of the DCFR: see STUDY GROUP ON A EUROPEAN CIVIL CODE, *Principles, Definitions and Model Rules of European Private Law - Draft Common Frame of Reference (DCFR) Outline Edition*, Munich, 2009, pp. 7 ff.

The model rules represent the greatest part of the DCFR. The adjective 'model' indicates that the rules do not have any normative force but are soft law rules as the PECL. The model rules are divided into ten books[222] that recall the structure of a civil code.[223]

Even if the DCFR was originally formulated as a preparatory work for the "political" Common Frame of Reference (CFR), after its publication the EU legislator has not taken any action toward this goal. Therefore, the merit of the DCFR is first of all to have promoted a comparative knowledge of private law and to have boost a debate within Europe over the necessity to create a more unified European private law. Therefore, the DCFR is an important initiative to be taken into account for the future process of the harmonization of the private law, and in particular in the field of the contract law.[224]

2.3 The projects of harmonization of contract law and debate on a European civil code

With the economic integration among the member states becoming more and more tight, the issue of the harmonization of private law, and especially the contract law field, has been in the last fifty years at the center of the debate both at the level of legislative and academic discourses.

To this regard in 1989 an ambitious project was the launched. In this year the European Parliament, starting from the assumption that

[222] These books are Book I: General provisions; Book II: Contracts and other juridical acts; Book III: Obligations and corresponding rights; Book IV: Specific contracts and the rights and obligations arising from them; Book V: Benevolent intervention in another's affairs; Book VI: Non-contractual liability arising out of damage caused to another; Book VII: Unjustified enrichment; Book VIII: Acquisition and loss of ownership of goods; Book IX: Proprietary security rights in movable assets; Book X: Trusts.

[223] Indeed, notwithstanding the different member states' approaches in the private law, the DCFR has basically adopted a structure shaped on the continental/civil law legal system. For example, we can find the use of several legal categories typical of the civil law, such as legal act, debt, and real right.

[224] On this aspect see I. SAMMUT, *Constructing Modern European Private Law: A Hybrid System*, Cambridge University Press, Cambridge, 2016, p. 252 ff. The author, indeed, suggests that "*it is clear the while the ultimate European Civil Code is not on the agenda, it is also clear that EPL in particular certain fields as identified previously, can be developed further in the interests of the Internal Market at least as an optional tool or as minimum harmonisation*".

"the unification of part of the private law (such as the contract law) is of great significance to the European common market", called for the formulation of a code of European private law.[225] This request was then repeated in 1994 with the Resolution that suggested four specific initiatives, namely "a. the Committee to conduct a study on the feasibility to draft a common private law, b. an expert panel to be set up to list the priorities of the items that need to be unified in the short term and the long term, c. EU to promote unification and standardization in Europe or across the world via the International Institute for the Unification of Private Laws, the UN International Trade Law Committee and the European Council, and d. to continue the support for the Committee to unify the Contract Law".[226]

After this, as described in paragraph 2.2., many initiatives particular in the field of the soft law were launched in order to boost a codification and create a common civil code for all the member states. The Draft Common Frame of Reference represents for sure one of the most important and, given its content, one of the most comprehensive in the area of the European private law.

Nevertheless, if we considered the following actions taken by the EU legislator, we see that a different approach has prevailed. As seen in paragraph 2.1, the issue of private law, and more precisely in the contract field, has been dealt manly by issuing several directives. This choice was hence made to limit the intervention of the EU law only in particular cases, when the need for a harmonized regulation was deemed essential. The progressive abandon of a far-reaching instrument of the European private law in favor of a sectorial approach is also confirmed by the recently final withdrawal by the Commission of the proposal for a Regulation on a Common European Sales Law (CESL).[227] The

[225] Several European comparative law scholars were the first to put forward the conception of "European common private law" in the early 1980s, and the most influential one was European Common Private Law published by German comparative law scholar Hein Kotz in 1981.
[226] See *Resolution A2-157/89, 0. J. 1989 C 158; Resolution A3-0329/94, O.J. 1994 C 205.*
[227] See Withdrawal of Commission proposals 2020/C 321/03. The proposal, issued in 2011 (see

proposal aimed at creating a second contract law regime for contracts throughout the European Union that was supposed to exist alongside the pre-existing rules of national contract law. The withdrawal of the proposal, therefore, represents a clear signal that a more pervasive approach to the contract law, and in general to the private law, is not to be any time soon pursued within the EU.

Given this situation at the present time, we can hence observe that the current approach to the harmonization of the private law may be defined as a progressive codification, i.e. carried out step by step through the regulation of single institutes of private law and the use of soft law instruments.[228]

Nonetheless, especially at the academic level the debate over the adoption of a more inclusive instrument still goes on, based on the fact that the directives fail to create an effective systematization of the private law in all its aspects and therefore leave significant loopholes in the legislation. Scholars have since long highlighted the advantages and disadvantages of a single codification in the area of private law.[229] It is true that the advantage of a single civil code would be major in term of promoting more coherence of the legal order, and bringing equality under different private laws, since different systems of national private law may be an obstacle to the free cross-border trade transactions. However, such monumental initiative also carries some significant concerns. Indeed, the differences between legal systems (civil law and common law), the issues related to the legal language employed (the EU has now twenty-three official language) could result in a legal transplant of major proportions that bears the risk of being an alien or

COM/2011/0635 final), was largely inspired by the DCFR in content and style, and aimed specifically at improving "*the establishment and the functioning of the internal market by facilitating the expansion of cross-border trade for business and cross-border purchases for consumers. This objective can be achieved by making available a self-standing uniform set of contract law rules including provisions to protect consumers, the Common European Sales Law, which is to be considered as a second contract law regime within the national law of each Member State*".

[228] As it has been pointed out by I. SAMMUT, *Constructing Modern European Private Law: A Hybrid System*, cit. p. 242 ff.

[229] *Ibidem*.

artificial product.[230] This is probably another reasons that the project of the European codification suffered in the last decades of some setbacks.

[230] "*By creating a common set of European rules and principles in private law, a civil code would confront every national legal system with a serious challenge. The European rules and principles might call into question values and concepts that had been perceived by lawyers in a particular national tradition to compromise central elements of the legal system*" (I. SAMMUT, *Constructing Modern European Private Law: A Hybrid System*, cit., p. 251).

SECTION 2 - THE REASONABLENESS IN HARD AND SOFT LAW INSTRUMENTS OF THE EUROPEAN CONTRACT LAW

1. Reasonableness in the EU directives

With specific reference to reasonableness, the EU Directives in the contract law field resort very often to this concept. The occurrence in the Directives of the term reasonableness is as indicated in the following chart.

DIRECTIVES		APPEARANCE OF REASONABLENESS AND DERIVATIVES
Doorstep Selling Directive	Council Directive 85/577/EEC of 20 December 1985	**2 times**: Article 1, par. 2; Article 3, par. 2 example Article 1, par. 2: "This Directive shall also apply to contracts for the supply of goods or services other than those concerning which the consumer requested the visit of the trader, provided that when he requested the visit the **consumer** did not know, or **could not reasonably have known**, that the supply of those other goods or services formed part of the trader's commercial or professional activities"
Product Liability Directive	Council Directive 85/374/EEC of 25 July 1985	**6 times**: Recital; Article 3, par. 3; Article 6, par. 1; Article 10 examples Article 3, par. 3: "Where the producer of the product cannot be identified, each supplier of the product shall be treated as its producer unless he informs the injured person, **within a reasonable time**, of the identity of the producer or of the person who supplied him with the product. The same shall apply, in the case of an imported product, if this product does not indicate the identity of the importer referred to in paragraph 2, even if the name of the producer is indicated" Article 6, par. 1: "A product is defective when it does not provide the safety which a person is entitled to expect, taking all circumstances into account, including: ... (b) the use to which it could **reasonably be expected** that the product would be put"

Self-employed Commercial Agents Directive	Council Directive 86/653/EEC of 18 December 1986	**6 times**: Article 3, par. 2; Article 4, par. 2; Article 6, par. 1; Article 8; Article 18 example Article 6, par. 1: "In the absence of any agreement on this matter between the parties, and without prejudice to the application of the compulsory provisions of the Member States concerning the level of remuneration, a commercial agent shall be entitled to the remuneration that commercial agents appointed for the goods forming the subject of his agency contract are customarily allowed in the place where he carries on his activities. If there is no such customary practice a commercial agent shall be **entitled to reasonable remuneration** taking into account all the aspects of the transaction"
Package Travel Directive	Council Directive 90/314/EEC of 13 June 1990	**3 times**: Recital; Article 4, par. 3; Article 5, par. 2 example Article 5, par. 2: "In the matter of damage other than personal injury resulting from the non-performance or improper performance of the services involved in the package, the Member States may allow compensation to be limited under the contract. Such **limitation** shall **not be unreasonable**"
Unfair Terms Directive	Council Directive 93/13/EEC of 5 April 1993	**3 times**: Annex §§ 1 and 2 example § 1. Terms referred to in article 3 (3): "Terms which have the object or effect of: … (g) enabling the seller or supplier to terminate a contract of indeterminate duration without **reasonable notice** except where there are serious grounds for doing so"
Conditional Access Directive	Directive 98/84/EC of the European Parliament and of the Council of 20 November 1998	1 time: Recital (22) Recital (22): "Whereas national law concerning sanctions and remedies for infringing commercial activities may provide that the activities has to be carried out in the knowledge or with **reasonable grounds for knowing** that the devices in question were illicit"
Consumer Sales Directive	Directive 1999/44/EC of the European Parliament and the Council of 25 May 1999	**9 times**: Recital (8) and (11); Article 2, par. 1, 3 and 4; Article 3, par. 3 and 5 example Article 2, par. 2 (Conformity with the contract): "Consumer goods are presumed to be in conformity with the contract if they: … (d) show the quality and performance which are normal in goods of the same type and which the **consumer can reasonably expect**, given the nature of the goods and taking into account any public statements on the specific characteristics

		of the goods made about them by the seller, the producer or his representative, particularly in advertising or on labelling"
Electronic Signatures Directive	Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999	**4 times**: Article 6, par. 1 and 2; Annex III § 1; Annex IV example Article 6, par. 1 (Liability): "As a minimum, Member States shall ensure that by issuing a certificate as a qualified certificate to the public or by guaranteeing such a certificate to the public a certification-service-provider is liable for damage caused to any entity or legal or natural person **who reasonably relies on that certificate**"
E-Commerce Directive	Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000	**2 times**: Recital (48); Article 12, par. 2 example Article 12, par. 2 ("Mere conduit"): "The acts of transmission and of provision of access referred to in paragraph 1 include the automatic, intermediate and transient storage of the information transmitted in so far as this takes place for the sole purpose of carrying out the transmission in the communication network, and provided that the information is not stored for any period longer than is **reasonably necessary** for the transmission"
Late Payment Directive	Directive 2000/35/EC of the European Parliament and of the Council of 29 June 2000	**2 times**: Recital (17); Article 3, par. 1 example Recital (17) "The **reasonable compensation** for the recovery costs has to be considered without prejudice to national provisions according to which a national judge can award to the creditor any additional damage caused by the debtor's late payment, taking also into account that such incurred costs may be already compensated for by the interest for late payment"
Unfair Commercial Practices Directive	Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005	**14 times**: Recital (18) and (19); Article 2; Article 5, par. 3; Article 7, par. 4; Article 11, par. 3; Annex 1 § 5, 6, 19 and 27; examples Article 2 (Definitions): "… (h) 'professional diligence' means the standard of special skill and care which a trader may **reasonably be expected** to exercise towards consumers, commensurate with honest market practice and/or the general principle of good faith in the trader's field of activity" Article 7, par. 4 (Misleading omissions): "In the case of an invitation to purchase, the following information shall be regarded as material, if not

		already apparent from the context: … (c) the price inclusive of taxes, or where the nature of the product means that the price **cannot reasonably be calculated in advance**, the manner in which the price is calculated, as well as, where appropriate, all additional freight, delivery or postal charges or, where these charges cannot **reasonably be calculated** in advance, the fact that such additional charges may be payable"
Misleading and Comparative Advertising Directive	Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006	**1 time**: Article 5, par. 6 Article 5, par. 6: "Where the powers referred to in paragraphs 3 and 4 are exercised exclusively by an administrative authority, reasons for its decisions shall always be given. In this case, provision must be made for procedures whereby improper or **unreasonable exercise of its powers** by the administrative authority or improper or **unreasonable failure to exercise** the said powers can be the subject of judicial review"
Late Payment Directive 2011	Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011	**1 time**: Article 6, par. 3 Article 6, par. 3 (Compensation for recovery costs): "The creditor shall, in addition to the fixed sum referred to in paragraph 1, be entitled to obtain **reasonable compensation** from the debtor for any recovery costs exceeding that fixed sum and incurred due to the debtor's late payment. This could include expenses incurred, inter alia, in instructing a lawyer or employing a debt collection agency"

Consumer Rights Directive 2011	Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011	**15 times**: Recital (34), (35) and (52); Article 5, par. 1; Article 6, par. 1; Article 8; Annex 1 examples Article 5, par. 1 (Information requirements for contracts other than distance or off-premises contracts): "Before the consumer is bound by a contract other than a distance or an off-premises contract, or any corresponding offer, the trader shall provide the consumer with the following information in a clear and comprehensible manner, if that information is not already apparent from the context: … (c) the total price of the goods or services inclusive of taxes, or where the nature of the goods or services is such that the price cannot **reasonably be calculated** in advance, the manner in which the price is to be calculated, as well as, where applicable, all additional freight, delivery or postal charges or, where those charges cannot **reasonably be calculated** in advance, the fact that such additional charges may be payable; … (h) where applicable, any relevant interoperability of digital content with hardware and software that the trader is aware of or can **reasonably be expected** to have been aware of"
Mortgage Credit Directive	Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014	**13 times**: Recital (11), (27), (31), (54), (55) and (65); Article 7, par. 1; Article 19, par. 1; Article 22, par. 3; Article 25, par. 4; Article 28, par. 1; Article 37 examples Article 7, par. 1 (Conduct of business obligations when providing credit to consumers): "Member States shall require that when manufacturing credit products or granting, intermediating or providing advisory services on credit and, where appropriate, ancillary services to consumers or when executing a credit agreement, the creditor, credit intermediary or appointed representative acts honestly, fairly, transparently and professionally, taking account of the rights and interests of the consumers. In relation to the granting, intermediating or provision of advisory services on credit and, where appropriate, of ancillary services the activities shall be based on information about the consumer's circumstances and any specific requirement made known by a consumer and **on reasonable assumptions about risks to the consumer's situation** over the term of the credit agreement" Article 25, par. 4 (Early repayment): "Where a consumer seeks to discharge his obligations under a credit agreement prior to the expiry of the agreement, the creditor shall provide the consumer without delay after receipt of the request, on paper or on another durable medium,

		with the information necessary to consider that option. That information shall at least quantify the implications for the consumer of discharging his obligations prior to the expiry of the credit agreement and clearly set out any assumptions used. Any **assumptions** used shall be **reasonable** and justifiable"
Consumer ADR Directive	Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013	**4 times**: Recital (2) and (15); Article 9, par. 1 and 2 example Article 9, par. 1 (Fairness): "Member States shall ensure that in ADR procedures: … (a) the parties have the possibility, **within a reasonable period of time**, of expressing their point of view, of being provided by the ADR entity with the arguments, evidence, documents and facts put forward by the other party, any statements made and opinions given by experts, and of being able to comment on them"
Directive of Sale of Goods and Supply of Digital Content and Digital Services	Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019	**26 times**: Recital (15), (24), (29), (30), (31), (41), (50), (55), (58); Article 7, par. 1, 2, 3 and 4; Article 13, par. 4; Article 14, par. 1; Article 16, par. 2 examples Recital (55) "…What is considered to be a **reasonable time for completing a repair or replacemen**t should correspond to the shortest possible time necessary for completing the repair or replacement…When implementing this Directive, Member States should be able to interpret the notion of reasonable time for completing repair or replacement, by providing for fixed periods that could generally be considered reasonable for repair or replacement, in particular with regard to specific categories of products" Article 13, par. 4 (Remedies for lack of conformity): "The consumer shall be entitled to either a proportionate reduction of the price in accordance with Article 15 or the termination of the sales contract in accordance with Article 16 in any of the following cases: … (d) the seller has declared, or it is clear from the circumstances, that the seller will not bring the goods into conformity **within a reasonable time**, or without significant inconvenience for the consumer" Article 14, par. 3 (Remedies for lack of conformity) "The trader shall bring the digital content or digital service into conformity pursuant to paragraph 2 **within a reasonable time** from the time the trader has been informed by the consumer about the lack of conformity, free of charge and without any significant inconvenience to the consumer, taking account

		of the nature of the digital content or digital service and the purpose for which the consumer required the digital content or digital service”

If we analyze the Directives provisions mentioning reasonableness, we can see that the concept is most frequently used in the directives related to consumer protection, particularly in the Consumer Sales Directive (1999/44/EC), Unfair Commercial Practices Directive (2005/29/EC), Consumer Rights Directive 2011(2011/83/EU), (2011/83/EU), and Directive of Sale of Goods and Supply of Digital Content and Digital Services (EU 2019/770).

From the point of view of the content of the provisions, we see that the application of reasonableness covers many aspects of the contractual relationship, such as the reasonable awareness of parties during the formation of a contract (e.g. article 1 of the Doorstep Selling Directive, 85/577/EEC), the requirement for the termination of the contract (e.g. annex I §1 of the Unfair Terms Directive, 93/13/EEC), the calculation of damages (e.g. article 6, paragraph 3, of the Late Payment Directive, 2011/7/EU) and so on.

Reasonableness is also employed as a criterion to give relevance to the expectation of a party. For example, in article 2, paragraph 2 of the Consumer Sales Directive (1999/44/EC) the conformity of the good have to be ascertained taking into regard the quality “which are normal in goods of the same type and which the consumer can reasonably expect, given the nature of the goods and taking into account any public statements on the specific characteristics of the goods”. Or article 2 of the Unfair Commercial Practices Directive (2005/29/EC) in which the professional diligence is defined according to the special skill and care that may reasonably be expected to exercise by a trader towards consumers.

Reasonableness appears very frequently in provisions directed to

determine specific aspect of the contract, such as the time, the price, or the remuneration. For example, article 14, paragraph 3, of the Directive of Sale of Goods and Supply of Digital Content and Digital Services (2019/771/EU) imposes to the trader to bring the digital content or digital service into conformity in a reasonable time from the time the trader has been informed by the consumer about the lack of conformity.[231] Article 5, paragraph 1, of the Consumer Rights Directive (2011/83/EU) states that in order to determine the total price of the good or the service if the price cannot reasonably be calculated in advance the seller has to indicate in any case the manner in which the price is to be calculated. Article 6, paragraph 1, of the Self-employed Commercial Agents Directive (86/653/EEC) declares that if the parties have not set a level of remuneration and there is not compulsory state provisions or customary practice, the commercial agent is be entitled to receive a reasonable remuneration taking into account all the aspects of the transaction.

Even if in the directives we do not find provisions on contract interpretation referring to the reasonable person as in the common law tradition or the UNIDROIT Principles, we can still observe that the EU legislator has outlined the standard of reasonableness in a very similar way. This can be spot, for example in the recent Directive of Sale of Goods and Supply of Digital Content and Digital Services (2019/770/EU) in which at Recital (46) it is provided that "The standard of reasonableness with regard to any reference in this Directive to what can be reasonably expected by a person should be objectively ascertained, having regard to the nature and purpose of the digital content or digital service, the circumstances of the case and to the usages and practices of the parties involved."

[231] The Recital (55) of the Directive also specify that "*When implementing this Directive, Member States should be able to interpret the notion of reasonable time for completing repair or replacement, by providing for fixed periods that could generally be considered reasonable for repair or replacement, in particular with regard to specific categories of products*".

2. Reasonableness in the EU soft law instruments

2.1. The Principles of European contract law (PECL)

In the PECL the notion of reasonable is mentioned about 90 times[232], which indicates that the standard of reasonableness is involved in almost every aspect of the contractual relationship.

Reasonableness is firstly included in Chapter 1 regarding the "General provisions" in article 1:302. According to this article, reasonableness under the PECL needs to be referred as "what persons acting in good faith and in the same situation as the parties would consider to be reasonable. In particular, in assessing what is reasonable, the nature and purpose of the contract, the circumstances of the case, and the usages and practices of the trades or professions involved should be taken into account". Accordingly, the standard to evaluate the reasonableness includes two aspects. The first aspect is that of the good faith of the parties.[233] Even if reasonableness and good faith are different concepts the PECL seems to connect these two notions[234]. The second aspect is the evaluation of what a party would consider to be reasonable

[232] Such as for example in: "reasonable time"(Article 2:206 Article 2:208(3); Article 3:203 Article 3:205(3), Article 3:209(3), Article 4:113, Article 7:102(c) , Article 7:109(2), Article 8:105 (2), Article 8:108 (3), Article 9:102(3), Article 9:303, Article 9:506, Article 11:303); "reasonable step"(Article 2:104(1),Article 7:110(1)(3), Article 9:505(1)); "(un)reasonable price"(Article 6:104 Article 6:105 Article 6:106(2));"reasonable length"(Article 6:109, Article 7:105 Article 8:106(2));"reasonable period"(Article 6:111(3) Article 8:106(3));"reasonable terms"(Article 7:110(2)), "reasonable belief"(Article 8:105(1)), Reasonable substitute transaction (Article 9:101); "(un)reasonable effort"(Article 9:102(2), Article 10:106), "reasonable circumstances"(Article 9:201(2)); "reasonable amount"(Article 9:309); "reasonable manner"(Article 9:506 Article 9:509(2)); "reasonable attempt"(Article 14:402); "reasonably anticipated"(Article 1:303(4)); "reasonably understood"(Article 2:102, Article 6:101); "reasonably relied on"(Article 2:105(4) Article 2:106) "reasonably believe"(Article 3:201, Article 8:105(1)(2)); "reasonably acquire"(Article 4:107 (3)); "reasonably has been taken into account"(Article 6:111); "unreasonably prejudice"(Article 7:103); "unreasonably expensive"(Article 7:110(3)); "reasonably cost incurred" (Article 7:110(4), Article 9:505, Article 10:106(1)); "reasonably has foreseen"(Article 8:103, Article 9:503); "reasonably expect"(Article 8:108(2), Article 14:303(1)); "reasonably obtain"(Article 9:102(2)); "unreasonably fails"(Article 9:303(3)(b)); "reasonably object"(Article 11:204(b), Article 11:308).

[233] On this aspect see D. BUSCH, E. HONDIUS, *The principles of European contract law and Dutch law: a commentary (Vol. 1)*, Kluwer Law International, The Hague, 2002, p. 63.

[234] Other articles connect the two notions, such as, for example, article 3:201 and article 6:111.

in the same situation. This aspect involves an objective test and it is based on the concept of an abstract person who has the background knowledge that he should have at the time when the contract is concluded. Article 1:302 also indicates the circumstances to take into account in order to determine the reasonableness. These are precisely: the nature and purpose of the contract, the circumstances of the case, and the usages and practices of the trades or professions involved.

Another important provision regarding the reasonableness is the transposition of the common law notion of the reasonable person in article 5:101 which provides for the general rules of contract interpretation. According to this article the contract has to be always interpreted according to the common intention of the parties even if this differs from the literal meaning of the words (paragraph 1 of the article). In case the intention cannot be established, the contract "is to be interpreted according to the meaning that reasonable persons of the same kind as the parties would give to it in the same circumstances" (paragraph 3 of the article). The following article 5:102 specifies which are those relevant circumstances, such as for example the preliminary negotiations, the conduct of the parties, even subsequent to the conclusion of the contract, the nature and purpose of the contract, or the meaning commonly given to terms and expressions in the branch of activity concerned and the interpretation similar clauses may already have received.

The PECL also make several references to the reasonable reliance of a party. For example, in article 6:101 a statement of a party gives rise to a contractual obligation if the other party has reasonably believed, according to the circumstances, that the statement was as such. The circumstances to assess if it was reasonable to believe so are indicated by the article in: the apparent importance of the statement to the other party, the party was making the statement in the course of business, and the relative expertise of the parties.

Lastly, other provisions deal with the determination of specific aspects of the contract, such as for instance:

(i) the price, as in article 6:104 according to which if the contract does not fix the price or the method of determining it, the parties are to be treated as having agreed on a reasonable price;

(ii) the time, as in article 7:102 according to which if there is no fixed time for the party to perform his obligation, then the performance has to be provided within a reasonable time after the conclusion of the contract;

(iii) the recovery for performance that cannot be returned in case of termination of the contract, as in article 9:309 according to which a party who has already fulfilled his obligation which cannot be returned and for which it has not received payment, may recover from the other party a reasonable amount for the value of the performance.

2.2 The Draft Common Frame of Reference (DCFR)

In the text of DCFR the concept reasonableness and the derivatives have been used more than 550 times[235]. Since the reasonableness emerges in such large numbers, it has attracted some criticism. In the opinion of

[235] Examples of the use of "reasonableness" and derivatives in the articles can be find in: II. – 6:103: Authorization (e), I. – 1:103: Good faith and fair dealing, II. – 8:101: General rules (3) (b), II. – 8:102: Relevant matters, III. – 1:110: Variation or termination by court on a change of circumstances (2) (d); "reasonable and equitable" III. – 1:110: Variation or termination by court on a change of circumstances (2) (a) (d); "Unreasonable usage", II. – 1:104: Usages and practices (3); "reasonably be expected" II. – 1:106: Form (2) (a), II. – 7:201: Mistake (a) (b), II. – 8:101: General rules (2), II. – 8:102: Relevant matters (2), III. – 1:110: Variation or termination by court on a change of circumstances (2)(b), III. – 3:104: Excuse due to an impediment (1) (2)(5), III. – 3:107: Failure to notify non-conformity (2)(3), III. – 3:502: Termination for fundamental non-performance (2)(a); "Reasonable time", II. – 4:204: Acceptance (2)(3), II. – 4:208: Modified acceptance (3)(c), III. – 2:102: Time of performance (1), III. – 3:104: Excuse due to an impediment (5), III. – 3:107: Failure to notify non-conformity (1)(2); "reasonable person", II. – 8:101: General rules (3); "reasonable step", II. – 9:103: Terms not individually negotiated (1); "reasonably be maintained", II. – 9:408: Effects of unfair terms (2); "reasonable notice" II. – 9:410: Terms which are presumed to be unfair in contracts between a business and a consumer (1)(g)(h); "unreasonably early deadline", II. – 9:410: Terms which are presumed to be unfair in contracts between a business and a consumer (1) (h); "unreasonable prejudice", III. – 2:103: Early performance (1).

some scholars,[236] the frequent use of reasonableness in DCFR seems that "all matter in contract law can be settled by it. The undue use of general provision and vague concepts will give the local courts too much discretion, which can lead to legal instability."[237] According to these scholars, the concept of reasonable is too vague to use at this regularity, although it may increase the fairness of the application of the law. In order to avoid the vagueness of the notion, the DCFR attempts to explain "what is reasonable" in the annex by stating that "What is 'reasonable' is to be objectively ascertained, having regard to the nature and purpose of what is being done, to the circumstances of the case and to any relevant usages and practices" (I. – 1:104). Nevertheless, scholars still consider this explanation is too uncertain, because it is tantamount to use an abstract description to explain a vague concept.[238]

If we analyze the single provisions of the DCFR, the concept of reasonableness is taken into account in the following aspects.

(1) The general provisions.

Just like PECL, the DCFR also places the reasonableness in the general part. Article I. – 1:104 states that "Reasonableness is to be objectively ascertained, having regard to the nature and purpose of what is being done, to the circumstances of the case and to any relevant usages and practices." Compared with PECL, the use of reasonableness in DCFR

[236] EIDENMÜLLER H., FAUST F., GRIGOLEIT H. C., JANSEN N., WAGNER G., ZIMMERMANN R., *The Common Frame of Reference for European Private Law: Policy Choices and Codification Problems,* in *Oxford Journal of Legal Studie*s, Vol. 28, 2008, p. 659. For example, (Article II.–9:105) the court could interfere with unilateral pricing when it is grossly unreasonable.

[237] *European Contract Law: the Draft Common Frame of Reference Report with Evidence, European Union Committee 12th Report of Session 2008–09 Ordered* to be printed 19 May 2009 and published 10 June 2009 Published by the Authority of the House of Lords, https://publications.parliament.uk/pa/ld200809/ldselect/ldeucom/95/95.pdf. Professor Vogenauer affirmed that: "*The general thrust of the criticism is that paradoxically the DCFR is both too detailed—it has very detailed rules going into the nitty-gritty—but, on the other hand, it uses an astonishing number of vague and ambiguous terms, concepts like "reasonable" and "good faith", so it leaves a lot of discretion to the judge or anyone else who would apply that sort of instrument. Of course, there are all sorts of criticisms as to particular substantive rules*."

[238] H. EIDENMÜLLER, F. FAUST, H. C. GRIGOLEIT, N. JANSEN, G. WAGNER, R. ZIMMERMANN, op. cit*., p.* 659.

does not make reference to the concept of good faith[239], but maintains the objective test. Also in this case, given that the standard of application of reasonableness remains open, the effect is to recognize a certain degree of flexibility in the contractual relationship.

Still from a general perspective, article I. – 1:103 provides also the notion of reasonable reliance to protect the parties' benefits under the provision of "good faith and fair dealing". To this regard, it was argued that "A particular aspect of the protection of reasonable reliance and expectations is to prevent a party, on whose conduct another party has reasonably acted in reliance, from adopting an inconsistent position and thereby frustrating the reliance of the other party"[240].

(2) The formation of contract.

In the provisions regarding the formation of the contract, reasonableness is used mainly in the following parts: if a party requests to assert a merger clause or modify a certain form, the "reasonable reliance" of the other party can turn into a preclusion of such possibility[241]; if the offer does not specify a period for the acceptance, acceptance needs to arrive within a reasonable time[242]; if the party revokes the offer, it is ineffective if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in

[239] PECL Article 1:302: *Reasonableness Under these Principles reasonableness is to be judged by what persons acting in good faith and in the same situation as the parties would consider to be reasonable.*

[240] See V. C. BAR, E. CLIVE, H.S. NÖLKE, *Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference (DCFR)* available at: https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/EUROPEAN_PRIVATE_LAW/EN_EPL_20100107_Principles__definitions_and_model_rules_of_European_private_law_-_Draft_Common_Frame_of_Reference__DCFR_.pdf.

[241] DCFR II. – 4:104: *Merger clause (4) A party may by statements or conduct be precluded from asserting a merger clause to the extent that the other party has reasonably relied on such statements or conduct.*
DCFR II. – 4:105: *Modification in certain form only (2) A party may by statements or conduct be precluded from asserting such a term to the extent that the other party has reasonably relied on such statements or conduct*.

[242] DCFR II. – 4:206: *Time limit for acceptance (2) If no time has been fixed by the offeror the acceptance is effective only if it reaches the offeror within a reasonable time.*

reliance on the offer.[243]

(3) The content and the performance of contract.

As in the PECL, CISG and UNTROIT Principles, the most recurrent expression is "reasonable time" (69 times), such as in Article III. – 2:102 which provides that if no time is specified the obligation has to be performed at a reasonable time. An explanation for reasonable time is also provided in the commentary according to which this expression depends on a variety of factors, including the nature of the goods, the services or rights. The time taken to perform a complex obligation is necessarily longer than a simple obligation. When the performance of a contract requires a long period of time, it is also necessary for the parties to give notice to the other party at a reasonable time if circumstances arise in the course of performance that do not conform to the contract. In the case of a lease contract, for example, when a problem arises with the leased property, the lessee needs to give feedback to the lessor within a reasonable time so that the parties can take remedial action. The reasonable time here also rests with the specific circumstances, "such as the type of goods leased, the parties involved, the term of the lease, the actual stage of the contract and the nature of the non-conformity"[244].

Reasonableness is also often used to determine the price when it cannot be determined from the contract, from other applicable rule of law or from usages or practices, or from the price normally charged in comparable circumstances. If none of these methods find application, then the criterion to be used is the reasonable price. [245] A specific

[243] DCFR II. – 4:202: *Revocation of offer (1) An offer may be revoked if the revocation reaches the offeree before the offeree has dispatched an acceptance or, in cases of acceptance by conduct, before the contract has been concluded. (...) (3) However, a revocation of an offer is ineffective if: (a) the offer indicates that it is irrevocable; (b) the offer states a fixed time for its acceptance; or (c) it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer*.

[244] STUDY GROUP ON A EUROPEAN CIVIL CODE AND THE RESEARCH GROUP ON THE EXISTING EC PRIVATE LAW (ACQUIS GROUP), *Principles, Definitions and Model Rules of European Private Law Draft Common Frame of Reference (DCFR)*, p.709

[245] DCFR II.–9:104: *Determination of price Where the amount of the price payable under a contract cannot be determined from the terms agreed by the parties, from any other applicable rule of law or*

application of the reasonable price can be found in the part that regulates the commercial agency, franchise and distributorship. Article IV.E.–2:306: states that "if a commercial agent, franchisor or distributor leaves surplus stock, spare parts, etc., after the contract has been avoided or the contractual relationship has been terminated, the principal, franchisor or supplier must repurchase these items and must do so at a reasonable price".

(4) The modification of contract.

Sometimes the contract may be subject to external factors and in this situation the reasonableness gives the flexibility in order for the parties to modify or change the content of the contract. According to DCFR[246], the above situation can be seen as change of circumstances. It means that in these circumstances a wide variety of methods may be applied to modify a contract, including but not limited to change the period of performance, alter the price, or increase or decrease the quality or quantity of the services or goods.[247] However, it is required that "any modification must be one that makes the obligation reasonable and equitable in the new circumstances; and it is not reasonable and equitable if the effect of the court order is to create a new hardship or injustice"[248].

(5) The invalidity of the contract.

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from usages or practices, the price payable is the price normally charged in comparable circumstances at the time of the conclusion of the contract or, if no such price is available, a reasonable price.

[246] DCFR III.–1:110: *Variation or termination by court on a change of circumstances (1) An obligation must be performed even if performance has become more onerous, whether because the cost of performance has increased or because the value of what is to be received in return has diminished. (2) If, however, performance of a contractual obligation or of an obligation arising from a unilateral juridical act becomes so onerous because of an exceptional change of circumstances that it would be manifestly unjust to hold the debtor to the obligation a court may: (a) vary the obligation in order to make it reasonable and equitable in the new circumstances; or (b) terminate the obligation at a date and on terms to be determined by the court*.

[247] Study Group on a European Civil Code and the Research Group on the Existing EC Private Law (Acquis Group), *Principles, Definitions and Model Rules of European Private Law Draft Common Frame of Reference (DCFR)*, p. 328.

[248] Study Group on a European Civil Code and the Research Group on the Existing EC Private Law (Acquis Group), *Principles, Definitions and Model Rules of European Private Law Draft Common Frame of Reference (DCFR)*, p.328.

The regulation of the mistake is strictly related to the protection of reasonable reliance and expectations which is a core aim of the DCFR, just as it is in PECL. This result is accomplished by holding the mistaken party to the obligation which the other party reasonably assumed was being undertaken, i.e. the mistaken party will therefore be bound to the appearance of what was said. [249] According to article 7:201 two conditions are required in order for the party to avoid the contract: (a) the party would not have concluded the contract or would have done so only on fundamentally different terms and the other party knew or could reasonably be expected to have known this; and (b) the other party caused the contract to be concluded in mistake by leaving the mistaken party in error, contrary to good faith and fair dealing, when the other party knew or could reasonably be expected to have known of the mistake.[250]

The consequence of the mistake is the avoidance of the contract. However, article II. – 7:203 provides that if the parties incurred in the same mistake, they can request to bring the contract into accordance with what might reasonably have been agreed had the mistake not occurred.

(6) The remedies of the parties.

As far as remedies for the parties are concerned, enforcement of obligation is usually a remedy that better suits the parties' initial contractual intentions than other forms of liability for breach of contract. The DCFR provides for compulsory performance, but also marks some situations for excluding it, specifically when it is not feasible and reasonable to enforce the performance of the contract.

[249] Ibid. p. 73. The part of principle states: "*The statement of principles in the Interim Outline Edition listed no fewer than fifteen items – justice; freedom; protection of human rights; economic welfare; solidarity and social responsibility; establishing an area of freedom, security and justice; promotion of the internal market; protection of consumers and others in need of protection; preservation of cultural and linguistic plurality; rationality; legal certainty; predictability; efficiency; protection of reasonable reliance; and the proper allocation of responsibility for the creation of risks.*"

[250] This is only one of the assumptions mentioned in the articles. The other ones are: the other party caused the mistake, or caused the contract to be concluded in mistake by failing to comply with a pre-contractual information duty or a duty to make available a means of correcting input errors; or, lastly, made the same mistake.

In case of monetary obligations,[251] for example, compulsory performance may not be accorded when the creditor can find a reasonable alternative transaction (e.g. another buyer or seller can be found without much effort or cost); or when it is unreasonable to require the performance (e.g. in the case of a long-term contract where the performing party has expressly stated that he cannot perform).

In case of non-monetary obligations, compulsory performance is excluded when: (a) the performance would be unreasonably burdensome or expensive,[252] namely when the cost of performance to the debtor is much superior than the benefit of performance or when performance takes so long that is not conducive to the efficient allocation of resources and loses its economic reasonableness; (b) the performance has a personal character that it would be unreasonable to enforce it by another debtor,[253] namely in when the performance of the contract has personal attributes and the performance cannot be delegated.[254]

More in general, the creditor loses the right to enforce specific performance if performance is not requested within a reasonable time after the creditor has become, or could reasonably be expected to have become,

[251] DCFR III. – 3:301: *Enforcement of monetary obligations (1) The creditor is entitled to recover money payment of which is due. (2) Where the creditor has not yet performed the reciprocal obligation for which payment will be due and it is clear that the debtor in the monetary obligation will be unwilling to receive performance, the creditor may nonetheless proceed with performance and may recover payment unless: (a) the creditor could have made a reasonable substitute transaction without significant effort or expense; or (b) performance would be unreasonable in the circumstances.*

[252] DCFR III. – 3:302: *Enforcement of non-monetary obligations (1) The creditor is entitled to enforce specific performance of an obligation other than one to pay money. (2) Specific performance includes the remedying free of charge of a performance which is not in conformity with the terms regulating the obligation. (3) Specific performance cannot, however, be enforced where: (a) performance would be unlawful or impossible.*

[253] DCFR III. – 3:302(3) *(c) performance would be of such a personal character that it would be unreasonable to enforce it.*

[254] STUDY GROUP ON A EUROPEAN CIVIL CODE AND THE RESEARCH GROUP ON THE EXISTING EC PRIVATE LAW (Acquis Group), *Principles, Definitions and Model Rules of European Private Law Draft Common Frame of Reference (DCFR)*, p.382. "*The expression "of a personal character" does not cover services or work which may be delegated. However, a provision in a contract that work may not be delegated does not necessarily make the work of a personal character. If the contract does not need the personal attention of the contracting party but could be performed by employees, the term prohibiting delegation may be interpreted as preventing only delegation to another enterprise, e.g. a sub-contractor. The signing of a document would not usually constitute performance of a personal character. An obligation to sign a document can mostly be enforced since the debtor's act can often be replaced by a court decree*."

aware of the non-performance.[255] If the time for performance of the contract has expired and the debtor does not perform its obligations, and the creditor does not request the debtor to fulfil the obligation within a reasonable period, the debtor may presume that the creditor is no longer interested in continuing the contractual relationship. In this situation the risk of failure to complete the contract in time should be reasonably allocated between the creditor and the debtor. The reasonable period of time refers to the time necessary to enable the debtor to perform the obligation, being the normal time required in the light of the nature of the contract, the purpose the customs of the transaction.

(7) The interpretation of the contract.

Article II. – 4:102 indicates the criterion according to which determine the intention of the parties. The rule indicates that "the intention of a party to enter into a binding legal relationship or bring about some other legal effect is to be determined from the party's statements or conduct as they were reasonably understood by the other party".

Moreover, in chapter 8 dedicated to the interpretation of the contract, the DCFR, as seen for other soft law instruments (the UNIDROIT Principles or the PECL), embraces the concept of the reasonable person when interpreting the intention of the parties. Article II. – 8:101 provides that the contract has to be interpreted according to the common intention of the parties, but it has to be interpreted according to the meaning which a reasonable person would give to it if an intention cannot be established, or the question arises with a person, not being a party to the contract or a person who by law has no better rights than such a party, who has reasonably and in good faith relied on the contract's apparent meaning.[256] The same provision is stated with

[255] DCFR III. – 3:302 (4).

[256] The following Article II. – 8:102 indicates, similarly as in the PECL, the relevant matters to take into consideration when interpreting the contract, which are *(a) the circumstances in which it was concluded, including the preliminary negotiations; (b) the conduct of the parties, even subsequent to the conclusion of the contract; (c) the interpretation which has already been given by the parties to*

regard to the interpretation of other juridical acts (article II. – 8:201).

The rule proposed by the DCFR reproduces the main features of the reasonable person standard as already seen in other legal experiences, but it also introduces a novelty. Indeed, the criterion of the reasonable person does not apply only to the parties of a contract, but it is also the primary criterion to which refer in case a third party, who relied on the contract, is involved. In this latter case, indeed, being the third party unrelated to the contract, the interpretation can only be according to the reasonable person, i.e. an abstract person who finds himself in that context.

3. Reasonableness in the European Court of Justice case law

The concept of reasonableness appears in some decisions of the European Court of Justice. To this regard it was observed that "it is somewhat difficult to track down an explicit reference to reasonableness in the case law of the European Court of Justice", since the usage of reasonableness is usually hidden within the legal reasoning of the Court of Justice.[257] The following analysis, therefore, will be directed to examine some decisions in order to understand how the European Court of Justice (ECJ) has given application to this concept.

The ECJ case law on reasonableness includes, first of all, some decisions regarding the interpretation of general expressions such as reasonable time. An example is the decision in *Christian Fülla v Toolport GmbH*.[258] This case was about a purchase of a tent concluded over the telephone. After the delivery the buyer, Mr. Fülla, discovered that the tent was not of the required quality, and asked the seller to pick up the

terms or expressions which are the same as, or similar to, those used in the contract and the practices they have established between themselves; (d) the meaning commonly given to such terms or expressions in the branch of activity concerned and the interpretation such terms or expressions may already have received; (e) the nature and purpose of the contract; (f) usages; and (g) good faith and fair dealing.

[257] See A. ADINOLFI, *The Principle of Reasonableness in European Union Law*, in G. BONGIOVANNI ET AL. (eds.)*, Reasonableness and Law, Law and Philosophy Library*, Springer, Berlin, 2009, p. 383.

[258] Case C-52/18, Christian Fülla v Toolport GmbH, ECLI:EU:C:2019:447.

good at his residence in order to proceed to the replacement. The seller, however, refused and asked to return the goods to his place of business because it was too burdensome to collect the good to the buyer's residence, given also its large measures. The buyer then argued that this request was not in line with the EU law and therefore brought the case before the ECJ.[259] The ECJ in its decision recognized that "the place where the consumer is required to make goods acquired under a distance contract available to the seller for them to be brought into conformity which is most suitable to ensure that they can be brought into conformity free of charge, within a reasonable time and without significant inconvenience to the consumer, depends on the specific circumstances of each individual case." Hence in its reasoning the ECJ took the chance to clarify what is the meaning of reasonable time to repair or replace the good. Specifically, the court indicated that in this case two factors should be considered to define the expression. A first factor is the location of the goods with respect to the seller's place of business: if the seller's place of business is in a different country from the buyer, the seller may need a significant amount of time to organize the inspection; however, if the seller has a corresponding place of business or transport network in the place where the goods are located, the time will be reduced accordingly. A second factor is the nature of the goods: if the goods are very heavy, large or fragile, then a longer period of time is allowed.

Beside the decisions concerning peculiar aspects of the contacts such as the reasonable time, the most innovative ECJ case law concerning the application of reasonableness regards the interpretation of the average consumer, which is an expression employed especially the directives concerning the unfair commercial practices. In order to determine who is the average consumer, the ECJ elaborated a test in the

[259] Specifically, article 3(3) of Directive 1999/44 according to which "*Any repair or replacement shall be completed within a reasonable time and without any significant inconvenience to the consumer, taking account of the nature of the goods and the purpose for which the consumer required the goods*."

well-known case *Gut Springenheide*.[260] This case concerned a description ("six-grain — 10 fresh eggs") appearing on packs of eggs that, according to the German courts, was likely to mislead a significant proportion of consumers.[261] The question specifically referred to the ECJ by the German court was whether, in order to assess a statement that mislead the purchaser, the court needs to look for the actual expectations of the consumers or the purchaser in an objectified sense. Moreover, the German court also asked to clarify, in case it was consumers' actual expectations that matter, which was the proper test: the view of the informed average consumer or that of the casual consumer. The ECJ answered to those questions by stating that "the national court must take into account the presumed expectations which it evokes in an average consumer who is reasonably well-informed and reasonably observant and circumspect." These two components of the standard to define the "average consumer" (i.e. "reasonably well informed" and "reasonably observant and circumspect") have to be assessed according to the social, cultural and linguistic characters of the consumer.

Later the test formulated by the ECJ was also expressly adopted by the EU legislators in the directive 2005/29/EC regarding the unfair business-to-consumer commercial practices (that amended the directives 84/450/EEC, 97/7/EC, and 98/27/EC).[262] According to the directive, the

[260] Case C-210/96, Gut Springenheide and Tusky v Oberkreisdirektor des Kreises Steinfurt, ECLI:EU:C:1998:369.

[261] The German court argued that the label implied falsely that the feed given to the hens was made up exclusively of the six cereals indicated and that the eggs had particular characteristics.

[262] The specific reference to the ECJ rulings is clear in recital 18 of the directive that states "*it is appropriate to protect all consumers from unfair commercial practices; however the Court of Justice has found it necessary in adjudicating on advertising cases since the enactment of Directive 84/450/EEC to examine the effect on a notional, typical consumer. In line with the principle of proportionality, and to permit the effective application of the protections contained in it, this Directive takes as a benchmark the average consumer, who is reasonably well-informed and reasonably observant and circumspect, taking into account social, cultural and linguistic factors, as interpreted by the Court of Justice, but also contains provisions aimed at preventing the exploitation of consumers whose characteristics make them particularly vulnerable to unfair commercial practices. Where a commercial practice is specifically aimed at a particular group of consumers, such as children, it is desirable that the impact of the commercial practice be assessed from the perspective of the average member of that group. It is therefore appropriate to include in the list of practices which are in all circumstances unfair a provision which, without imposing an outright ban*

consumer's expectation will be protected only if it is reasonable. The related issue was whether this reasonable expectation needs to be assessed with respect to the average man (i.e. an abstract figure) or the real consumer of the given case. On this aspect it was argued that directive seems to adopt a mixed definition, partly realistic and partly statistical.[263] Consequently, the consumer will not be protected if the error in which he/she incurred was avoidable on the basis of a normal level of information. In order to determine whether a commercial practice is misleading one has to assess "if its factual context, taking account of all its features and circumstances and the limitations of the communication medium, it omits material information that the average consumer needs, according to the context, to take an informed transactional decision and thereby causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise." (article 7).[264]

It was observed that in the ECJ decisions[265] and, later, in the directive[266] the reasonableness is a cognitive criterion that goes beyond statistical evidence, and adds an element of flexibility in the contractual relationship. Specifically, it was noted that the test provided in the ECJ

on advertising directed at children, protects them from direct exhortations to purchase. The average consumer test is not a statistical test. National courts and authorities will have to exercise their own faculty of judgement, having regard to the case-law of the Court of Justice, to determine the typical reaction of the average consumer in a given case."

[263] See C. ALVISI, *Il consumatore ragionevole e le pratiche commerciali sleali*, in *Contratto e impresa*, 2008, pp. 700 – 715.

[264] Moreover, according to the ECJ case law, when assessing the consumer's reasonable expectation, the courts need to refer both at the kind of consumer, and the characteristics of the product. The latter aspect was expressly tackled in the case Boston Scientific Medizintechnik GmbH case (Cases C-503/13 and C-504/13, Boston Scientific Medizintechnik GmbH v. AOK Sachsen-Anhalt — Die Gesundheitskasse (C-503/13), Betriebskrankenkasse RWE (C-504/13), ECLI:EU:C:2015:148) in which the ECJ affirmed that with regards to the medical devices (the case was about a defective pacemakers), in the light of their function and the particularly vulnerable situation of patients using such devices, the reasonable expectation concerning the safety requirements of those devices are particularly high. On this aspect see C. ALVISI, *The Reasonable Consumer under European and Italian Regulations on Unfair Business-to-Consumer Commercial Practices,* in G. Bongiovanni et al. (eds.)*, Reasonableness and Law, Law and Philosophy Library*, op. cit. p. 286 ff.

[265] See C. TWIGG-FLESNER, *Deep impact? The EC Directive on Unfair Commercial Practices and domestic consumer law*, in *Law Quarterly Review*, 2005, pp. 386–389.

[266] See C. ALVISI, op. cit. For some case-law see Case C-632/16, Dyson Ltd, Dyson BV v. BSH Home Appliances NV, ECLI:EU:C:2018:599,

decisions is qualitative, that makes it very close to the common law concept of reasonableness.[267]

[267] See C. TWIGG-FLESNER, op. cit., pp. 386–389.

CHAPTER III

REASONABLENESS IN CHINESE CONTRACT LAW

SECTION 1 - THE CONCEPT OF REASONABLENESS IN TRADITIONAL CHINESE LAW

1. The concept of "reasonableness" (*heli* 合理) in traditional Chinese thinking.

The concept of reasonable, and its derivatives, in Chinese language is expressed with the locution *heli* (合理). The word is made by two Chinese characters. The first *he* (合) means "appropriate", "suitable", "proper" and "agreement" [268]. The second Chinese character *li* (理) is a phonogram[269], consisting of a semantic part and a phonetic part. On the left is the radical[270], *yu* (玉), which suggests the concept of jade and on the right is the character *li* (里) which literally means "inside" and provides the hint to its pronunciation. "*The concept behind this word, in its most ancient meaning, is that of the 'pattern' in things: jade is a precious stone that can be worked easily if the engraver is able to follow its natural markings*"[271].

Actually, it is the second character *li* (理) that holds the profound

[268] The Contemporary Chinese-English Dictionary, Beijing, 2002.
[269] The phonogram refers to a word-making method of Chinese characters. Chinese written language is formed on the basis of pictograms, self-explanatory characters, and ideogrammatic compounds. Each character consists of two parts, on the one side is the meaning and the other side is the sounds.
[270] The radical in Chinese is 偏旁 (pian pang), or simply 旁 (pang). A radical, or component of a character, usually indicates its meaning, just like 水 (shui, water) with a 冫 becomes 冰 (bing, ice).
[271] M. TIMOTEO, *Vague Notions in Chinese Contract Law: The Case of Heli*, in *European Review of Private Law*, 2010, p. 939. This can be seen in the encyclopedia *Shuo Wen Jie Zi*（说文解字）, that contains the explanation of the ancient Chinese culture, society, history and literature, including the explanation of the use of ancient words.《说文》："理，治玉也。"《说文通训定声》："顺玉之文而剖析之。"

meaning of *heli* (合理). In Chinese history this character's connotations have followed a very complex and long path, since it was well known long before the advent of the Confucianism philosophy and lasted until modern times. To uncover the different meanings that the concept *li* (理) had during centuries is a necessary step in order to fully understand what *heli* (合理) means in today's Chinese contract law.

The first Chinese ideologist, of whom we have knowledge that reasoned on the concept of *li*(理) is Liu Shao[272]. According to his theories, four different kind of *li*(理) can be uncovered[273]: *shi li*(事理), *qing li* (情理), *yi li* (义理) and *dao li* (道理).

The first kind of *li*(理), *shi li*(事理), is the one mentioned above and is related to the nature of objects. Like telling the tree's age by the annual ring, natural texture of things can be used to analyse facts and nature. *Li* (理) in this meaning is considered the path which indicates how to fully comprehend things and their features.[274] Following this meaning, the Chinese philosopher Daizhen[275] interpreted *li*(理) as the basis of the nature of objects, such as the vein of wood and the grain of cloth; the way of distinguishing the minor differences of similar things; the way of doing

[272] 刘邵，Liu Shao, courtesy name Kongcai (孔才), was an official of the state of Cao Wei during the Three Kingdoms period (220–280 AD) of China.

[273] *S. Liu*, *Figures*, Shanghai Joint Publishing Press, Shanghai, 2005. 刘邵，《人物志》，上海三联出版社，2005 年。 As reported by the author, Liu Shao said that: "*When we talk about 'li(理)', we can identify four categories of meaning (...). The evolution of things on the heaven and earth, and the rise and wane of sun and moon, can be called "daoli (道理)". To establish the legal system, to regulate social affairs, so that the person's acts are carried out in accordance with the legislation, is called the matter of "shili (事理)". The feudal ethics and rites in moderation, so that people's behavior can rely on rules, is called "yili(义理)*". The temperament and feeling of human beings is called "*qingli* (情理)". Another author that follows Lu Shao's theory is Mou Zhongsan: *Z. S. Mou*, *Mind-Substance and Nature-Substan*ce (the first volume), Shanghai Chinese Classics Publishing House, Shanghai, 1999. 牟宗三，《心体与性体》（上册），上海古籍出版社，1999 年版。

[274] Y. H *Zhang* (ed.), *Jurisprudence in society*, Law Press, Beijing, 2016. 张永和编，《社会中的法理》，法律出版社，2016。

[275] 戴震 Dai Zhen (January 19, 1724 – July 1, 1777) was a prominent Chinese scholar of the Qing dynasty from Xiuning, Anhui. He made great contributions to mathematics, geography, phonology and philosophy. His philosophical and philological critiques of Neo-Confucianism continue to be influential.

something methodically[276].

The second kind of *li*(理), *qing li* (情理), is related to human feeling, so it is considered to be flowing, alive, revealing of complex life, uncertain and unpredictable[277]. This concept had very different destinies during the evolution of Chinese thinking, due to its unpredictability. During the Song and Ming Dynasties it was opposed by the *song ming li xue* (宋明理学) philosophy, that was sustaining a theory based on truth and objectivity and not on human feeling[278]. However, during the late Ming Dynasty, Li Zhi[279] and Yuan Chonghuan[280] began to rethink the concept of *li* (理) expressed in the adage "uphold justice, destroy desire" (*Cuntianli, mierenyu*, 存天理，灭人欲), since the idea that a rule applied too strictly was lacking justice, after all, became prevalent. This awareness was finally embraced during the Qing Dynasty when the philosopher Daizhen, in its work *Meng Zi Zi Yi Shu Zheng* (孟子字义疏证), stated that "it is not possible to be reasonable without emotion"[281]. Furthermore he affirmed that if the rule is regulated too strictly it could result as unjust: when a man was punished by the rule, people may think the rule is unjust and sympathize with him; but if a man was punished due to the betrayal of *qing li* (情理), others would only feel that he deserves

[276] Z. *Dai*, M*engzi ziyishuzheng (the sixth volume)*，Huangshan Pulishing Press, Hefei, 1995, p.151. 戴震,《孟子字义疏证》,《戴震全书》卷六，黄山书社，1995 年。
[277] See J. P. *Zhang*, *The traditional Chinese Law and the Transform of Modern China*, Law Press, Beijing, 1997. 张晋藩,《中国法律的传统与近代转型》，法律出版社，1997 年。
[278] *song ming li xue* (宋明理学), often shortened to *li xue* (理学), is a moral, ethical, and metaphysical Chinese philosophy influenced by Confucianism, and originated with Han Yu and Li Ao (772–841) in the Tang Dynasty. This philosophy became prominent during the Song and Ming dynasties. "Uphold justice, and destroy desire (*Cuntianli mierenyu*, 存天理，灭人欲)" This is a moral standard put forward by Cheng Hao and Cheng Yi, famous Confucian scholars of the Song dynasty. Its original meaning is that the nature and healthy lifestyle is the principle of the world and seeking ease and comfort is the desire. It aims to tell people to comply with nature and eliminate unreasonable requirement. However, for a long time, it has been misinterpreted as restricting freedom.
[279] 李贽, Li Zhi (1527–1602), often know by his pseudonym Zhuowu, was a Chinese philosopher, historian and writer of the late Ming Dynasty.
[280]袁崇焕, Yuan Chonghuan (1584 –1630), courtesy name Yuansu or Ziru, was a politician, military general and writer who served under the Ming dynasty.
[281] Z. *Dai*, *op, cit.*, p.152.

punishing for what he did[282]. In the modern culture the criticism to Neo-Confucianism from New Culture Movement[283], a movement based upon western ideals like democracy and science as well as on the importance of "personal liberation", emphasised human emotion's free expression.

The third kind of *li*(理) is *yi li*(义理), considered a pure philosophical concept. If *qing li*(情 理) could be conveyed through art, since art expresses human feelings, *yi li*(义理) can be deemed as a philosophical thinking close to the western rationalism. In its traditional meaning of "justice, moral, righteousness" is considered an important concept in Confucianism, but the raise of this concept in modern times is to be attributed to the philosophers in Song and Ming dynasty.[284]

The fourth kind of *li*(理) is *dao li* (道理), a typical concept that represents Chinese spirit, convey Chinese people's minds and express Chinese way of thinking. Following this kind of *li*(理), an act is reasonable if it is appropriate for human connection[285]. It is a comprehensive and complex concept, which includes reason, sense and principles. During history, Chinese culture kept exploring *dao li*(道理), so that a philosophy, known as "Daoism"[286], was developed and became one of the fundamental theoretical basis of Chinese thinking.

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[282] Z. *Dai*, *op, cit*., p. 288.

[283] The New Culture Movement affirmed from the mid-1910s to 1920s sprang from the disillusionment with traditional Chinese culture following the failure of the Chinese Republic – founded in 1912 – to address China's problems. Scholars such as Chen Duxiu, Cai Yuanpei, Li Dazhao, Lu Xun, Zhou Zuoren, He Dong, and Hu Shih, had classical educations but began to lead a revolt against Confucianism.

[284] See H.W. *Fang* (ed.), *Reconstruction of Literature and Creation of Chinese Discourse*, Central Compilation & Translation Press, Beijing, 2015. 方汉文主编，《世界文学重构与中国话语创建》，中央编译出版，2015 年。

[285] *H. Cheng, Y. Cheng*, *The Articles Left by Chengs in Henan province: volume 6*, wang xiaoyu, Zhonghua Book Company, Beijing, 1981, p.84. 程颢，程颐，《河南程氏遗书：第六卷》,王孝鱼点校，中华书局，1981 年。

[286] Daoism, is a philosophical tradition of Chinese origin which emphasizes living in harmony with the Dao (道). This is a fundamental idea in most Chinese philosophical schools; in Daoism, however, it denotes the principal that is the source, pattern and substance of everything that exists. Daoism differs from Confucianism by not emphasizing rigid rituals and social order, but is similar in the sense that it is a philosophical thinking that aims at achieving perfection by becoming one with the unplanned rhythms of the universe called "the way" or "*dao* (道)".

Nowadays, in the modern Chinese vocabulary, the meaning of *li* (理) has been influenced by western culture and it could be translated as rational. This concept, though, went through a process of gradual understanding and incorporation in Chinese culture: at the end of 19th century, *li* (理) was translated as "scientific spirit" by the scholar Yan Fu[287].

2. Confucianism and *Heli* (合理)

2.1 The Main Doctrine of Confucianism: zhong yong (中庸), the Doctrine of the Golden Mean.

The Doctrine of the Golden Mean or *zhong yong* (中庸) is both a doctrine of Confucianism and the title of one of the books of the Confucian philosophy. The concept first appeared in book VI, verse 29 of the *The Analects of Confucius* (*Lunyu*, 论语)[288] and is considered the highest principle of moral cultivation in Confucianism. *The Doctrine of the Golden Mean* is a text rich with symbolism and guidance to perfecting oneself. The mean is also described as the "unswerving pivot" or *zhongyong*(中庸). *Zhong*(中) means bent neither one way or another, and *yong* (庸)represents unchanging. Confucius says, "*zhong yong* (中庸) is supreme in terms of social moralities."[289] Though the two Chinese characters *Zhong* (中, moderate) and *Yong* (庸, mediocre, common[290]), that represent the golden mean, had long existed, back to the early Spring and Autumn Period[291], it is still believed that Confucius first adopted this

[287] Yan Fu was a Chinese scholar and translator, most famous for introducing western ideas, including Darwin's "natural selection", to China in the late 19th century.

[288] The Analects of Confucius (*Lunyu*，论语)，The Analects of Confucius is an ancient Chinese book composed of a collection of sayings and ideas attributed to the Chinese philosopher Confucius and his contemporaries, traditionally believed to have being compiled and written by Confucius's followers. "The Master [Confucius] said, The virtue embodied in the doctrine of the Mean is of the highest order. But it has long been rare among people" – *Analects, 6:29*.

[289] The Analects of Confucius, the original text: "中庸之为德也，其至矣乎".

[290] The term doesn't have a negative meaning in Confucianism philosophy.

[291] The Spring and Autumn period was a period in Chinese history from approximately 771 to 476

concept.

Before Confucius, the thought of being "*zhong* (中)" had derived from the original concepts of "bullseye"[292] and "flagpole"[293], meaning the centre of something. Later, Chinese classics *The Book of documents* (*Shang Shu*, 尚书)[294] and *The Book of Changes*(*Zhou Yi*，周易)[295] enriched the definition of *zhong*(中), including righteousness and morality, so *zhong*(中) became a virtue and contains the meaning of moderate behaviours without prejudice or discrimination.

Later on, the classics *The Rites of Zhou* (*Zhouli*, 周礼)[296] mentioned neutrality, which is close to the *Doctrine of the Golden Mean*: "A person with no response to emotions such as joy, wrath, grief and pleasure is neutral; a person with moderate response to such emotions is neutral."[297].

Yong only appeared seven times in two literatures of the pre-Qin period[298], namely *The Book of Songs* (*Shijing*,诗经) and *The Book of Documents*(*Shangshu*, 尚书). And in *The Book of Documents*, *yong* (庸) was generally used as a verb, meaning "to use".

Confucius combined *zhong* (中) and *yong* (庸) and elaborated a new

BC (or according to some authorities until 403 BC[a]) [2] which corresponds roughly to the first half of the Eastern Zhou period. The period's name derives from the Spring and Autumn Annals, a chronicle of the state of Lu between 722 and 479 BC, which tradition associates with Confucius.

[292] Original text is "射箭之中"(she jian zhi zhong)。

[293] Original text is "建旗之中"(jian qi zhi zhong)。

[294] *The Book of documents* (*shang shu*，尚书), namey The Book of Documents, also known as the Esteemed Documents, is one of the Five Classics of ancient Chinese literature. It is a collection of rhetorical prose attributed to figures of ancient China, and served as the foundation of Chinese political philosophy for over 2,000 years.

[295] *The Book of Changes* (*zhou yi*,周易), known as Classic of Changes or Book of Changes, is an ancient Chinese divination text and the oldest Chinese classics. Possessing a history of more than two and a half millennia of commentary and interpretation, the *Yi Jing* (易经) is an influential text read throughout the world, providing inspiration to the worlds of religion, psychoanalysis, literature, and art.

[296] *The Rites of Zhou* (*zhou li*, 周礼) The Rites of Zhou, originally known as "Officers of Zhou" is a work on bureaucracy and organizational theory.

[297] *Zhong Yong*, the original text："喜怒哀乐之为发，谓之中；发而皆中节，谓之中。"

[298] A.L. *Dong*, *Characteristics and reflection of traditional legal culture from the perspective of the golden mean*, in *Gansu Society Science*, 2009, p.106. 董爱玲，《中庸观下的传统法律文化特征及当代省思》, 甘肃社会科学，2009 年第 3 期。

philosophy, with profound repercussions in historical development. He inherited the diversified definitions of the word and bestowed new meanings upon it.

2.2 Meanings of Zhong Yong(中庸)

Ancient Chinese law is usually identified with Confucianism doctrine. As introduced above, "The golden mean" (*zhong yong*, 中庸) or *zhong dao* (中道 tradition of Confucian continuity) is an important philosophy in ancient China with a comprehensive, systematic and holistic framework of thought.

The golden mean proclaimed that *zhong* (中,moderation) is the base of the world[299] and 和 (*he*), harmony, is the good way of running life, ie. the purpose, the final aim of life[300]. In *The Spring and Autumn Annals* (*Chunqiuzhanguo*, 春秋战国)– *The Twentieth Year of Zhao*, is recorded an argument of Yan Ying[301] about *he* (和, harmony). Yan Ying used some metaphors to explain *he* (和): the palatable soup made by a chef with "five flavours" (sour, sweet, bitter, pungent and salty), or a beautiful melody played by a musician in pentatonic scale[302]. *The book of the golden mean* uplifted *zhong* (中, moderation) and *he* (和, harmony) to a paramount level – "In a state of harmony the nature and all beings work properly." [303]

[299] *Zhong Yong*, the original text："中也者，天下之大本也，和也者，天下之达道也。"。

[300] Harmony boasts strong Chinese characteristics, and expresses the traditional Chinese philosophy in pursuit of a balance between man and nature, among people and between man's body and soul.

[301] 晏婴(Yan Ying), more widely known as Yan Zi, was born in the now called Gaomi county, Shandong province. He served as prime minister to the state of Qi during the Spring and Autumn period. An accomplished philosopher, statesman and politician, he was an elder contemporary of Confucius

[302] *Zuo zhuan*(左传), the twentieth year of Zhao, records the saying of Yan Ying："先王之济五味。和五声也，以平其心，成其政也。"

The *Zuo zhuan* (左传), generally translated The Commentary of Zuo, is an ancient Chinese narrative history, traditionally regarded as a commentary on the ancient Chinese chronicle Spring and Autumn Annals。

[303] *Zhong Yong* (中庸) , the original test: "中也者,天下之大本也;和也者,天下之达道也。致中和,天地位焉,万物育焉。"

Confucius confers utmost importance to the *zhong yong*(中庸): *zhong yong*(中庸) is supreme in terms of social morality, nevertheless, common people have been for long slack in practicing it.[304] In *Commentary Studies of the Zhongyong*(*Zhongyongzhanjuxu*,中庸章句序), Zhu Xi[305] also says, "*Zhong yong* (中庸) is the tradition of Confucian continuity"[306]. Therefore, we can see that Chinese philosophers, following Confucius theories, believed that harmony and moderation were the moral codes for the existence and the correct development of nature and society.

In the preface of the translation of Montesquieu's *The Spirit of Laws* (Volume I), Yan Fu compared Chinese and Western laws and cultures and affirmed that, "the word law of the west can be interpreted as reasons, rites, codes and institutions in Chinese, so scholars should distinguish between the two"[307], and he even says that in ancient China *li* is the origin of law.[308] Therefore, *zhong yong*(中庸) can be regarded as the "legal theory" in ancient Chinese legal system and it refers to properness, moderation, reasonableness and correctness, appropriateness, indiscriminate and unbiased.

2.3 Connections between zhong yong (中庸) and reasonableness

Zhong (中) refers to moderation and the accuracy or appropriateness in handling complexity: people's behaviour should be neither excessive nor inadequate. The moderation here also means to work in conformity with a certain standard or code. When a controversy occurs, the problem

[304]*Zhong Yong* (中庸), the original test: "中庸之为德矣,其至矣乎!民鲜能久矣。"
[305] Zhu xi was a Confucian scholar in Song Dynasty (960-1279), who was the leading figure of School of principle and the most influential Neo-Confucian rationalist in China.
[306] See *X. Zhu* (Song Dynasty), *The Interpretation of the Golden Mean*, Zhonghua Book Company, Beijing, 1981. 朱熹（宋）,《中庸章句序》，中华书局，1981年。
[307] Yan Fu translated The Spirit of the Laws by Montesquieu as 《法意》 (Fayi, The Meaning of the Law), and he wrote this opinion in the preface. The original text is"按语中比较中西法律文化后认为："西文'法'字,于中文有理、礼、法、制四者之异译,学者审之。"
[308] The original text:"理为法之原"

solver should properly deal with it in terms of the objective, method and attitude: that is what being moderate demands.

2.3.1 Reflection of reasonableness in *zhong yong* (中庸)

In Chinese society, the most common approach to handling a case is to reach an agreement and restore the balance between the parties' interests.

To reach an agreement means to deal with a case through mediation. Litigation and mediation are common means in dispute settlement. Litigation works in line with the logic of argument, which is to argue and judge the right or wrong of something; whereas mediation conforms to the logic of *he* (和, harmony). In the process of mediation, the two parties will probably fall into argument when they both claim their separate interests and standpoints and discuss upon the facts due to different understandings, but the ultimate purpose of mediation is to reach the consensus.

"Reasonableness" in the *zhong yong*(中庸) aims at retaining the harmony between the inner world and the natural world. As Joseph Needham[309] put it, "*Ancient Chinese seek harmony in nature and regard harmony with nature as the ideal of human relationship*"[310], thus argument is deemed to damage the harmony in nature. As a result, in traditional Chinese society, people tended to retain peace instead of fighting for their rights when confronted with disputes or controversies.

Chinese peoples are often not content with the constraints of laws or regulations[311], they prefer to rely on local custom or traditional Confucian

[309] Noel Joseph Terence Montgomery Needham (9 December 1900 – 24 March 1995) was a British biochemist, historian and sinologist known for his scientific research and writing on the history of Chinese science and technology.

[310] *N. J. T. M. Needham*i, *Science and Civilization in China (seven volumes)*, Oxford University Press. The work was translated in Chinese by the Department of history of science, Shanghai Jiaotong University, the Science Press, Beijing, 2011, p.43. 李约瑟，《中国的科学与文明》（第七卷）， 上海交通大学科学史系译，科学出版社, 2011 年。

[311] See X.T. *Fei*, *Fei xiaotong collected essays on sociology*，Tianjin Peoples Publishing House，

thought to keep harmony[312]. Especially in the small cities or countryside villages, if a controversy is brought about a Court, it must be because the traditional rules have been infringed, which is a dishonoured matter[313]. Therefore, in some Chinese mind, especially those of the older generation, one of the manifestations of social and family harmony is the absence of dispute – "no litigation."

If case dispute arises, a lawsuit is seldom filed, but often the dispute is settled via mediation. To build up a harmonious social norm is one the supreme goals of Confucian culture. In this context litigation is considered a negative social behaviour which disturbs the harmonious social relations. Therefore, mediation better complies with the traditional focus and pursuit of reasonableness. Under such circumstance, "reasonableness" can be interpreted as a pragmatic conduct as well as the best solution. Considering the above, it can be concluded that traditional mediation system finds its roots in the Confucian culture and the practice that follow the golden mean. This is also the reason why the mediation system is still prevalent in China[314], since it allows to keep harmony in

Tianjing, 1985. 费孝通，《费孝通社会学论文集》，天津人民出版社，1985 年。

[312] "Harmony" boasts strong Chinese characteristics, and expresses the traditional Chinese philosophy in pursuit of a balance between man and nature, among people and between man's body and soul. The main belief of the Chinese traditional educational philosophy is the unity of Heaven and person and the unity of Knowing and Doing. The objective truth and subjective feeling are not opposites. For ancient Chinese philosophers, heaven and earth are objective existence, and people are part of the objective world. The objective laws will not be around for you, what you have to do is to adapt the nature. When a dispute happened, people should deal with it in accordance with the principle which should be infiltrated into culture, non-striving, and flexible according to the circumstances, as well as, the natural conditions. See C. LI, *Chinese Philosophy*, in W. EDELGLASS, J.L. GARFIELD, *The Oxford Handbook of World Philosophy*, Oxford University Press, Oxford, 2011, p. 230 ff. See also D. ZHANG, *Key Concepts in Chinese Philosophy*, 2002. Translated and edited by E. Ryden. New Haven, CT, and Beijing: Yale University Press and Foreign Languages Press.

[313] See X.T. *Fei*, *Earthbound China*, People's Publishing House, Beijing, 2008. 费孝通，《乡土中国》，人民出版社，2008 年。

[314] The detail can be seen in the People's Mediation Law of the People's Republic of China, which is enacted by Standing Committee of the National People's Congress in 2010, and entered into force in 2011. It is necessary to note that in modern times, in Chinese metropolis the attitude towards litigation has changed and now citizens tend to solve dispute with ordinary litigation proceedings. The traditional "what happens in the family stays in the family"(*Jiachoubukewaiyang*, 家丑不可外扬) is still valid, but with several exceptions. In former China, when people had conflicts with each other, they needed to solve them by themselves or internally, and if they involved third parties, they would have been counted or ridiculed. This outsider includes everyone except the contradictory parties. So "family scandals cannot be spread to the outside" become a Chinese idiom.

society[315].

Balance in the legal field refers to the equilibrium of human feelings and law. This worldly wisdom entails the characteristics of reasonableness in the notion of *zhong yong* (中庸). In the settlement of disputes, Chinese generally adhere to the principles of being fair and reasonable, and take both human sense and reason into account.

Huang Guangguo [316] identified three contents to the concept of "human feelings" in Chinese society. Firstly, it means the fundamental feelings or emotional reactions in daily life; secondly, it refers to the resources granted to the other party in social deals; thirdly, it is the social norm and moral code in interpersonal relationship. At the earliest period of China, reason and human feelings were two separate concepts. Reason was the natural law, which was intrinsic, universal and complied with the order (rule); human feeling was personal, it could be altered and more arbitrary (wilful). Gradually, these two concepts mingled and became an integral concept, *qing li* (情理).

This concept entails both personal emotions and requirements of obligation and rule, as well as moral code. Japanese scholar Shiga studied Chinese cases during Ming and Qing Dynasties and elaborated an explanation of the concept of *qing li*(情理), which can be simply put as "a feeling of righteous equilibrium in common sense"[317].

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[315] The goal of constructing a "harmonious society" was raised as fundamental for Chinese Government in the 11th five years plan, designed to cover the period 2006-2010 and approved under the leadership of President Hu Jintao and Premier Wen Jiabao. For an analysis of the key features of China's 11th five year plan, see Y. ZHANG, *To Achieve the Goals of China's 11th Five Years Plan Trough Reforms*, Development Research Center of the State Council, P.R.China, 2006, available at https://www.nomurafoundation.or.jp/en/wordpress/wp-content/uploads/2014/09/2006120607_Zhang_Yongsheng.pdf.

[316] G.G. *Huang*, *Human Connection and Face: Chinese Power Game*, Renmin University Press, Beijing, 2011, p. 238. 黄光国，《人情与面子：中国人的权力游戏》， 中国人民大学出版社，2011 年， 第 238 页。

[317] See S.G. *Shuzo* (Janpanese), *Principle of Chinese Family Law*, translated by J.G. ZHANG, Commercial Press, Beijing, 2013, p. 39. This concept is also related to the collective idea of Chinese society, where it is not the individual interest that is considered, but rather the collectivity. 滋贺秀三（日），《中国家族法原理》，张建国译，商务印书馆，2013 年, 第 39 页。

Therefore, the so-called *qing li* (情理)" can be said to be a kind of righteous equilibrium in Chinese culture. It is more a personal feeling than an objective fact, but it can affect the judgment of the litigator. That is to say, "*zhong yong* (中庸)" does not enjoy a universal and objective standard. The Chinese "righteous equilibrium" or "reasonable" decision making method is determined by the circumstances and relations.

There is an old Chinese saying that goes: "*there is a scale in the mind of each person*". The idea is that justice naturally inhabits a man's heart, but in fact, the "scale" is a private scale rather than a righteous, objective scale, because it measures in proportion to the personal relations or intimacy degree of each human being.

When asked "what is the most commonly used mediation method", a prominent mediator said, "*I think my method is very simple. I mediate according to laws. I don't mean to persuade any party. I just try to convince them that is how the laws prescribe. And we should all conform to laws. I would first analyse the case as stipulated in laws and then take some personal factors into account.*"[318]

3. Contract law and *heli* in Imperial China

In the history of China, the traditional Chinese legal system has been defined "a combination of civil and criminal laws" (*Zhufaheyi minxingbufen*, 诸法合一，民刑不分)[319]. This mixed character has usually been referred to as "imperial law", made by a huge amount of written law which was mainly administrative and penal, while civil law was mainly

[318] X.Y. Wu, *The Golden Mean and its Modernity Dilemma: Tradition and Transformation of Folk Dispute*, in *Theory and Reform*, No.2. 2017, p.161. 邬欣言，《中庸理性与现代性困境:民间纠纷解决场域中实践逻辑的传统与转型》，理论与改革，2017 年第 2 期， 第 161 页。

[319] See X.Y. *Zeng*, *Chinese Legal History*, China Renmin University Press, Beijing, 2003. 曾宪义，《中国法制史》，中国人民大学出版社，2013 年。

governed by local customs[320]. Compared with Western laws, the provisions of civil law in ancient China have always been seen as few and fragmentary, without any possibility to form a system like the one created in Roman Law. Therefore, from the perspective of formal meaning of the civil law, there was no such word like "civil law" in ancient China[321]. This image of the Chinese law, created having in mind Western legal models as reference and considered an expression of a cultural approach called "legal orientalism"[322], has been revised in the last few decades where new researches on the Chinese traditional legal system have presented the complexity of this system which had an autonomous development following specific historical and cultural paths. Overcoming the analytical perspective that framed Chinese traditional law in the light of the Western legal categories and moving to the search of the typical factors and the specificities of the legal experience of Imperial China, the last reconstructions show a legal system characterized by the interaction between formal law and social norms, between laws, Confucian moral and rites and giving rise to a unique combination of formal and informal governing methods, with a strong emphasis on the latter[323]. This typical character, which represent the synthesis of Legalist doctrines and Confucian moral codes, including those described in the previous pages, began to clearly emerge since the Tang dynasty, unanimously acknowledged as the greatest imperial dynasty in ancient Chinese history. Tang dynasty, during the reign of the Taizong Emperor (627-649), issued

[320] Z.P. *Chen*, *The Tension Between Traditional and Modern Legal Culture -- and the Reason for the Underdeveloped Civil Law in Ancient China*, in *Journal of Shantou University* (Humanities and Social Sciences Edition) , Vol.34, 2018. 陈子盼，《传统与现代法律文化的张力—兼论中国古代民法欠发达的原因》，汕头大学学报（人文社会科学版），2018 年，第 7 期，第 34 卷。

[321] See K. *Wang*, *The Ancient Chinese Civil Law*, in *Journal of Hubei Radio & TV University*, Vol. 28, 2008.王昆，《浅论古代中国固有民法》，湖北广播电视大学学报，2008 年第 8 期，第 28 卷。

[322] On this issue the classic reference work is T. RUSKOLA, *Legal Orientalism, China, United States and Modern Law*, Harward University Press, Massachusetts,2013. On orientalism as a cultural approach, see the well known E. W. SAID, *Orientalism*, Pantheon Books, New York, 1978.

[323] On this revision see, among others works, HUANG P.C., *Civil Justice in China, Representation and Practice in the Qing*, 1996, Stanford University Press, Stanford, 1994; Id., *Code, Custom and Legal Practice in China. The Qing and the Republic Compared*, Stanford University Press, Stanford, 2001; H. WINDROW, *A Short History of Law, Norms and Social Control in Imperial China*, in *Asia Pacific Law and Policy Journal*, 2006, vol 7, issue, 2, p. 246 (244-301).

the Tang Code, a milestone in the history of the Chinese legal system[324] that was the great reference model for the subsequent imperial Codes. This code set the formula for an efficient and extremely long-lived governing system, built upon and reinforced by social norms and informal hierarchies that survived for over 1,200 years, until the fall of the Empire in 1911.

Within this context, *heli*(合理) which, as we have seen, was a central concept of the Confucian cultural system, became and remained a core element in the Chinese legal thought, being one of the most relevant connecting points between the formal and informal sectors of the system. Being linked with notions of fairness and justice, *heli*(合理) developed as a judicial evaluation standard, a balancing criterion between the interests of the parties in a dispute, implying the application of a contextual approach. In contract litigations, the application of *heli*(合理) meant "*taking into account the background relationship of the parties, the circumstances relating to the formation and performance of the contract, and customary practices in a trade or business*"[325]. *Heli*(合理) thus developed as an evaluation standard able to connect formal laws with concrete circumstances. A popular synthesis of the use of *heli*(合理) in the legal sphere is the well-known proverb *heqing heli hefa*(合情 合理 合法), whose literal translation is 'according to human feelings or relevant circumstances, according to reason, according to law'. "*This adage, that is very popular still today, suggests the idea that the three factors, that are, relationship, rightness, and law, must be integrated by the judge in resolving a case. Thus, as expressed by the syntactic position of the word in this sentence, heli is a matter of balancing by means of the appropriate combination between authoritative prescriptions (fa，法) and relevant*

[324] The Tang code was the first Chinese imperial code that survived in its entirety through several dynasties into the modern era, also having wide influence on the legal developments in neighbouring countries, such as Japan, Korea, and Vietnam.

[325] These are words by L. A. DI MATTEO, *Rule of Law in China: The Confrontation of Formal Laws with Cultural Norms*, in *Cornell International Law Journal*, vol. 51, 2018, n. 2, p. 425.

circumstances (*qing,*情) […]"[326]. As a matter of fact *heli* (合理) embodied a broad contextual approach, marking the methods of settling legal decisions and applying formal rules taking into due consideration the material particularities of each case and the understanding of the circumstances[327].

The standard of *heli*(合理) crossed all legal sectors, even that of contracts, which lived mainly in the informal part of the system. However, contracts where not completely ignored by formal law, i.e. by written rules of the Imperial dynasties. The "Contract" (*Hetong*,合同 in contemporary Chinese legal language) was called *Qiyue* (契约) in ancient China, a word which was first recorded in the *Rites of Zhou* (*Zhouli Tiangong Xiaozai*《周礼•天宫•小宰》)[328] of the Western Zhou Dynasty (c.11th century-771 B.C.)[329], where among the government's function the following were mentioned: "to judge the disputes on transfer of ownership on the basis of the *Shuqi*(书契) […], to judge the disputes o trading on the basis of *Zhiji*(质剂). The two words *Shuqi*(书契) and *Zhiji*(质剂), the first one having the character *qi*(契)nas a suffix, refer to different kinds of contract. However contract law never became the subject of much attention on the part of the Imperial codes. Although some reference to contractual relationships was made in the *Zalv* (杂律, i.e. the section of "miscellaneous law" within the Tang Code) most of the contracts were governed by custom. A similar approach was followed in Song (960–1279), Yuan (1271–1368) and Ming (1368–1644) Dynasties, according to the popular saying "officials have political laws, and the people follow

[326] These are words by M. TIMOTEO, *Vague Notions in Chinese Contract Law: The Case of Heli, European Review of Private Law*, cit. p. 943.

[327] See R.G. YU, *Traditional Ritual and Chinese Legal System*, China Publishing Group, Beijing, 2016. 俞荣根,《礼法传统与中华法系》，中国民主法制出版社， 2016年。

[328] The Rites of Zhou is a Confucian classic. It has the most authoritative record and explanation of ritual law and ethics, and has the most profound influence on the ritual system of the past.

[329] The Zhou Dynasty (1046-256 BCE) was among the most culturally significant of the early Chinese dynasties

private agreements" (*Guanyouzhengfa mincongsiyue*, 官有政法，民从私约)[330].

[330] T. H. *Luo*, *Private loans in the Tang Dynasty*, Taiwan Commercial Press, Taiwan, 2005, p.341. 罗彤华，《唐代民间借贷》，台湾商务印书馆，2005 年, 第 341 页。

SECTION 2 - THE EVOLUTION OF THE CONTRACT LAW IN MODERN AND CONTEMPORARY CHINA: LEGISLATIVE REFORMS AND THE RE-EMERGENCE OF REASONABLENESS

1. The new contract law rules in modern and contemporary China

As a central element of traditional Chinese law, the concept of *heli* enters a phase of profound crisis when China embarks on the transition towards modernity, a transition that takes place in the sign of a massive process of transplants of foreign legal models. This process which began at the end of the Nineteenth century, Western civil law was introduced in China, bringing with it a new, modern, contract law made up of completely new rules and principles.

The entry of these new legal models has been a long, complex and troubled experience, which is important to summarize in its most relevant passages for a better understanding of the topic that we are exploring.

During the late Qing Dynasty (1644–1911), China experienced the imperialistic conquest and started a complex process of legal modernization following Western civil law models. A central part of these reforms was the codification of civil law, which would have a profound impact on the development of Chinese law. In 1911, the Qing government formulated the Draft Civil Law of Qing Dynasty, which fully reflected the Qing government's strategy of "*adopting the latest theories of modern times* (*Jiancai jinshi zuixinzhi xueshuo* 兼采近世最新之学说)".[331] The Draft code was patterned after the German model, via Japan[332]. Moreover, the influence of other European laws, in particular Swiss law, is recognized[333]. The Project of the Civil Code consisted in five books of

[331] F. H. *Chen*, *The Research and Enlightenment of General Legislation of Civil Law in Late Qing Dynasty*, in *Journal of China University of Political Science and Law*, No.6, 2017, p. 38. 陈范宏，《清末民国民法总则编立法探赜及启示》，中国政法大学学报，2017 年第 6 期, 第 38 页。

[332] The first three books (General Principles, Obligations and Rights over Things) were completed by Matsuoka Yoshimasa, a judge of the Tokyo Court of Appeal engaged for the task.

[333] Z.J. *Liu*, *The Compilation of the Civil Code in the Late Qing Dynasty and the Early Republic of China*, in *Shanxi Archives*, No.8, 2018, p.161. 刘志娟,《清末民初民法典的编纂及当下启示》，山

which the first three (general part, law of obligations, real rights) followed the setting of the corresponding books of the Japanese Civil code and its European models of reference, while the last two (family law and succession law) were written under the auspices of the Ministry of Rites, with the declared intention of preserving the core of Chinese cultural values in the context of legal modernization. As far as contract law is concerned the draft let the customary rules on *dian*[334] (conditional sale of land) survive, within a new conceptual structure patterned after civil law reference models.

After a first and a second draft of the Civil code, which did not take effect, due to the collapse of the Qing and the political chaos that subsequently plagued the country, the first Civil code of modern China was enacted in 1929-1930, under the Republic of China, born after the dissolution of the Empire and ruled by Guomindang which governed China from 1927 to 1948. The Guomindang code was a modern civil code, more decidedly oriented towards European continental legal models, with the German and Swiss one (via Japan) remaining the main reference models. It was the first formal civil code in the history of modern China[335], where general rules of civil and commercial laws where combined. It was organized into five parts: the general part; the law of obligations, property law; family law; inheritance law.

After the foundation of the People's Republic of China in 1949, the new Chinese government abolished the 1930 Civil code, together with all the Guomindang laws, and begun building a socialist legal system,

西档案，2018 年，第 8 期。

[334] *Dian*, which was one the most relevant customary law contracts in late Imperial China, consisted by the sale of land or of part of the rights to land within the agreement that the seller had the right to repurchase if certain conditions in the *dian* contract were met. This customary practice was inserted into the Ming and Qing codes. See M. ALLE, *Code, Culture and Customs: Foundation of Civil Case Verdicts in a Nineteenth-Century County Court*, in K. BERNARDT, P.C. HUANG (eds.), *Civil law in Republican China*, Stanford University Press, Stanford, 1994, p. 134.

[335] L.X. *Yang*, *Gorgeous Turn around and Torturous Development of Chinese Civil Law in a Century—Review and Prospect of the 100-year History of Chinese Civil Law*, in *Journal of Henan University of Economics and Law*,No.5, 2011, p.8. 杨立新，《百年中的中国民法华丽转身与曲折发展——中国民法一百年历史的回顾与展望》，第 5 期，河南财经政法大学学报，2011 年, 第 8 页。

through a large scale borrowing from the Soviet legal model. Contract law was reshaped following economic reforms. The earliest PRC contract law was in the Provisional Measures for Signing Contracts with State-owned Enterprises and Cooperatives (*Jiguan guoying qiye hezuoshe qianding hetongqiyue zanxingbanfa*, 机关国营企业合作社签订合同契约暂行办法) on October 3, 1950 and in Decision on Signing and Strictly Enforcing Contracts (*Guanyu renzhen dingli yu yangezhixing hetong de jueding*, 关于认真订立与严格执行合同的决定), which included a series of contracts in the planned economy regime, which was being established. Between the 1950s and the 1960s various sectorial contract regulations were issued, always in close relationship with the State economic planning. There did not exist a comprehensive contract law system. Moreover, in the meanwhile the formal legal system was progressively weakening, especially during the Cultural Revolution, crossed by a strong anti-legalitarian wave [336].

The Cultural Revolution ended in October 1976 and after the Third Plenum of the Eleventh Central Committee of the Chinese Communist Party, held in 1978, China's policy direction dramatically changed, under the leadership of Deng Xiaoping who launched a new policy of "domestic reform, opening to outside" (*Duinei gaige, duiwai kaifang*, 对内改革，对外开放).

In this context contract law rules started to be redesigned: in August 1979, the State Economic Commission, the General Administration of Industry and Commerce, and the People's Bank of China issued a Joint Notice on Several Issues Regarding the Management of Economic Contracts. (*Guanyu guanli jingji hetong ruogan wenti de lianhe tongzhi*关于管理经济合同若干问题的联合通知)", followed by Trial Provisions on Basic Terms of Economic Contracts for Industrial, Commercial and Rural Enterprises (*Guanyu gongshang nongshang qiye jingji hetong jiben*

[336] On this evolution see CHEN S., *The Establishment and Development of the Chinese Economic Legal System in the Past Sixty Years*, in 23 *Columbia Journal of Asian Law* 109 (2009-2010).

tiaokuan de shixing guiding, 关于工商、农商企业经济合同基本条款的试行规定) issued by the State Administration of Industry and Commerce.

On September 30 in 1981, China signed the United Nation Convention on the International Sale of Goods, while in December of the same year, the Economic Contract Law of the People's Republic of China (*Jingji hetongfa*, 经济合同法) was adopted. This law applied to economic contracts in which contractual parties were domestic persons acting within the economic planning system and was followed by the Regulations on the Purchase and Sale Contracts for Industrial and Mineral Products (*Gongkuang chanpin gouxiao hetong tiaoli*, 工矿产品购销合同条例), the Regulations on the Purchase and Sale Contracts for Agricultural and Sideline Products(*Nongfu chanpin gouxiao hetong tiaoli*,农副产品购销合同条例), the Regulations on the Contracts for Construction Engineering Survey and Design(*Jianzhu gongcheng kancha sheji hetong tiaoli*, 建筑工程勘察设计合同条例), the Regulations on the Contracts for Construction and Installation(*Jianzhu anzhuang gongcheng chengbao hetong tiaoli*, 建筑安装工程承包合同条例), the Regulations on Contracts for Property Insurance (*Caichan baoxian hetong tiaoli*, 财产保险合同条例), the Regulations on Processing Contracts (*Jiagong chenglan hetong tiaoli*, 加工承揽合同条例), the Regulations on Loan Contracts (*Jiekuan heotng tiaoli*, 借款合同条例), and the Implementation Rules of Storage Contracts (*Cangchu baoguan hetong shishi xize*, 仓储保管合同实施细则), providing further legal basis for regulating contractual relationships.

Since the reform and opening-up, a number of foreign investment were attracted by Chinese market and cross-border trade became more frequent. Considering the particularity of foreign-related economic contracts, Foreign Economic Contract Law (*Shewai jingji hetongfa*, 涉外经济合同法) was passed on March 21, 1985. China also began to import advanced foreign technologies on a large scale to increase its own

production capacity and technological strength. Therefore, the Technology Contract Law (*Jishu hetongfa*, 技术合同法) was passed on June 23, 1987. Thus, these major pieces of law, together with administrative regulations promulgated by the State Council and various ministries established a basic framework of contract law at the national level. They were joined by the The General Principles of Civil Law (*Minfa tongze*, 民法通则), approved in 1986, where few provision related to civil contracts were inserted. Within the context of a transition from planned economy to market oriented economy, the law of contract reflected both market transactions and planned allocation of resources by the State. However, the three pieces of legislation on contract law were not intended to be a comprehensive set. They were enacted piecemeal following the developments of the economic reform starting from 1979. They contained contradictory provisions, and the scope of each of them overlapped. Thus, in 1993, the drafting process of a new Contract Law, which was intended to replace the three pieces of legislation started and the first comprehensive Chinese Contract Law (*Hetongfa*, 合同法) was enacted in 1999[337]. This law reflects China's significant policy change following the development of economic reforms[338]: as China has moved to a market-oriented economy, there was no need to keep a differential treatment between civil contracts and economic contracts and between domestic economic contracts and foreign economic contracts. The new uniform contract law introducing a comprehensive contract law system, recognized the principle of freedom of contract [339] and managed to reduce governmental intervention in contractual activities to a minimum. In order

[337] On the evolution of contract law in the first decades of the reforms see, J.H. ZHONG, G.H. YU, *China's Uniform Contract Law: Progress and Problems*, in *Pacific Basin Law Journal*, 17(1), 1999, p. 2.

[338] The promulgation of this law has a practical significance for China's entry into the WTO in 2001. See Decision of the CPC Central Committee on Major Issues Pertaining to Comprehensively Promoting the Rule of Law (*Zhonggong zhongyang guanyu quanmian tuijin yifa zhiguo ruogan zhongda wenti de jueding*, 中共中央关于全面推进依法治国若干重大问题的决定). The full text of the Resolution can be found at the following web address: news.xinhuanet.com/ziliao/2014-10-30/c127159908.htm.

[339] Art. 4 Chinese Contract Law, that will be analysed in the following paragraph.

to reflect the principle of freedom of contract, the Contract Law redefined and extends the concept of contract. According to the Contract Law, a contract is defined as an agreement whereby the parties establish, change or terminate civil relationships between individuals, legal persons and other organizations of equal standing[340].

The contract law was followed by several laws, according to the piecemeal approach chosen by the Chinese government, to define a complete legal framework of private law: the Real right law (*Wuquanfa*，物权法) was approved in 2007; Tort Law (*Qinquanfa*,侵权法) and the Law on the Applications of Laws to Civil Relations with Foreign elements followed in 2009 and 2010 (*Shewai minshi guanxi falv shiyongfa*, 涉外民事关系法律适用法); the 1991 Civil Procedure Law was revised in 2007 and 2012. (*Minshi susongfa*,民事诉讼法)

The choice of following this piecemeal approach to reform the Chinese private law regime left the project of civil code in the background. This topic, after more than ten years in which the it remained in the wings, was back in the limelight under the new leadership of Xi Jinping and Li Keqiang, that put a new strong emphasis on legal reforms with the approval of the Resolution of the Communist Party Central Committee on Certain Major Issues Concerning Comprehensively Advancing the Law-Based Governance of China,[341] at the end of the Fourth Plenary Session of the 18th Central Committee of the Communist Party of China (CPC), held in Beijing from 20 to 23 October 2014.

[340] Art . 2 Chinese Contract Law: "*A contract in this Law refers to an agreement among natural persons, legal persons or other organizations as equal parties for teh establishment, modification, termination of a relationship involving teh civil rights and obligations of such entities*."
Agreements concerning personal relationships such as marriage,adoption, guardianship, etc.shall be governed by the provisions in other laws.
第二条【合同定义】本法所称合同是平等主体的自然人、法人、其他组织之间设立、变更、终止民事权利义务关系的协议。婚姻、收养、监护等有关身份关系的协议，适用其他法律的规定。

[341] See Decision of the CPC Central Committee on Major Issues Pertaining to Comprehensively Promoting the Rule of Law(*Zhonggong zhongyang guanyu quanmian tuijin yifa zhiguo ruogan zhongda wenti de jueding*, 中共中央关于全面推进依法治国若干重大问题的决定), available at: http://www.lawinfochina.com/display.aspx?id=18488&lib=law.

"Following this document, the first document in the history of the Central Committee of the CCP completely devoted to the topic of law, the Civil Code once again became a fundamental part of the political agenda, in connection with efforts to strengthen the rule of law and bring the existing civil legislation into the framework of a system"[342]. The new Chinese civil code (*Minfa dian*, 民法典)has been approved between 2017 (First Book of the Code on General rules of civil law) and 2020 (Six special books on Property law, Contract Law, Personality Rights, Family Law, Succession Law, Tort law). The 1999 Contract Law is now absorbed by the civil code which contains more than 1,200 articles, combining a number of existing single laws into one law, but also contains new provisions. The Civil Code will take effect on 1 January 2021, and when it takes effect, it will abolish, among other laws, the General Provisions of the PRC Civil Law, the PRC Marriage Law, the PRC Guarantee Law, the PRC Contract Law, the PRC Property Law and the PRC Tort Liability Law.

2. General Principles of Chinese Contract Law: the 1999 Contract Law

As we have seen above, the enactment of the Contract Law was a milestone in Chinese legal development for the establishment of a market economy since it harmonised in one comprehensive instrument the pre-existing rules on contracts, contained in the different laws on civil law.

The Contract Law set forth in its first part several principles that are supposed to guide the interpretation of the specific substantive provisions of the law and to support the application of the rules, where inevitable gaps would occur[343].

The first principle, inserted in Art. 2 and 3, is that of equality of the

[342] These are words by M. TIMOTEO, *China Codifies. The First Book of the Civil Code between Western Models to Chinese Characteristics*, in *Opinio Juris in Comparatione*, 2019, 1, p.36.
[343] See L. A. DI MATTEO, L. CHEN (eds.), *Chinese Contract Law. Civil and Common Law Perspectives*, Cambridge University Press, Cambridge, 2017, p. 18, 403.

parties. Art. 2 recognises that the parties are equal[344] and art. 3 states that no party may impose its will upon the one of the other party[345]. The interpretation of these two articles combined suggests that no coercion in the process of the contract formation or performance is admissible. Some authors criticize this formulation since it is unclear what would happen if inequality in the bargain is foreseen[346].

Art. 3 can be seen as stressing on the importance of freedom of contracts and focusing on inequality of bargaining power, since the phrase "… no party may impose his own will upon the other party" seems to prevent a party with superior bargaining power to abuse its position in the negotiation of the agreement[347].

Art. 4 of the CCL deals with the autonomy of will providing that "The parties have the right to lawfully enter into a contract of their own free will in accordance with the law, and no unit or individual may illegally interfere therewith"[348]. The article, by excluding the intervention of third parties in the contract, still leaves the possibility for restrictions imposed by the law. This principle seems to incorporate the idea of freedom to contract, more than freedom of contract[349].

Moreover, in its opening section the contract law also contains some general principles such as that of respect of fairness and good faith: according to Article 5 "The parties shall observe the principle of fairness

[344] Art. 2 Chinese Contract Law: "*For the purposes of this Law, a contract is an agreement on the establishment, alteration or termination of civil right-obligation relations between natural persons, legal persons and other organizations of subjects with equal status. (...)*". 第二条 【合同定义】本法所称合同是平等主体的自然人、法人、其他组织之间设立、变更、终止民事权利义务关系的协议。 婚姻、收养、监护等有关身份关系的协议，适用其他法律的规定。

[345] Art. 3 Chinese Contract Law: "*The parties to the contract have equal legal status, and a party may not impose its will on the other party*." 第三条 【平等原则】合同当事人的法律地位平等，一方不得将自己的意志强加给另一方。

[346] L. A. DI MATTEO, LEI CHEN (eds.), *Chinese Contract Law. Civil and Common Law Perspectives*, cit. p. 117.

[347] See J. W. FU, *Modern European and Chinese Contract Law: A Comparative Study of Party Autonomy*, Kluwer Law International, Hague, 2011, p. 39.

[348] The original Chinese version is the following: 第四条【合同自由原则】当事人依法享有自愿订立合同的权利，任何单位和个人不得非法干预。

[349] These are words of L. DI MATTEO, *Rule of Law' in China: The Confrontation of Formal Law with Cultural Norms*, cit., p. 401.

in defining each other's rights and obligations."[350], while Article 6 provides that "The parties shall observe the principle of good faith in exercising their rights and fulfilling their obligations."[351]

The principle of reasonableness is not inserted within the general principles recognized at the opening of the law. However the Contract Law marks the returns on the legal scene of the concept of resasonablenss, referring at least three dozen times to several distinct expressions invoking it, a fact that is is considered one of the effects of the strong influence on the 1999 Contract Law of CISG and UNIDROIT Principles for International Commercial Contracts[352].

In particular the concept "reasonable time limit" is inserted in many provisions in part one of the law on contract in general (Articles 23, 69, 94, 95, 110, and 118). Here noteworthy is, for example, Art. 94 CCL, introducing in Chinese contract law the hypothesis of the anticipatory breach provided for by art. 72 of CISG, a party is entitled to terminate the contract if "(…) (3) one of the parties delays the performance of a major obligation, and after being called on to perform the obligation, fails to do so within a reasonable period of time"[353]. The expression "reasonable time limit" can also be fonud in part two of the law, containing specific provisions for different types of contract (Articles 182, 206, 221, 227, 230, 232, 248, 281, 282, 286, 290 and 393). Other rules refer to "unreasonable requirements" (Articles 257 about work contract and Article 289 on transport contract), "unreasonable price' (art 74 on perfomance of

[350] Art. 5 of Chinese Contract Law, original version: 第五条【公平原则】当事人应当遵循公平原则确定各方的权利和义务。

[351] Art. 6 of Chinese Contract Law, original version: 第六条【诚实信用原则】当事人行使权利、履行义务应当遵循诚实信用原则。

[352] On this influence see, amongst others, H. SHIYAN, *The CISG and the Modernisation of the Chinese Contract Law*, in *International Trade/ADR in South Pacific*, Hors Serie Volume XVII, 2014, p. 67-80. C. M. WITHED, T*he Unidroit Principles of International Commercial Contracts: an Overview of their Utility and the Role they Have Played in Reforming Domestic Contract Law Aorund the Word*, in *ILSA Journal of International and Comparative Law*, 2011, n, 1°. p. 188 ff.; D. HUANG, *The UNIDROIT Principle and their influence in the modernization of contract law in the People's Republic of China*, in *Uniform Law Review*, 2003, p. 107 ff.

[353] Art. 94 of Chinese Contract Law, original version: 第九十四条 【合同的法定解除】有下列情形之一的，当事人可以解除合同：（三）当事人一方迟延履行主要债务，经催告后在合理期限内仍未履行；(…).

contracts) “reasonable expenses” (art. 119 on breach of contract).

More in general, even if not inserted within the general principles of the 1999 Contract law, reasonableness is considered related to other principles introduced by the new law, first of all the principle of fairness, contained in art. 5[354] and principle of good faith[355] which appears not only in the general principles of the law[356]. As a matter of facts Chinese courts since the very beginning of contract law reforms, started using in conjunction these principles[357].

3. General Principles of Chinese Contract Law: General Rules of Civil Law.

On March 15, 2017 the Twelfth National People’s Congress of the People’s Republic of China enacted the first part of what has become the first comprehensive Chinese Civil Code, entitled “General Rules of the Civil Law of the People’s Republic of China” (from now on, GRCL)[358].

[354] Art. 5 Chinese Contract Law: “*The parties shall adhere to the principle of fairness in deciding their respective rights and obligations*.” 第五条　【公平原则】当事人应当遵循公平原则确定各方的权利和义务。

[355] See art. 6 Chinese Contract Law: “*The parties shall observe the principle of honesty and good faith in exercising their rights and performing their obligations*.” 第六条　【诚实信用原则】当事人行使权利、履行义务应当遵循诚实信用原则。

[356] For example art. 42 “*that holds a party liable for damages if it caused damages to the other party in concluding the contract negotiated in bad faith or intentionally provided wrong information and violated in any other way the principle of good faith: “he party shall be liable for damage if it is under one of the following circumstances in concluding a contract and thus causing losses to the other party: (1) pretending to conclude a contract, and negotiating in bad faith; (2) deliberately concealing important facts relating to the conclusion of the contract or providing false information; (3) performing other acts which violate the principle of good faith*.”

第四十二条　【缔约过失】当事人在订立合同过程中有下列情形之一，给对方造成损失的，应当承担损害赔偿责任：（一）假借订立合同，恶意进行磋商；（二）故意隐瞒与订立合同有关的重要事实或者提供虚假情况；（三）有其他违背诚实信用原则的行为。

Moreover, art. 60: “*requires the parties to perform their obligations following the principle of good faith: “Each party shall fully perform its own obligations as agreed upon. The parties shall abide by the principle of good faith, and perform obligations of notification, assistance, and confidentiality, etc. in accordance with the nature and purpose of the contract and the transaction practice*.”

第六十条　【严格履行与诚实信用】当事人应当按照约定全面履行自己的义务。当事人应当遵循诚实信用原则，根据合同的性质、目的和交易习惯履行通知、协助、保密等义务。

[357] See next section III.

[358]General Rules of the Civil Law of the People’s Republic of China (*Zonghua renmin gongheguo*

The long awaited Civil Code of the People's Republic of China has been passed by the Thirteenth National People's Congress on May 28, 2020, and took effect on January 1, 2021.

The Civil Code is a large collection of existing laws and regulations as well as judicial interpretation related to civil activities and relations, including but not limited to property right, contracts, marriage and family, succession, tort, to personal rights. 1999 Contract Law has been absorbed and revised, still paying close attention to the latest developments in international uniform law of contracts, not only taking into account the last versions of the UNIDROIT Principles of International Commercial Contracts, but also looking at the 2002 European Principles of Contract Law and the 2009 Draft Common Frame of Reference of European private law[359].

The rules on contracts are to be found not only in the Book three but also in the Book One, which is the General Part of the Code, patterned after the first Book of the German Civil code. In the first book we find general rules of civil law that apply to all juristic acts, including contracts. Several of those general rules derive from 1999 Contract law. For example, with regard to the form of the juristic act, Article 135, reproducing Article 10 of the Contract law, provides that "Civil juristic acts may employ written, oral, or other forms; where a specific form is provided for in laws or administrative regulations, or where the parties have agreed on a specific form, that form shall be employed". Morever,

minfa zongze, 中华人民共和国民法总则), approved on March 15, 2017 and effective from October 1, 2017.

[359] See S.Y. HAN, *The UNIDROIT and the Development of Chinese Contract Law*, in *Global Law Review*, 2015, no. 6, p.69-82. 韩世远，《<国际商事合同通则>与中国合同法的发展》, 环球法律评论, 2015, 第 6 期，第 69-82 页。

Y. QI, *On the Debt of Synergy*, in *Legal and Commercial Studies*, No. 1, 2020, p. 143-156. 齐云，《论协同之债》，法商研究, 2020，第 1 期，第 143-156 页。

H.F. XIE, *The change of the inner system of the contract section of the Civil Code*, in *Journal of Shanxi University (Philosophy and Social Science Edition)*, No. 6, 2020, p. 16-25. 谢鸿飞，《<民法典>合同编内在体系的变迁》. 山西大学学报(哲学社会科学版), 2020, 第 6 期，第 16-25 页。

C.Z. Liu, *The Legislative Orientation and Systemic Openness of the Contracts Part of the Civil Code*, in *Global Law Review*, No. 2, 2020, p. 68-82.刘承韪，《民法典合同编的立法取向与体系开放性》，环球法律评论, 2020，第 2 期，第 68-82 页。

the provision dedicated to the interpretation of the manifestation of will, providing that it must be based on expressions used in combination with the relevant terms, the nature and purpose of conduct, customs and the principle of good faith (Article 142), reproduces a rule already stated in Contract Law (Article 125).

The general principles of civil law provided for in the first book of the code are also relevant for contract law. Amongst the 12 articles of the book, we find principles of protection of the rights and legitimate interests of individuals[360], of equality[361], free will[362], justice[363], good faith and honesty[364], respect of the law and of core socialist values in the perspective of creating a "socialism with Chinese characteristics" (*Zhongguo tese shehuizhuyi*, 中国特色社会主义)[365] and the principle according to which civil law subjects in civil activities must not violate

[360] Art. 3 "*The personal rights, proprietary rights, and other lawful rights and interests of the persons of the civil law are protected by law and free from infringement by any organization or individual*." 第三条 【民事权利及其他合法权益受法律保护】民事主体的人身权利、财产权利以及其他合法权益受法律保护，任何组织或者个人不得侵犯。

[361] Art. 4 "*All persons of the civil law are equal in legal status when conducting civil activities.*" 第四条 【平等原则】民事主体在民事活动中的法律地位一律平等。

[362] Art. 5 "*When conducting a civil activity, a person of the civil law shall, in compliance with the principle of voluntariness, create, alter, or terminate a civil juristic relationship according to his own will*." 第五条 【自愿原则】民事主体从事民事活动，应当遵循自愿原则，按照自己的意思设立、变更、终止民事法律关系

[363] Art. 6 "*When conducting a civil activity, a person of the civil law shall, in compliance with the principle of fairness, reasonably clarify the rights and obligations of each party.*" 第六条 【公平原则】民事主体从事民事活动，应当遵循公平原则，合理确定各方的权利和义务。

[364] Art. 7 "*When conducting a civil activity, a person of the civil law shall, in compliance with the principle of good faith, uphold honesty and honor commitments.*" 第七条 【诚信原则】民事主体从事民事活动，应当遵循诚信原则，秉持诚实，恪守承诺。

[365] Art. 1: "*This Law is formulated in accordance with the Constitution of the People's Republic of China for the purposes of protecting the legitimate rights and interests of the persons of the civil law, properly regulating civil relations and maintaining social and economic order, adapting to the need of developing socialism with Chinese characteristics and carrying forward the core socialist values*" (第一条 【立法目的和依据】为了保护民事主体的合法权益，调整民事关系，维护社会和经济秩序，适应中国特色社会主义发展要求，弘扬社会主义核心价值观，根据宪法，制定本法。). As it is well known, the phrase "Chinese characteristics" belongs to Deng Xiaoping, Chinese leader from 1978 to 1997, who's intention was to highlight the importance that China moved away from the Soviet model and create a socialist model based upon "Chinese characteristics". See C. WING, HUNG LO, *Socialist Legal Theory in Deng Xiaoping's China*, in *Columbia Journal of Asian Law,* 1997, p. 470.

laws and must not act against "public order and good customs" (*gongxu liangsu*, 公序良俗) are stated[366].

Reasonableness is included in the general principles with reference in general to civil law relation and not specifically with regard to contracts.[367] However as it was in the Contract law, we find references to the specific notions linked to reasonableness, such as that of a reasonable time, reasonable price, or to the use of reasonable (or unreasonably) as an adjective for specific situations. For example in the first chapter of the Book III, where General rules of contracts are contained, art. 481 about acceptance of contracts provides that where no time limit for acceptance is specified in the offer and the offer is not made in a real-time communication the acceptance notice shall reach the offeror within a reasonable period of time. About standard claused art. 497 (2) declares that such clauses are void if "the party providing the standard clause unreasonably exempts or alleviates himself from the liability, imposes heavier liability on the other party, or restricts the main rights of the other party".

On the background of the legislative evolution that has been summarised in the previous paragraphs, which has marked the transition from the classical socialist legal models to a market socialist model in Chinese contract law, a very relevant action is the one carried out by the judiciary and in particular by the Supreme People's Court. Within this framework the concept of reasonableness in addition to be progressively widely used in the laws on contract, started to be adapted also in the judicial activity. This is another relevant chapter of the re-emergence of the concept of reasonableness in contemporary Chinese contract law that will be described in the next section.

[366] Art. 8 "*When conducting a civil activity, no person of the civil law shall violate the law, or offend public order or good morals.*" 第八条 【守法与公序良俗原则】 民事主体从事民事活动，不得违反法律， 不得违背公序良俗。

[367] See on this next Section.

SECTION 3 - THE DEVELOPMENTS OF THE STANDARD OF *HELI*: THE ROLE OF THE COURTS

1. Judicial introduction of heli in Chinese contract law.

In the context of the piecemail and incremental approach followed by the Chinese legislator in the reform of Contract law in the last decade, Chinese courts started intervening in cases not covered by statutory law making use of the concept of *heli*. This use lead to the introduction of rules about change of circumstances during the performance of contract, which was an issue where the contribution of the courts, especially the Supreme People's Court has been fundamental.

With regard to this issue, the case Wang Zhoucun v. Qinglong Group Seven Orchard[368] (a dispute of rural land contract) is the earliest one in which the standard of reasonableness as an expression of the principle of fairness, has been used to deal with change of circumstances in a contract. Wang Zhoucun, the plaintiff, is a villager in Qinglong Village, The defendant is Group Seven of Qinglong Village, Duan Township, Fufeng County, Shaanxi Province. On 15 December 1982, a rural contract was entered into between the defendant and the plaintiff for a period of five years, which was subsequently renewed for another five years. In October 1987, due to the increased price of fresh fruits, the profits of the plaintiff's orchard increased as well. The defendant then unilaterally terminated the contract without the consent of the plaintiff and then subcontracted the orchard to a third party. This caused economic losses to the plaintiff. Thus, the plaintiff brought a lawsuit to the court. The Fufeng County People's Court held that it was more reasonable to apply the principle of change of circumstances to this case, instead of the traditional principle of *pacta sunt servanda*. Eventually, the court judged that the

[368]Wang Zhoucun, Ren Guixia v. Qinglong Village seven groups, *Gazette of the Supreme People's Court* , 1990 No.3 (General :23).王周存 青龙七组王周存、任桂侠诉青龙村七组果园承包合同纠纷案，《最高人民法院公报》 1990 年第 3 期(总:23 期)。

contract between Group Seven of Qinglong Village, the defendant, and the plaintiff was valid, and the parties shall continue to perform this contract. Also, while the other terms remained unchanged, the subsequent contract fee shall be changed from 1512 yuan per year to 3024 yuan per year. At the same time, the court ruled that since the defendant's breach of contract had brought losses to the plaintiff, it was reasonable for the plaintiff to ask the defendant to continue to perform the contract as well as to pay its losses caused by the breach of contract.

We may say that this case is a precedent for the court to apply the principle of change of circumstances on the ground of *heli* and to introduce the rule according to which, where any major change which is not caused by any of the parties and is a fundamental change of the base of the contract, if the continuous performance of the contract is obviously unfair to the other party, the people's court shall decide whether to modify or rescind the contract under the principle of fairness.

Later, in 1996, there was another well-known case, namely Wuhan Gas Company v. Chongqing Testing Instrument Factory case regarding a breach of contract dispute over a gas meter bulk purchase and sale contract[369]. This case, which was also selected as a representative case published in the Gazette of the Supreme People's Court that same year, set the rule according to which an unforeseeable and extraordinary change of circumstances, (in that case the price of the goods object of the contract) made unfair (*gongping*,公平) and unreasonable (*heli*, 合理) continuing to perform the obligations as agreed in the original contract. Here the concepts of fairness (*gongping*,公平), reasonableness (*heli*, 合理) and good faith (*chengxin*, 诚信) have been considered as concepts in strict relation[370].

The association of the concept of reasonableness with that of other

[369] Wuhan Municipal Coal Gas Corp. v. Chongqing Measuring Instrument Factory, SPC Gazette, Issue 2,1996. 武汉市煤气公司诉重庆检测仪表厂煤气表装配线技术转让合同、煤气表散件购销合同纠纷案，最高人民法院公报，第 2 期，1996 年。

[370] For an analysis of this cases, see M. TIMOTEO, *Vague Notions in Chinese Contract Law: The Case of Heli,* cit., p. 944 ff.

general concepts, especially that of fairness, and good faith, has been frequently observed. For example in cases involving standard contracts the fact that standards terms have not been brought to other party's attention in a "reasonable way" has often been considered against the principle of fairness or the principle of good faith[371]. Also in relation to the notion of reasonable reliance of one party in the framework of the contractual relation Chinese courts reasoned framing reasonableness in the context of the principles of fairness and good faith. One the first cases decided in this regards was an insurance contract case[372] where, grounding on the incompleteness of the agreement, the insurance company attempted to discharge the contract, after an accident that damaged the good object of the contract. The court acknowledged that the insured reasonably relied on the existence of the contract concluding that, even if incomplete, it had legal effect according to the principle of reasonableness. The concept of reasonable reliance of a party has then been used in several judgements rendered with reference to cases where a person acts not possessing agency power, or being in excess of his or her authority, where, according to art. 49 of the Contract law, the agency conduct shall have effect if the other party has grounds for believing that the said person possesses agency power[373].

2. The Interpretations of the Supreme People's Court

Even if these decisions are noteworthy, we should remember that the Chinese legal system is not a case law system and judicial decisions

[371] See Sun Baojing v. Yidingge Shanghai co. LTD, Shanghai Huangpu People's Court (2012) huang pu min yi chu zi civil judgment No. 879, Shanghai Huangpu People's Court (2010) Huang Pu Min Yi Chu Zi Civil Judgment No.879. 孙宝静诉上海一定得美容有限公司保健服务合同纠纷案，上海市黄浦区人民法院（2012）黄浦民一初字第 879 号民事判决书

[372] The contract was disciplined by the Economic contract law, according to which the economic contract was concluded after an agreement on main items is reached. see M. TIMOTEO, *op,cit*., p. 945 ff.

[373] See the case Fujian Wanxiang Real Estate Development Co., Ltd. v. You Binqiong, The Supreme People's Court (2016) Zui Gao Fa Min Shen Civil Judgment No.733.福建省万翔房地产开发有限公司与游斌琼民间借贷纠纷再审案,最高人民法院(2016) 最高法民申 733 号民事判决书.

cannot be considered binding precedents. However, a very important role is played by the highest judicial organ, ie. the Supreme People's Court which, also taking account of the judicial uses of reasonableness, in 2009 intervened with two acts on the judicial implementation of contract law, where the standard of reasonableness has been embodied.

With reference to these acts we should first spend some some words about their nature within the Chinese system of sources of law.

Chinese legal system has a structure of sources of the law where statutory law is the highest source, as it is stated in art. 5 of Chinese Constitution[374], and the power to interpret law is assigned to the Standing Committee of the National People's Congress (NPC SC), as indicated in art. 67 of the Constitution[375]. However, Chinese Supreme People's Court and Supreme People's Procuratorate, since the beginning of the law

[374] Art. 5: "*The People's Republic of China governs the country according to law and makes it a socialist country under rule of law. The State upholds the uniformity and dignity of the socialist legal system. No laws or administrative or local regulations may contravene the Constitution. All State organs, the armed forces, all political parties and public organizations and all enterprises and institutions must abide by the Constitution and other laws. All acts in violation of the Constitution or other laws must be investigated. No organization or individual is privileged to be beyond the Constitution or other laws.*" 第五条　中华人民共和国实行依法治国，建设社会主义法治国家。国家维护社会主义法制的统一和尊严。一切法律、行政法规和地方性法规都不得同宪法相抵触。一切国家机关和武装力量、各政党和各社会团体、各企业事业组织都必须遵守宪法和法律。一切违反宪法和法律的行为，必须予以追究。任何组织或者个人都不得有超越宪法和法律的特权。

[375] See art. 67 of Chinese Constitution, which contains the functions of the Standing Committee of the NPC: "*The Standing Committee of the National People's Congress exercises the following functions and powers: (1) to interpret the Constitution and supervise its enforcement; (2) to enact and amend laws, with the exception of those which should be enacted by the National People's Congress; (3) to partially supplement and amend, when the National People's Congress is not in session, laws enacted by the National People's Congress, provided that the basic principles of these laws are not contravened; (4) to interpret laws; (5) to review and approve, when the National People's Congress is not in session, partial adjustments to the plan for national economic and social development or to the State budget that prove necessary in the course of their implementation; (6) to supervise the work of the State Council, the Central Military Commission, the Supreme People's Court and the Supreme People's Procuratorate; (7) to annul those administrative regulations, decisions or orders of the State Council that contravene the Constitution or other laws; (...)*". 第六十七条　全国人民代表大会常务委员会行使下列职权：（一）解释宪法，监督宪法的实施；（二）制定和修改除应当由全国人民代表大会制定的法律以外的其他法律；（三）在全国人民代表大会闭会期间，对全国人民代表大会制定的法律进行部分补充和修改，但是不得同该法律的基本原则相抵触；（四）解释法律；（五）在全国人民代表大会闭会期间，审查和批准国民经济和社会发展计划、国家预算在执行过程中所必须作的部分调整方案；（六）监督国务院、中央军事委员会、国家监察委员会、最高人民法院和最高人民检察院的工作；（七）撤销国务院制定的同宪法、法律相抵触的行政法规、决定和命令(…)..

reforms has been issuing judicial interpretations as national law tends to set out broad principles that require to be detailed to support judicial interpretation. In 1981 Resolution of the Standing Committee of the National People's Congress Providing an Improved Interpretation of the Law[376] provides that: "Interpretation of questions involving the specific application of laws and decrees in court trials or in the procuratorial work of the procuratorates shall be provided by the Supreme People's Court or the Supreme People's Procuratorate respectively". Similar provisions can also be found in *Organic Law of the People's Courts of China*[377] that was enacted in 1979 and amended in 1983. In 2007 *Provisions of the Supreme People's Court on the Judicial Interpretation Work*[378] further improves the procedures of the formulation of judicial interpretation. In Article 5, it provides that "the judicial interpretations issued by the Supreme People's Court shall have full legal force, and this article has been abided by at large".

In 2015 the Legislation Law[379] addressed the issue in art. 104[380]. Even if judicial interpretation is not a formal source of laws in China., however,

[376] *Quanguo renda changweihui guanyu jiaqiang falv jieshi zhongzuode jueyi*《全国人大常委会关于加强法律解释工作的决议》

[377] *Renmin fayuan zuzhifa*《人民法院组织法》

[378] Zuigao renmin fayuan guanyu sifa jieshi gongzuode guiding《最高人民法院关于司法解释工作的规定》

[379] Lifafa 《立法法》

[380] Art. 104: "*Interpretations on the specific application of laws in adjudication or procuratorate work that are issued by the Supreme People's Court or Supreme People's Procuratorate shall primarily target specific articles of laws, and be consistent with the goals, principles and significance of the legislation. Where encountering the situation provided for in the second paragraph of Article 45 of this Law, a request for a legal interpretation, or a proposal to formulate or revise relevant law, shall be submitted to the National People's Congress Standing Committee. (2) Specific interpretations on the application of law in adjudication or procuratorate work made by the Supreme People's Court or Supreme People Procuratorate, shall be reported to the Standing Committee of the National People's Congress for recording within 30 days of their being released. (3) Adjudication and procuratorate organs other than the Supreme People's Court and the Supreme People's Procuratorate must not make specific interpretations on the application of law*." 第一百零四条 最高人民法院、最高人民检察院作出的属于审判、检察工作中具体应用法律的解释，应当主要针对具体的法律条文，并符合立法的目的、原则和原意。遇有本法第四十五条第二款规定情况的，应当向全国人民代表大会常务委员会提出法律解释的要求或者提出制定、修改有关法律的议案。最高人民法院、最高人民检察院作出的属于审判、检察工作中具体应用法律的解释，应当自公布之日起三十日内报全国人民代表大会常务委员会备案。最高人民法院、最高人民检察院以外的审判机关和检察机关，不得作出具体应用法律的解释。

it has an important role in guiding the work of the court, especially in civil cases.

The Supreme People's Court, has the power to give interpretation on questions concerning specific application of laws and decrees in judicial proceedings, especially in order to fill gaps and to solve conflicts and some vagueness among the laws so that effective enforcement can be carried out by the judicial branch.

With regard to the judicial development of the standard of heli the relevant acts issued by the Supreme Peoples' Court are the Second Interpretation on Several Issues Concerning the Application of the Contract Law[381] and the Guiding Opinion on Several Issues Relating to the Trial of Civil and Commercial Contractual Disputes[382] under the Current Situation.

The Interpretation and the Guiding Opinion formally introduced the doctrine of change of circumstances that, as we have seen, was missing in legislative contract law rules and was introduced in some judicial decisions. According to the Second Contract Law Interpretation, if objective circumstances have materially changed since the signing of the contract, and such a change was unforeseeable when the contract was entered into, was not excused by a force majeure event, was not part of the commercial risks inherent to the nature of the transaction, and makes it obviously unfair to continue the performance, a party may request the court to modify or terminate the contract[383]. The Guiding Opinion referred

[381] *Zuigao renmin fayuan guanyu shiyong zhonghua renmin gongheguo hetongfa ruogan wentide jieshi (er)*最高人民法院关于适用《中华人民共和国合同法》若干问题的解释（二）.

[382] *Zuigao renmin fayuan fabude guanyu shenli nongcun chengbao hetong jiufen ruogan wentide yijian* 最高人民法院发布的《关于审理农村承包合同纠纷案件若干问题的意见》。

[383] Art. 26: "*Where any major change which is unforeseeable, is not a business risk and is not caused by a force majeure occurs after the formation of a contract, if the continuous performance of the contract is obviously unfair to the other party or cannot realize the purposes of the contract and a party files a request for the modification or rescission of the contract with the people's court, the people's court shall decide whether to modify or rescind the contract under the principle of fairness and in light of the actualities of the case.*" 第二十六条 合同成立以后客观情况发生了当事人在订立合同时无法预见的、非不可抗力造成的不属于商业风险的重大变化，继续履行合同对于一方当事人明显不公平或者不能实现合同目的，当事人请求人民法院变更或者解除合同的，人民法院应当根据公平原则，并结合案件的实际情况确定是否变更或者解除。

to the standard of *heli* (合理) in two instructions to the Courts' application of the principles of change of circumstances. The first one, regarding the differentiation between mere commercial risk and material change in circumstances, specifies that courts shall assess whether the risk was unforeseeable according to the "general social opinion", whether the extent of the risk was far beyond the normal "reasonable expectation of an ordinary person", and whether the risk could have been controlled and/or prevented[384]. In the second instruction, the Supreme People's Court states that in dealing with cases affected by a material change of circumstances courts shall "reasonably adjust the interests of the parties"[385]. With regard to this adjustment the Court says that the application of the principle of the change of circumstances does not merely mean releasing the debtor's obligations but fairly and reasonably (*gongping heli*, 公平合理) balancing and adjusting the respective interests of the parties, guiding them in renegotiations of the contracts, and further mediating the contractual dispute in the event of the failure of the renegotiation[386].

Another reference to *heli* (合理) within the Guiding Opinion regards the adjustment of agreed liquidated damages. According to the Contract Law and the Second Contract Law Interpretation, if the amount of damages agreed upon in a contract is excessively higher than the actual loss suffered by the innocent party, a court may "reasonably adjust" the amount upon the request of the other party[387], where a reasonable

[384] Section I, 3 Guiding Opinions.

[385] Section I, 4 Guiding Opinions.

[386] Moreover, ad has been outlined by M. Timoteo, a strict supervision has been provided over cases of application of such a complex judicial evaluation – in which fairness and reasonableness are the leading criteria to be followed – through a Circular issued by the Supreme Court itself. On this and, more in general, for a comment of the Supreme People's Court rules commented in the text. See M. TIMOTEO, *Vague Notions in Chinese Contract Law: The Case of Heli,* cit., p. 949.

[387] Art. 114 of Chinese Contract Law: "Where the amount of liquidated damages agreed upon is lower than the damages incurred, a party may petition the People's Court or an arbitration institution to make an increase; where the amount of liquidated damages agreed upon are significantly higher than the damages incurred, a party may petition the People's Court or an arbitration institution to make an appropriate reduction……"
第一百一十四条　【违约金】约定的违约金低于造成的损失的，当事人可以请求人民法院或者仲裁机构予以增加；约定的违约金过分高于造成的损失的，当事人可以请求人民法院或者仲裁

adjustment meant balance the interests of the parties, considering the factors in the specific cases, such as the extent to which the contract was fulfilled, the relative degree of fault attributable to the parties, the loss of the non-breaching party, the relative market power of the parties when entering into the contract and when a standard contract or standard clauses have been used[388].

A third reference to *heli* (合理)is to be found with regard to the calculation of attainable profit losses in case of breach of contract. Here the SPC addresses people's courts towards a 'reasonable distribution of the burden of the proof' giving the following criteria: the breaching party will bear the burden of proof that the innocent party had not taken reasonable measures to mitigate the loss, and the innocent party's contributory negligence; the innocent party will bear the burden of proving the loss of profits suffered[389].

Moreover, other reference to reasonableness are in the field of standard terms. Article 39 of the Chinese Contract Law provided for the

机构予以适当减少。

Arts 27, 28 and 29 of Interpretation II of the Supreme People's Court of Several Issues concerning the Application of the Contract Law of the People's Republic of China:

Art. 27 "*Where, by counterclaim or defense, a party requests the court to adjust the default fine under paragraph 2 of Article 114 of the Contract Law, the people's court shall support such a request.*" 第二十七条当事人通过反诉或者抗辩的方式，请求人民法院依照合同法第一百一十四条第二款的规定调整违约金的，人民法院应予支持。

Art. 28 "*Where a party requests the people's court to increase the default fine under paragraph 2 of Article 114 of the Contract Law, the amount of the default fine after the increase shall not exceed the amount of the actual losses; if, after the increase of the default fine, the party requests compensation for losses by the other party, the people's court shall reject such a request.*" 第二十八条当事人依照合同法第一百一十四条第二款的规定，请求人民法院增加违约金的，增加后的违约金数额以不超过实际损失额为限。增加违约金以后，当事人又请求对方赔偿损失的，人民法院不予支持。

Art. 29 "*Where a party alleges that the agreed default fine is too much and requests a proper reduction, the people's court shall weigh the request and make a ruling on the basis of the actual losses, in consideration of the performance of contract, seriousness of the fault of the party, expected benefits and other comprehensive factors and under the principles of fairness and good faith. If the default fine agreed on by the parties exceeds the losses incurred by 30%, generally, it shall be deemed as "significantly higher than the losses incurred" as mentioned in paragraph 2 of Article 114 of the Contract Law.*" 第二十九条　当事人主张约定的违约金过高请求予以适当减少的，人民法院应当以实际损失为基础，兼顾合同的履行情况、当事人的过错程度以及预期利益等综合因素，根据公平原则和诚实信用原则予以衡量，并作出裁决。 当事人约定的违约金超过造成损失的百分之三十的，一般可以认定为合同法第一百一十四条第二款规定的"过分高于造成的损失"。

[388] Section II, 7 Guiding Opinions.

[389] Section III, 11 Guiding Opinion.

definition of standard form and the obligations of the user, requiring that the party providing the standard forms takes reasonable measures to remind the other party to pay attention to the standard forms which reduce or exempt the former's responsibilities.[390] In the Second Contract law Interpretation art. 6, explained the concept of "reasonable way" in the standard form of contract: "Where, at the time of concluding a contract, the party providing the standard clauses adopted special characters, symbols, fonts and other signs sufficient to arouse the other party's attention to the content of the standard clauses regarding liability exemptions or restrictions in favour of the party providing the standard terms, and made an explanation of the standard clauses according to the requirements of the other party, the people's court shall determine that the requirement of "a reasonable way" in Article 39 of the Contract Law has been satisfied. The party providing the standard clauses shall bear the burden of proof on its/his fulfilment of the obligation to make reasonable prompting and explanation. [391]

In the same Supreme People's Court Interpretation the standard of reasonableness is addresses with regard to the cancellation right of creditor in contract law. According to the article 74 of Chinese Contract law, when the debtor transfers property at a significantly unreasonably low price, thereby causing damage to the creditor and the assignee is

[390] Article 39 of Chinese Contract Law: "*Where standard terms are adopted in concluding a contract, the party supplying the standard terms shall define the rights and obligations between the parties abiding by the principle of fairness, and shall inform the other party to note the exclusion or restriction of its liabilities in a reasonable way, and shall explain the standard terms upon request by the other party. Standard terms are clauses that are prepared in advance for general and repeated use by one party, and which are not negotiated with the other party when the contract is concluded*."
第三十九条 【格式合同条款定义及使用人义务】采用格式条款订立合同的，提供格式条款的一方应当遵循公平原则确定当事人之间的权利和义务，并采取合理的方式提请对方注意免除或者限制其责任的条款，按照对方的要求，对该条款予以说明。
格式条款是当事人为了重复使用而预先拟定，并在订立合同时未与对方协商的条款。

[391]Original version of art. 6 of the Interpretation II of the Supreme People's Court of Several Issues concerning the Application of the Contract Law of the People's Republic of China:
第六条 提供格式条款的一方对格式条款中免除或者限制其责任的内容，在合同订立时采用足以引起对方注意的文字、符号、字体等特别标识，并按照对方的要求对该格式条款予以说明的，人民法院应当认定符合合同法第三十九条所称"采取合理的方式"。提供格式条款一方对已尽合理提示及说明义务承担举证责任。

conscious of that, the creditor may ask the court to cancel the debtor's act.[392] However, in the legislative practice, the parties diverging over whether the price is reasonable nor not, and it may make the court is difficult to make the decision. Thus, the Second Contract Law Interpretation in art. 19, also mentions the "obviously unreasonable low price" as used in Article 74 of the Contract Law: "The people's court shall confirm it based on the judgment of an ordinary business operator at the place of transaction, by reference to the guiding price of the price department or the market trading price at the place of transaction and in combination with other relevant factors. If the transfer price does not reach 70% of the guiding price or market trading price at the place of transaction at the time of transaction, generally, it may be deemed as an obviously unreasonable low price. If the transfer price is higher than the local guiding price or market trading price by 30%, generally, it may be deemed as an obviously unreasonable high price."[393]

A last reference to reasonableness is in the Interpretation of the Supreme People's Court on Issues Concerning the Application of Law for the Trial of Cases of Disputes over Sales Contracts[394], with regard to the

[392] Article 74 of Chinese Contract Law: "*Where the obligor waives its creditor's right against a third party that is due or assigns its property without reward, thereby harming the obligee's interests, the obligee may petition the People's Court for cancellation of the obligor's act. Where the obligor assigns its property at a low price which is manifestly unreasonable, thereby harming the obligee's interests, and the assignee is aware of the situation, the obligee may also petition the People's Court for cancellation of the obligor's act. The extent to which the right to cancel can be exercised is limited to the rights of the obligee. The expenses necessary for the obligee to exercise the right to cancel shall be borne by the obligor.*"
第七十四条 【债权人的撤销权】因债务人放弃其到期债权或者无偿转让财产，对债权人造成损害的，债权人可以请求人民法院撤销债务人的行为。债务人以明显不合理的低价转让财产，对债权人造成损害，并且受让人知道该情形的，债权人也可以请求人民法院撤销债务人的行为。
撤销权的行使范围以债权人的债权为限。债权人行使撤销权的必要费用，由债务人负担。

[393] Original version of Art. 19 of Interpretation II of the Supreme People's Court of Several Issues concerning the Application of the Contract Law of the People's Republic of China:
第十九条 对于合同法第七十四条规定的"明显不合理的低价"，人民法院应当以交易当地一般经营者的判断，并参考交易当时交易地的物价部门指导价或者市场交易价，结合其他相关因素综合考虑予以确认。转让价格达不到交易时交易地的指导价或者市场交易价百分之七十的，一般可以视为明显不合理的低价;对转让价格高于当地指导价或者市场交易价百分之三十的，一般可以视为明显不合理的高价。债务人以明显不合理的高价收购他人财产，人民法院可以根据债权人的申请，参照合同法第七十四条的规定予以撤销。

[394] *Zuigao renmin fayuan guanyu shenli maimai hetong jiufen anjian shiyong falv wenti de jieshi*《最

notification obligation of purchaser in the sales contract. In the provisions of article 158 of CCL, if the parties fail to agree on the inspection period of the subject matter, the purchaser shall notify the seller within a reasonable time when it discovers or should discover that the quantity or quality of the subject matter is not in conformity with the contract. [395] However, the Contract Law don't further specify what is "reasonable time" exactly, and what should be used as a reference to determine it. Therefore, the Interpretation of the Supreme People's Court on Issues Concerning the Application of Law for the Trial of Cases of Disputes over Sales Contracts [396] the "reasonable period" is mentioned and specified: "When determining the reasonable period as prescribed in paragraph 2 of Article 158 of the Contract Law, the people's court shall comprehensively take into account the transaction nature, purpose, methods, and customary business practice between the parties, the category, quantity and nature of the subject matter, the circumstances regarding installation and use, the nature of any defects (...) and make a judgment based on the principle of

高人民法院关于审理买卖合同纠纷案件适用法律问题的解释》

[395] Article 158 of Chinese Contract Law: "*Where the parties have agreed upon an inspection period, the buyer shall notify the seller of any non-compliance in quantity or quality of the subject matter within such inspection period. Where the buyer delayed in notifying the seller, the quantity or quality of the subject matter is deemed to comply with the contract. Where no inspection period is agreed, the buyer shall notify the seller within a reasonable period, commencing on the date when the buyer discovered or should have discovered the quantity or quality non-compliance. If the buyer fails to notify within a reasonable period or fails to notify within 2 years, commencing on the date when it received the subject matter, the quantity or quality of the subject matter is deemed to comply with the contract, except that if there is a warranty period in respect of the subject matter, the warranty period applies and supersedes such two year period. Where the seller knows or ought to know the non-compliance of the subject matter, the buyer is not subject to the time limits for notification prescribed in the preceding two paragraphs.*"
第一百五十八条　【买受人的通知义务及免除】当事人约定检验期间的，买受人应当在检验期间内将标的物的数量或者质量不符合约定的情形通知出卖人。买受人怠于通知的，视为标的物的数量或者质量符合约定。
当事人没有约定检验期间的，买受人应当在发现或者应当发现标的物的数量或者质量不符合约定的合理期间内通知出卖人。买受人在合理期间内未通知或者自标的物收到之日起两年内未通知出卖人的，视为标的物的数量或者质量符合约定，但对标的物有质量保证期的，适用质量保证期，不适用该两年的规定。
出卖人知道或者应当知道提供的标的物不符合约定的，买受人不受前两款规定的通知时间的限制。

[396] *Zuigao renmin fayuan guanyu shenli maimai hetong jiufen anjian shiyong falv wentide jieshi*《最高人民法院关于审理买卖合同纠纷案件适用法律问题的解释》

good faith. Two years (…) is the longest reasonable period. (…)"[397].

3. From Courts to the Civil code: the new provision on the change of circumstances.

The definition of the discipline of change of circumstances, where the standard of reasonableness elaborated by the Chinese Supreme People's Court had a central role, found a point of arrival in the new Chinese civil code, entered into force since 1st January 2021. In addition to confirm the previous provisions of the 1999 Contact law where *heli* standard was referred to, the Code introduces a new rule in one of the fields where *heli* has been more widely applied, ie that of the change of circumstances.

Here I summarize the legal evolution on this matter comparing the different approaches in statutory provisions and SPC judicial interpretations.

Reply of Supreme People's Court (1992) in the No. 29 (*Zuigao minren fayuan zai*	Paragraph 2: "In the case of change of circumstances unforeseeable and non-preventable by the concerning

[397] Article 17 of Interpretation of the Supreme People's Court on Issues Concerning the Application of Law for the Trial of Cases of Disputes over Sales Contracts : "*When determining the "reasonable period" as prescribed in paragraph 2 of Article 158 of the Contract Law, the people's court shall comprehensively take into account the transaction nature, purpose, methods, and customary business practice between the parties, the category, quantity and nature of the subject matter, the circumstances regarding installation and use, the nature of any defects, the duty of reasonable care to be assumed by the buyer, the inspection methods and their degree of difficulty, the specific environment at the location of the buyer or inspector and their own skills as well as other reasonable factors, and make a judgment based on the principal of good faith. "Two years" as prescribed in paragraph 2 of Article 158 of the Contract Law is the longest reasonable period. This period is a non-variable period and does not apply to provisions on the suspension, interruption or extension of the statute of limitations.*"
第十七条　人民法院具体认定合同法第一百五十八条第二款规定的"合理期间"时，应当综合当事人之间的交易性质、交易目的、交易方式、交易习惯、标的物的种类、数量、性质、安装和使用情况、瑕疵的性质、买受人应尽的合理注意义务、检验方法和难易程度、买受人或者检验人所处的具体环境、自身技能以及其他合理因素，依据诚实信用原则进行判断。
合同法第一百五十八条第二款规定的"两年"是最长的合理期间。该期间为不变期间，不适用诉讼时效中止、中断或者延长的规定。

(1992) di 27 hao fuhan, 最高人民法院在（1992）第 27 号复函)	party…at the price agreed in the contract… obviously unfair, the concerning party may modify or terminate the contract."[398]
Minutes of Meeting of the National Economic Trial, issued on May 5th, (Issued by Supreme People's Court [1993] No. 8) (*Quanguo jingji shenpan gongzuo huitan jitao (fafa [1993] 9 hao wen)*,《全国经济审判工作会谈纪要》（法发[1993]8 号文）)	2. "Where the circumstance on which the contract is based has undergone fundamental changes unforeseeable by the parties due to reasons not imputable to the parties, and thus performing the contract is obviously unfair, the contract may, pursuant to application of the parties, be modified or terminated according to the circumstance."[399]
The Opinions on Several Issues Concerning the Trial of Disputes over Rural Contracting Agreements, issued by Supreme People's Court on April 14th, 1986 (*Zuigao renmin fayuan fabude guanyu shenli nongcun chengbao hetong jiufen anjian ruogan wentide yijian 1986-4-14*, 最高人民法院发布的《关于审理	Article 4: "In terms of modification and termination of the Contracting Agreement, it is stipulated modification or termination of the Contracting Agreement shall be permitted under the following circumstances: (1) modification or cancellation of the plan based on which the contract is concluded; and (2) major changes in income situation resulted from national policies on tax, pricing, etc."[400]

[398] The original text: "由于发生了当事人无法预见和防止的情势变更……仍按原合同约定的价格……显失公平，当事人可以变更或解除合同."

[399] The original text:"由于不可归责于当事人双方的原因，作为合同基础的客观情况发生了非当事人所能预见的根本性变化，以致合同履行显失公平的，可以根据当事人的申请，按情势变更原则变更或解除合同。"

[400] The original text: "就承包合同的变更和解除问题，规定出现下列两种情况的，应当允许变更或者解除承包合同：一是订立承包合同依据的计划变更或者取消的；二是因国家税收、价

农村承包合同纠纷案件若干问题的意见》1986 年 4 月 14 日)	
Contract Law 1999 (*Hetongfa 1999*, 合同法 1999 年)	Change of circumstance was once approved, but not retained in the final legal text.
Interpretation II of the Supreme People's Court of Several Issues concerning the Application of the Contract Law of the People's Republic of China (*Zuigao renmin fayuan guanyu shiyong zhonghua renmin gongheguo hetongfa ruogan wentide jieshi (er)*, 最高人民法院关于适用《中华人民共和国合同法》若干问题的解释 （二）)	Article 26, "Where any major change which is unforeseeable, is not a business risk and is not caused by a force majeure occurs after the formation of a contract, if the continuous performance of the contract is obviously unfair to the other party or cannot realize the purposes of the contract and a party files a request for the modification or rescission of the contract with the people' s court, the people' s court shall decide whether to modify or rescind the contract under the principle of fairness and in light of the actualities of the case."[401]
Supreme People's Court Guidance on Several Issues Concerning the Trial of Disputes over Civil and Commercial	1. "Carefully apply the change of circumstances and rationally adjust the relationship of interest between two parties.

格等政策的调整，致使收益情况发生较大变化的。"

[401]The original text: "合同成立以后客观情况发生了当事人在订立合同时无法预见的、非不可抗力造成的不属于商业风险的重大变化，继续履行合同对于一方当事人明显不公平或者不能实现合同目的，当事人请求人民法院变更或者解除合同的，人民法院应当根据公平原则，并结合案件的实际情况确定是否变更或者解除。"

Contracts under the Current Situation, issued by Supreme People's Court (2009) No. 40 (*Zuigao renmi fayuan guanyu dangqian xingshixia shenli minshangshi hetong jiufen anjian ruogan wentide zhidao yijian(fafa[2009] 40 hao)*, 最高人民法院关于当前形势下审理民商事合同纠纷案件若干问题的指导意见（法发[2009]40 号）)	With respect to numerous disputes over product transaction and financial flows among current market entities resulted from multiple factors including price volatility of raw materials, change in market demand relation, insufficient working capital, it requires that People's Court shall, based on the principle of equity and change of circumstances, carefully examine applications put forward in lawsuits by some concerning parties for the modification or termination of the contract pursuant to change of circumstances." Application of change of circumstances is not simply releasing the debtor's obligation and causing the creditor to bear adverse results, but adjust the parties' relation of interest fairly and reasonably while being fully aware of interest balance."[402]
The Civil Code of the People's Republic of China , the first draft (*Zhonghua renmin gongheguo minfadian*	Article 533: After conclusion, if the basis for contract has undergone major changes, which are unforeseeable by the parties when concluding the contract, not resulted

[402] The original text: "慎重适用情势变更原则，合理调整双方利益关系。
其要求当前市场主体之间的产品交易、资金流转因原料价格剧烈波动、市场需求关系的变化、流动资金不足等诸多因素的影响而产生大量纠纷，对于部分当事人在诉讼中提出适用情势变更原则变更或者解除合同的请求，人民法院应当依据公平原则和情势变更原则严格审查。
并于最后强调适用情势变更原则并非简单地豁免债务人的义务而使债权人承受不利后果，而是要充分注意利益均衡，公平合理地调整双方利益关系。"

yishengao,《中华人民共和国民法典》一审稿)	from force majeure and not commercial risks, and performance of the contract is obviously unfair for one party, the party adversely affected may request renegotiation with the other party…[403]
The Civil Code of the People's Republic of China , the second draft (*Zhonghua renmin gongheguo minfadian ershengao*,《中华人民共和国民法典》二审稿)	Article 533 : "After conclusion, if the basis for contract has undergone major changes, which are unforeseeable by the parties when concluding the contract, and not commercial risks, and performance of the contract is obviously unfair for one party, the party adversely affected may request renegotiation with the other party…"[404]
Opinions on Providing Judicial Protection to Epidemic Prevention and Control according to law and Promotion of Steady Economic Performance, issued by Shandong Higher People's Court (on February 18th, 2020) (*Shandongsheng gaoji renmin fayuan guanyu yifa*	5. "proper trial of contract disputes is mentioned. With respect to contract disputes, the court shall strengthen mediation, to fundamentally resolve disputes. The court may also give overall consideration for the influence of the epidemic on the time, method and degree of contract performance, to determine responsibilities of

[403] The original text: "合同成立后，订立合同的基础发生了当事人在订立合同时无法预见的、非不可抗力造成的不属于商业风险的重大变化， 继续履行合同对于当事人一方明显不公平的，受不利影响的当事人可以请求与对方重新协商……"

[404] The original text: "合同成立后，订立合同的基础条件发生了当事人在订立合同时无法预见的、不属于商业风险的重大变化，继续履行合同对于当事人一方明显不公平的， 受不利影响的当事人可以请求与对方重新协商……"

fangkong yiqing he cujin jingji pingwen yunxing tigong sifa baozhangde yijian, 2020-2-18, 山东省高级人民法院《关于为依法防控疫情和促进经济平稳运行提供司法保障的意见》,（2020 年 2 月 18 日发布）)	concerning parties fairly and reasonably."[405]
Guidance on Providing Judicial Protection to Epidemic Prevention and Control according to law and Promotion of Steady Economic Performance, issued by Jiangsu Higher People's Court (on February 13th, 2020) (*Jiangsusheng gaoji renmin* fayuan guanyu *yifa fangkong yiqing he cujin jingji pingwen yunxing tigong sifa baozhangde yijian 2020-2-13*,江苏省高级人民法院关于为依法防控疫情和促进经济社会发展提供司法服务保障的指导意见（2020 年 2 月 13 日发布）)	5. "The court shall properly review contract disputes related to epidemic prevention and control, and reasonably identify the influence of the epidemic on contract performance. After the conclusion of the contract, if continuing to perform the contract is obviously unfair or cannot achieve contract objective as a result of the epidemic or its prevention and control, and the concerning party sues for modification or termination of the contract, the court may apply stipulations of the Frustration of Purpose, and judge loss caused by contract modification or termination based on the principle of equity."[406]
China Civil Code (come into	Article 533: After a contract is

[405] The original text: "妥善审理合同纠纷。对相关合同纠纷，加强调解工作，促进从根本上化解纠纷。综合考虑疫情影响合同履行的时间、方式、程度等因素，公平合理确定合同当事人的责任。"

[406] The original text: "依法妥善审理与疫情防控有关的合同纠纷案件。合理认定疫情对合同履行的影响。合同成立后因疫情形势或防控措施导致继续履行对一方当事人明显不公平或者不能实现合同目的，当事人起诉请求变更或者解除合同的，可以适用合同法关于情势变更的规定，因合同变更或解除造成的损失根据公平原则裁量。"

effect on January 1st 2021) (Zhongguo *Minfadian*, 中国民法典)	formed, where a fundamental condition upon which the contract is concluded is significantly changed which are unforeseeable by the parties upon conclusion of the contract and which is not one of the commercial risks, if continuing performance of the contract is obviously unfair to one of the parties, the party that is adversely affected may re-negotiate with the other party; where such an agreement cannot be reached within a reasonable period of time, the parties may request the people's court or an arbitration institution to rectify or rescind the contract. The people's court or an arbitration institution shall rectify or rescind the contract in compliance with the principle of fairness, taking into account the actual circumstances of the case….[407]

The legislator included in the norms some elements deriving from judicial guidelines and practice. In particular, given that commercial risks and unreasonable foreseeability together constitute "two sides of the same coin", attention needs to be paid to the distinction between change of circumstances and commercial risks[408]. This aspect is mentioned in Article

[407] The original text: "合同成立后，合同的基础条件发生了当事人在订立合同时无法预见的、不属于商业风险的重大变化， 继续履行合同对于当事人一方明显不公平的，受不利影响的当事人可以与对方重新协商……"

[408] H.X. LIANG, *Ten Issues in the Interpretation and Application of the Civil Code*, in *Journal of Wenzhou University (Social Science Edition)*, Issue 1, 2021, p.12. 梁慧星，《民法典解释与适用中的十个问题》，温州大学学报（社会科学版），2021 年第 1 期，第 12 页。

III of the Guidance in Regarding to Judicial Issues of Civil and Commercial Contract Disputes Under the Current Situation[409] issued by the Supreme People's Court: "*When judging whether a major objective change falls into a change of circumstances, attention should be given by the people's court to assess whether the type of risk belongs to the general concept of society that cannot be foreseen in advance, and whether the degree of risk is far beyond the reasonable expectation of normal people..., the specific conditions of the market should be combined to identify change of circumstances and commercial risks in individual cases*."

In this regard, Prof. Han Shiyuan consider that to judge whether risks exceed reasonable expectations, commercial risks can be comprehensively analyzed from the above-mentioned dimensions, specifically including whether the risks can be encountered or tolerated, and these several criteria should be combined to judge commercial risks and change of circumstances. The specific criteria for judgment are as follows[410]:

Judgment criteria	Foreseeable risk	Unforeseen risk
Tolerable risk	A. The contract is binding and does not apply to the principle of change of circumstances	B. The contract is binding and does not apply to the principle of change of circumstance
Unbearable risk	C. There is scope for applying the principle of change of	D. Applicable principle of change of circumstances

[409] Zuigao renmin fayuan guanyu dangqian xingshixia shenli minshi shangshi hetong jiufen anjian ruogan wentide zhidao yijian 《最高人民法院关于当前形势下审理民商事合同纠纷案件若干问题的指导意见》

[410] S.Y. HAN, *A Study on Several Issues Concerning Change of circumstances*, *Peking University Law Journal*, p. 663. 韩世远，《情事变更若干问题研究》，中外法学，2014 年第 3 期，第 663 页.

	circumstances	

According to the content of the table, the answers to items A and D are determined. Prof. Han Shiyuan believes that in Situation B, despite its unforeseeability, the risk is still within the tolerable range of the party concerned and only some inconvenience will occur during performance. A reasonable judgment can be made by the court based on the identity characteristics of the parties, such as whether the parties are natural persons or legal persons and the strength of their financial situation[411]. The case C is a little bit more complicated. Despite being predictable, the risk has already exceeded the tolerable level. In the Prof. Han Shiyuan' opinion, "not only the type of foreseeable risk (such as price fluctuation) is required, but also the severity of the change (normal or abnormal) needs to be measured" when judging whether a certain risk is reasonably foreseeable[412].

For example, in the case of a rural land contract dispute, Xu Jingshu v. Pingfu Township, Teng County Guohe Feibo Forest Farm, the court held that "with the rapid development of China's social and economic and the continuous adjustment of the rural industrial policy, the price of the rural land contract within the county has increased considerably in recent years is an objective fact. In this case, the contractual fee agreed between the two parties at the time of signing the contract was 12 RMB per mu per year, but the current contractual fee for new rural forest land in the county has been as high as 80 RMB. Even taking into account factors such as price increases, the difference is particularly huge, which was not foreseen by the parties when the contract was signed and was beyond the control of the parties. The current contract has yet to be performed for 41 years and continuing to perform at the original annual contractual fee rate will result in an obviously imbalance. Therefore, the court determined the

[411] See S.Y..HAN, *op. cit*, p. 664.
[412] S.Y..HAN, *General Provisions of Contract Law*, Law Press, 3rd edition, 2001, p.390. 韩世远，《合同法总论》，法律出版社，2001 年，第 390 页。

obligations of both parties reasonably in accordance with the principle of fairness and adjusted the rent of the original contract."[413]

By contrary, in the dispute over the lease contract between Xinji Maternal &Child Health Care Hospital v. Wenjia Fangbei Village Committee of Xinji Town, the court held that "although the market value of the renting house had risen from 550,000 to 990,000, Xinji Maternal and Child Health Care Hospital and Village Committee knew the lease fee agreed in the contract when they signed it and had clear expectations of the actual payment in the transaction. The contract has been performed to date without any change in policy or context, and it is a commercial risk that the rent fluctuates with the market economy. Therefore, there is no change of circumstances in this case."[414]

The last condition of change of circumstance is that the performance of the contract as agreed would be obviously unfair. When interpreting "obviously unfair", both in judicial practice as we have seen, and in theory, principle of fairness is a concept that is often referred to.[415] Moreover, a direct link between the two concept has been established in the first book of the Civil Code where art. 6 says: "The parties to civil legal relations shall conduct civil activities under the principle of fairness

[413] Xu Jingshu v. Pingfu Township, Teng County Guohe Feibo Forest Farm, Wuzhou Intermediate People's Court, (2019) Gui 04 Min Zhong No. 659 civil judgment
许景舒与藤县平福国合飞播林场林业承包合同纠纷案，梧州市中级人民法院，（2019）桂 04 民终 659 号民事判决书

[414] Xinji Maternal and Child Health Care Hospital and villagers committee of Wenjiafangbei Village, Xinji Town Shijiazhuang Municipal Intermediate People's Court (2017) Ji 01 Minzhi No. 2044 Civil Judgment
辛集市妇幼保健院与辛集市辛集镇温家方碑村村民委员会租赁合同纠纷案，石家庄市中级人民法院（2017）冀 01 民终 2044 号民事判决书

[415] See L. HE, H. GUO, "*Change of Circumstances" May Be Used with Caution in the Event of Serious,* in *Business Daily*, No.2 2020.何鎏 郭宏，《继续履约严重不公时"情势变更原则"方可慎用》，中国商报，第 2 期，2020 年.
See Y. MENG, *On the Determination of Apparent Unfairness in Contracts*, East China University of Political Science and Law, 2019. 孟阳，《论合同显失公平的认定》，华东政法大学，2019.
See L. H. DONG, *On the abuse and regulation of the principle of fairness in civil law*, Lanzhou University, 2018. 董黎华，《论民法公平原则的滥用及规范》，兰州大学，2018.
In the researches that are related to changes in circumstances, we can see the discussion about "principle of fairness".

and reasonably determine the rights and obligations of each party"[416].

It has been argued that the principle of fairness means fairness and reasonableness, and that it is primarily a measure of things from the perspective of social justice and the accepted values of right and wrong.[417] The principle of fairness in law is to integrate this moral concept with the principle of law and give it legal effect, which fully reflects the consistency between law and morality.[418] In the other words, the principle of fairness is the legalization of the concept of social fairness and justice, which is mainly reflected in civil activities as the reciprocity of rights and obligations of civil subjects and the balance of interests, and the handling of civil disputes should be in accordance with the law, with fairness and reasonableness.[419]

When encountering with change of circumstances, the relationship between fairness and reasonableness is that a fundamental change has caused an "unreasonable" distribution of rights and obligations between the parties, resulting in an "obviously unfairness". And the rule of change of circumstances is, in effect, a rule for the reasonable allocation of losses arising from commercial risks that are substantially beyond the normal range[420]. Prof.Wang Liming has pointed out that "If the party claiming rescission on the basis of the rule of change of circumstances does so on the grounds that he has suffered adverse consequences and that the rescission will cause damage to the other party, then consideration may be given to ordering the party claiming rescission to make appropriate compensation to the party who has suffered damage. It is not essentially damages, but rather a sharing or compensation for the damage. Even if the

[416] Chinese Civil code Article 6 "*The parties to civil legal relations shall conduct civil activities under the principle of fairness and reasonably determine the rights and obligations of each party*".
[417] L. TAN, *On the Principle of Fairness*, in *Modern Law*, No. 4, 1989, p. 27.谭玲，《论公平原则》，现代法学，1989 年第 4 期，第 27 页。
[418] See L. TAN, *op. cit*, p. 28.
[419] Z.Y WEI, *Principles and Practices of Civil and Commercial Law*, Peking University Press, Beijing, 1995, p. 23. 魏振瀛：《民商法原理与实务》，北京大学出版， 1995 年，第 23 页。
[420] M.L. SUN, *Changes of Circumstance and Contract Theory,* Beijing Law Press, Beijing, 2004, p.387. 孙美兰《情事变动与契约理论》 ,北京法律出版社， 2004 年， 第 387 页。

contract is rescinded, the loss arising from the change of circumstances should be reasonably apportioned."[421]

Thus, "obviously unfairness" in this context is reflected in the fact that a significant and unusual objective change has caused a change in the conditions on which the parties entered into the contract. And the change results in a significant imbalance in the interests of the parties if the contract continues to be performed as agreed. This is contrary to the fairness principle of "reasonable determination of the rights and obligations of the parties". The purpose of a change of circumstances is to balance the rights and obligations of the parties by allocating the risks with "reasonableness" and avoiding one party having to bear all of the risks in the end. [422]

[421] L.M. WANG J.Y. CUI, *New Theory on Contract Law; General Provisions*, Law Press, 1996, p. 322. 王利明、崔建远著：《合同法新论：总则》，法律出版社，1996 年版，第 322 页.

[422] Y. ZHANG, *On the Principles of Circumstance Change*s, East China University of Political Science and Law, 2019, p. 13. 张宇，论情势变更原则，华东政法大学，2019 年，13 页。We find also several cases following this approach. See Wuzhou Changzhou District People's Court (2017) Gui 0405 Minchu No. 184 civil judgmen*t* 梧州市长洲区人民法院（2017）桂 0405 民初 184 号民事判决书; Wuzhou Intermediate People's Court (2018) Gui 04 Min Zhong No. 1206 civil judgment, Wuzhou Intermediate People's Court (2020) Gui 04 Min Zhong No. 852 civil judgment. 梧州市中级人民法院（2018）桂 04 民终 1206 号民事判决书, 梧州市中级人民法院（2020）桂 04 民终 852 号民事判决书; Shanghai Second Intermediate People's Court (2019) Hu02 Min Zhong No. 6819 civil judgmen*t* 上海市第二中级人民法院（2019）沪 02 民终 6819 号民事判决书

CONCLUSION

The research that I have been conducted confirms the centrality of the theme of reasonableness as an emerging theme of contemporary contract law.

Historically, within the Western Legal Tradition the notion of reasonableness is considered a typical expression of the common law legal culture where, through a long judicial evolution, the standard of reasonableness has been developed and rooted into the English contract law, leading to a shift from the strict literal interpretation of contracts and making room for justice and fairness demands raised by concrete context. It hence represents a fundamental standard according to which the courts may ascertain the rule to apply according to the peculiar circumstances of the case, or the specific intention of the parties of a certain contract.

The pervasive reliance on reasonableness is such as to characterize the common law legal discourses, distinguishing it from legal discourses in other cultures. "*Whatever we sense as the common denominator underlying "reasonable reliance" and "reasonable mistake" is lost in continental legal debate. Whether we think differently from our European counterparts is not so easily assayed. That we speak differently, however, is quite clear*"[423].

In the last decades the situation has, however, considerably started changing. Moving from these two different starting points, the elaboration of a new set of common contract law rules for Europe and a new growing attention to the role of reasonableness in the civil law systems saw the emergence of a new role for the standard of reasonableness, also under the influence of the uniform contract law rules that, embodying, several

[423] These are words by G. P. FLETCHER, *The Right and the Reasonable*, *Harvard Law Review*, 1985, p. 950.

elements deriving from common law tradition, has been acknowledging a growing role to reasonableness. The idea of "reasonableness" in international commercial law has become a distinct but essential basis of international conventions about conflicts of laws. For example, the Rome Convention of June 19, 1980, which applies to contractual obligations; the Second Hague Convention, applying to international sales of goods (1986). The similar fact has appeared in other conventions dealing with conflicts of law in areas other than global trade law. Starting from the Vienna Convention on the contracts for the international sale of goods which gave a prominent role to reasonableness alongside good faith, reasonableness has spread progressively throughout European contract law, particularly, to a greater extent, in most academic projects aiming at harmonizing European contract law.

Principles of European Contract Law (PECL), Code Européen des Contrats, Principles of European Law (PEL), Draft Common Frame of Reference (DCFR), Unidroit Principles of International Commercial Contracts have largely embraced reasonableness, a notion whose flexibility and proximity to concrete circumstances, compared with features of other well-known principles familiar to Civil law (such as good faith or diligence), is considered most suitable for the legal harmonization process, satisfying the quest for uniform criteria leaving at the same time room for local differences.

Also the EU statutory law has embraced this concept in building a common legal framework in the field of contract law. We see references to the reasonableness both in the directives, such as the recent Directive of Sale of Goods and Supply of Digital Content and Digital Services, and in the ECJ case law, when interpreting the notion of “average consumer”. As it was observed, the reasonableness adopted by the EU law is fashioned in a very similar way as in the common law: it is a concept that allows to take into consideration all the circumstances, not necessarily expressed in the contract, that may be relevant for a given case.

On the other side of the Eurasian continent a parallel evolution has

been reconstructed as for as the standard of reasonableness is concerned. We have seen that the principle of reasonableness has a long history having been widely used as a criterion of judicial interpretation of contracts since the Imperial times. The word reasonableness (*heli* 合理) has been used in the traditional Chinese legal culture in strict connection with the concept of "justice" and is an expression of contextualist approach in judgments. The use of reasonableness in traditional judicial discourses was associated with an idea of balancing intervention of the judge founded on the evaluation of the specific circumstances of the case. After having being apparently disappeared in modern times when a legal modernization process was carried out on the basis of the civil law models, the concept of reasonableness has been re-emerging in the last decades of reforms. In particular we have seen that the 1999 Contract law, strongly influenced by international harmonized instruments such as the CIsg and the UNIDROIT Principles for international commercial contacts, widely referred to a concept of reasonableness following the afore-mentioned international legal models. Following this statutory development, the Chinese courts introduced the use of this criterion in contractual law disputes. It is interesting to observed that in some cases the judicial use of the standard has preceded the legislator intervention, as the re-emergence of the reasonableness in courts decisions dates back to the first decade of the post-Mao legal reforms, when it was used as a hermeneutical criterion to balance law and circumstances within the framework of a very fragmented legal system. Reasonableness has been developing as a balancing yardstick giving relevance to the specific circumstances of the case. A paradigmatic use of this standard has marked the rules on change of circumstances which have been built making reference to the concept of reasonableness.

This first analysis of legal evolution and the circulation of the standard of reasonableness as hermeneutical criterion in contract law shows not only very strong elements of connections between different

legal systems, mainly established through practices of legal transplants, but also traces of convergences in the demands and the concrete application which characterize the use of reasonableness. A set of specific applications of the standard, such as to determine single aspects of the contract (such as the time or the relevance of a conduct), in addition to other expressions related to the reasonableness refer to the reliance or the expectation of a party has been spread through European and Chinese contract laws. Moreover, the concept of reasonableness has been taken into consideration by using this standard not only to determine single aspects of the contract but also as a more far-reaching criterion to interpret the agreement. The latter goal, as we have seen, is achieved through the transposition of the notion of "reasonable person", which had a strong role in common law rules on contracts and is present also in the European contract law. In China the new civil code, introducing the reasonableness in connection with the principles of fairness in private law relations leaves the room for a wider use of the concept in contract law.

This research does confirm the centrality of the theme of reasonableness as an emerging theme of contemporary law on which a fruitful dialogue between different legal systems can be fostered. The exploration here made suggests a complex network of operative rules as expression of the notion of reasonableness in contract law and raises the need of a higher level of attention to be paid on standards and general clauses in wide comparative law perspective. A further research direction in this regard should be made in relation to the other great concepts which mark the evolution of contemporary contract law and which has been emerged in several respects in this research (i.e. the concept of good faith)[424].

In the contemporary world, where the dogma of legal positivism has fallen and contract law is increasingly expanding at the supranational and

[424] In this regard see the considerations made by Emanuela Navarretta, *Good Faith and Reasonableness in European Contract Law*, in J. Rutgers and P. Sirena (Eds.), *Rules and Principles in European Contract Law*, Cambridge, Intersentia, 2015, pp. 135-150.

global level, general principles take on an increasingly important role. If in modern times, in civil law systems, general principles have been scarcely considered by legal interpreters because they are harbingers of legal uncertainty, today they take on a completely different meaning, thanks to their effectively expansive nature, which allows to express and relate different legal traditions in a context in which there is more and more space for soft law instruments in commercial and contractual legal relationships. Among these, the principle of reasonableness can play a crucial role in the future of global law.

BIBLIOGRAPHY

ALLE M., *Code, Culture and Customs: Foundation of Civil Case Verdicts in a Nineteenth-Century County Court*, in K. Bernardt, P.C. Huang (eds.), *Civil law in Republican China*, Stanford University Press, Stanford, 1994.

ALVISI C., *Il consumatore ragionevole e le pratiche commerciali sleali*, in *Contratto e impresa*, 2008.

ALVISI C., *The Reasonable Consumer under European and Italian Regulations on Unfair Business-to-Consumer Commercial Practices,* in G. Bongiovanni et al. (eds.)*, Reasonableness and Law,* Springer Science & Business Media, 2009.

ANDREWS N., *Contract Rules: Decoding English Contract Law*, Intersentia, Cambridge, 2016.

ARISTOTELE*, The Nicomachean Ethics,* edited by L. Brown, translated by D. Ross, Oxford world's classics, Oxford, 2009.

ARNIO A.*, The Rational as Reasonable. A Treatise on Legal Justification*, Reidel, Frankurt, 1987.

ATIYAH P. S., *Introduction to contract Law*, Clarendon Press, Oxford, 1989.

BAR V. C., CLIVE E., NÖLKE H.S. BEALE H., HERRE J., HUET J., SCHLECHTRIEM P., STORME M., SWANN S., VARUL P., VENEZIANO A., ZOLL F. (eds.), *Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference (DCFR)*, available at: https://www.dsg.univr.it/documenti/OccorrenzaIns/matdid/matdid197976.pdf.

BAR V. C., CLIVE E., NÖLKE H.S. BEALE H., HERRE J., HUET J., SCHLECHTRIEM P., STORME M., SWANN S., VARUL P., VENEZIANO A., ZOLL F. (eds.), *Principles, Definitions and Model Rules of European Private*

Law, Draft Common Frame of Reference (DCFR), Articles and Comments(Interim Edition, to be completed), available at: https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/EUROPEAN_PRIVATE_LAW/EN_EPL_20100107_Principles__definitions_and_model_rules_of_European_private_law_-_Draft_Common_Frame_of_Reference__DCFR_.pdf.

BARNARD C., PEERS S., *European Union Law*, Oxford University press, Oxford, 2017.

BEATSON J., BURROWS A., CARTWRIGHT J. (eds.), *Anson's Law of Contracts*, 29th ed., Oxford University Press, Oxford, 2010.

BERGER K.P., *The Lex Mercatoria Doctrine and the UNIDROIT Principles*, in *Law and Policy in International Business*, 1997.

BERGSTEN E. E., *The Willem C. Vis International Commercial Arbitration Moot: The Perspective of the Organizer*, in Croatian Arbitration Yearbook, 1999.

BONELL M.J., *Towards a Legislative Codification of the UNIDROIT Principles?*, in *Uniform Law Review*, n. 12, 2007.

BONELL M.J., *An International Restatement of Contract Law: The UNIDROIT Principles of International Commercial Contracts*, Transnational Publishers, Ardsley, New York, 2005.

G. BONGIOVANNI, G. SARTOR, C. VALENTINI (eds.), *Reasonableness and the Law*, Springer-Dordrecht, Berlin, 2009.

BROXIS H., VOLCKE W. D., *General Essay on German Civil Law (33rd edition)*, translated by Zhang Yan, Yang Dake School, Renmin University of China Press, Beijing, 2014.

BUSCH D., HONDIUS E., T*he principles of European contract law and Dutch law: a commentary (Vol. 1)*, Kluwer Law International, Hague, 2002.

CARDOZO B. N., *The Nature of the Judicial Process*, Yale University

Press, New Haven, 1922.

CHEN F. H., *The Research and Enlightenment of General Legislation of Civil Law in Late Qing Dynasty*, in *Journal of China University of Political Science and Law*, No.6, 2017. 陈范宏，《清末民国民法总则编立法探赜及启示》，中国政法大学学报，2017 年第 6 期。

CHEN S., *The Establishment and Development of the Chinese Economic Legal System in the Past Sixty Years*, in *Columbia Journal of Asian Law*, 2009-2010.

CHEN Z.P., *The Tension Between Traditional and Modern Legal Culture -- and the Reason for the Underdeveloped Civil Law in Ancient China*, in *Journal of Shantou University* (Humanities and Social Sciences Edition), Vol.34, 2018. 陈子盼，《传统与现代法律文化的张力—兼论中国古代民法欠发达的原因》，汕头大学学报（人文社会科学版），2018 年，第 7 期，第 34 卷。

CHENG H., CHENG Y., *The Articles Left by Chengs in Henan province: volume 6*, wang xiaoyu, Zhonghua Book Company, Beijing, 1981. 程颢，程颐，《河南程氏遗书：第六卷》,王孝鱼点校，中华书局，1981 年。

CHEN-WISHART M., *Contract Law,* Oxford University Press, Oxford, 2018.

CHITTY J., BEALE H., *Chitty on Contracts*, Sweet & Maxwell - Thomson Reuters, London, 2012.

Consumers: New EU rules crackdown on misleading advertising and aggressive sales practices, Brussels, 12 December 2007 available at: https://ec.europa.eu/commission/presscorner/detail/en/IP_07_1915.

CORBIN A. L., *Corbin on contracts*, Matthew Bender, 1963.

CORBIN A. L., *Offer and Acceptance, and Some of the Resulting Legal Relations*, in *Yale L.J.*, 1917.

CORTEN O., *The Notion of "Reasonable" in International Law: Legal Discourse, Reason and Contradictions*, in *The International and*

Comparative Law Quarterly Vol. 48, No. 3 Jul., 1999.

D. HUANG, *The UNIDROIT Principle and their influence in the modernization of contract law in the People's Republic of China*, in *Uniform Law Review*, 2003.

DAI Z., M*engzi ziyishuzheng (the sixth volume)*，Huangshan Pulishing Press, Hefei, 1995. 戴震,《孟子字义疏证》,《戴震全书》卷六，黄山书社，1995 年。

Decision of the CPC Central Committee on Major Issues Pertaining to Comprehensively Promoting the Rule of Law (*Zhonggong zhongyang guanyu quanmian tuijin yifa zhiguo ruogan zhongda wenti de jueding*, 中共中央关于全面推进依法治国若干重大问题的决定). The full text of the Resolution can be found at the following web address: news.xinhuanet.com/ziliao/2014-10-30/c127159908.htm.

DI MATTEO L. A., CHEN L. (eds.), *Chinese Contract Law. Civil and Common Law Perspectives*, Cambridge University Press, Cambridge, 2017.

DI MATTEO L. A., *Critical Issues in the Formation of Contracts Under the CISG,* in *Belgrade Law Review*, 2011.

DI MATTEO L. A., *Rule of Law in China: The Confrontation of Formal Laws with Cultural Norms*, in *Cornell International Law Journal*, vol. 51, 2018.

DI MATTEO L. A., *The Counterpoise of Contracts: The Reasonable Person Standard and the Subjectivity of Judgment*，in *South Carolina Law Review*, 1997, p. 293.

DONG A.L., *Characteristics and reflection of traditional legal culture from the perspective of the golden mean*, in *Gansu Society Science*, 2009, p.106. 董爱玲，《中庸观下的传统法律文化特征及当代省思》，甘肃社会科学，2009 年第 3 期。

DONG L. H., *On the abuse and regulation of the principle of fairness in civil law*, Lanzhou University, 2018. 董黎华，《论民法公平原则的滥用及规范》，兰州大学，2018.

EIDENMÜLLER H., FAUST F., GRIGOLEIT H. C., JANSEN N., WAGNER G., ZIMMERMANN R., *The Common Frame of Reference for European Private Law: Policy Choices and Codification Problems,* in *Oxford Journal of Legal Studie*s, Vol. 28, 2008.

ENDERLEIN F., MASKOW D., *International sales law: United Nations Convention on Contracts for the International Sale of Goods: Convention on the Limitation Period in the International Sale of Goods: commentary*, Oceana, New York, 1992.

ENG S., *Legal Philosophy in Norway in the 20th Century*, E. Pattaro, C. Roversi, (eds.), in *A Treatise of Legal Philosophy and General Jurisprudence (volume 12)*, *Legal Philosophy in the Twentieth Century: The Civil Law World*, Springer Netherlands, Dordrecht, 2016.

European Union Committee, *European Contract Law: the Draft Common Frame of Reference Report with Evidence,* 12th Report of Session 2008–09, available at https://publications.parliament.uk/pa/ld200809/ldselect/ldeucom/95/95.pdf.

FANG H.W. (ed.), *Reconstruction of Literature and Creation of Chinese Discourse*, Central Compilation & Translation Press, Beijing, 2015. 方汉文主编，《世界文学重构与中国话语创建》，中央编译出版，2015 年。

FASSÒ G., *Storia della filosofia del diritto*, vol. I, *Antichità e medioevo*, Il Mulino, Bologna, 2001.

FEI X.T., *Earthbound China*, People's Publishing House, Beijing, 2008. 费孝通，《乡土中国》，人民出版社，2008 年。

FEI X.T., *Fei xiaotong collected essays on sociology*，Tianjin Peoples

Publishing House，Tianjing, 1985. 费孝通，《费孝通社会学论文集》，天津人民出版社，1985 年。

FERRARI F., S*pecific Topics of the CISG in the Light of Judicial Application and Scholarly Writing*, in *Journal of Law and Commerce,* 1995.

FLEMING J. J., Q*ualities of the Reasonable Man in Negligence Cases*, in *Missouri Law Review*, 1951.

FLETCHER G. P., *The Right and the Reasonable*, in *Harvard Law Review* Vol. 98, No. 5, 1985.

FLETCHER G.P., *Comparative Law as a Subversive Discipline*, in *American Journal of Comparative Law*, 1998.

FOWLER H. W., Crystal D., *A Dictionary of Modern English Usage: The Classic First Edition*, Oxford University Press, Oxford, 2009.

FU J. W., *Modern European and Chinese Contract Law: A Comparative Study of Party Autonomy*, Kluwer Law International, Hague 2011, p. 39.

GARDNER G. K., A*n Inquiry into the Principals of the Law of Contracts*, in *Harvard Law Review*, 1932.

GARNER B. A. (eds.), *Black's Law Dictionary*, Thomson Reuters, Toronto, 2004.

GARRO A., *The Gap-Filling Role of the UNIDROIT Principals in International Sales Law: Some Comments on the Interplay between the Principals and CISG*, in *Tulane Law Review*, 1995.

GAUCH P., SCHLUEP W., SCHMID R., JÖRGEMMENEGGER S., *Schweizerisches Obligationenrecht Allgemeiner Teil*, Schulthess Verlag, Zwingliplatz, 2020.

GRUNDMANN S., MAZWAUD D. (Eds), *General clauses and standards in European contract law: comparative law, EC law and contract law codification*, The Hague, *Kluwer Law International*, 2005.

GRUNING D., LEVASSEUR A. R., TRAHAN J. R., ROY E., *Traduction du code civil français en anglais version bilingue*, 2015, available at https://halshs.archives-ouvertes.fr/halshs-01385107).

GUO Y., JIN T., *Review of the International Symposium on CISG Application and Interpretation in Member States*, in *Wuhan University Review of International Law*, 2008. 郭玉军 靳婷，《1980 年 CISG 在成员国的适用与解释国际研讨会综述》， 武大国际法评论，2008 年第 2 期。.

HAN S.Y., *A Study on Several Issues Concerning Change of circumstances*, *Peking University Law Journal*, p. 663. 韩世远，《情事变更若干问题研究》，中外法学，2014 年第 3 期，663 页.

HAN S.Y., *The UNIDROIT and the Development of Chinese Contract Law*, in *Global Law Review*, 2015. 韩世远，《<国际商事合同通则>与中国合同法的发展》,环球法律评论,2015,第 6 期。

HAN S.Y.., *General Provisions of Contract Law*, Law Press, 3rd edition, 2001. 韩世远，《合同法总论》，法律出版社，2001 年。

HANS V. H., *Les Principes UNIDROIT et lArbitrage Commercial International, in: ICC (ed.), The UNIDROIT Principals for International Commercial Contracts - A New Lex Mercatoria?*, in *Paris,* 1995, available at: https://www.trans-lex.org/117400/_/a-new-lex-mercatoria-paris-1995-at-181-et-seq/.

HART H.L.A., *Punishment and Responsibility,* Oxford University Press, New York, 1968.

HE L., GUO H., "*Change of Circumstances" May Be Used with Caution in the Event of Serious*, in Business Daily, No.2 2020.何鎏 郭宏，《继续履约严重不公时"情势变更原则"方可慎用》，中国商报，第 2 期，2020 年.

HISCOCK E., *The Keeper of the Flame: Good Faith and Fair Dealing in International Trade*, in *Loyola of Los Angeles Law Review*, 1996.

HERBERT A.P., *Uncommon Law*, Methuen Publishing Ltd, London, 1935.

HONNOLD J. O., *Uniform Law for International Sales under the 1980 United Nations Convention,* Kluwer Law International, Hague, 2009.

HONNOLD J.O., *Uniform Law for International Sales under the 1980 United Nations Convention*, Kluwer Law International, Hague, 1999.

HOUTTE V. H., *Les Principes UNIDROIT et l'Arbitrage Commercial International*, in ICC (ed.), *The UNIDROIT Principles for International Commercial Contracts - A New Lex Mercatoria?*, Paris, 1995.

HUANG G.G., *Human Connection and Face: Chinese Power Game*, Renmin University Press, Beijing, 2011. 黄光国，《人情与面子：中国人的权力游戏》，中国人民大学出版社，2011 年。

HUANG P. C., *Civil Justice in China, Representation and Practice in the Qing*, 1996, Stanford University Press, Stanford, 1994.

HUANG P. C., *Code, Custom and Legal Practice in China. The Qing and the Republic Compared*, Stanford University Press, Stanford, 2001.

Introduction to the Principles of European Contract Law (PECL), available at: https://www.cisg.law.pace.edu/cisg/text/peclintro.html.

INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW (UNIDROIT), *UNIDROIT Principles of international commercial contracts 2016*, UNIDROIT 2016, Rome, 2016.

JACKSON C. M., *Reasonable Persons, Reasonable Circumstances*, in *San Diego Law Revie*w, 2013.

JOACHIM W.E., *The Reasonable Man in United States and German Commercial Law*, in *Comp. L. Yb. Int l Bus*., 1992, available at: https://www.trans-lex.org/124800/_/joachim-willi-e-the-reasonable-man-in-united-states-and-german-commercial-law-15-complybint-l-bus-1992-at-341-et-seq/.

KOTLER P., ARMSTRONG J., WONG V., SAUNDERS J., *Principles of marketing* (5th ed.), Pearson, London, 2008.

KOZOLCHYK B., *The UNIDROIT Principles as a Model for the Unification of the Best Contractual Practices in the Americas*, in *American Journal of Comparative Law*, 1998.

LANDO O., *Is Good Faith an Over-Arching General Clause in the Principles of European Contract Law?*, in *European Review of Private Law*, 2007.

LIANG H.X., *Ten Issues in the Interpretation and Application of the Civil Code*, in *Journal of Wenzhou University (Social Science Edition)*, Issue 1, 2021. 梁慧星，《民法典解释与适用中的十个问题》，温州大学学报（社会科学版），2021 年第 1 期。

LIU C.Z., *The Legislative Orientation and Systemic Openness of the Contracts Part of the Civil Code*, in *Global Law Review*, No. 2, 2020.刘承韪，《民法典合同编的立法取向与体系开放性》，环球法律评论,2020，第 2 期。

LIU S., *Figures*, Shanghai Joint Publishing Press, Shanghai, 2005. 刘邵，《人物志》，上海三联出版社，2005 年。

LIU Z.J., *The Compilation of the Civil Code in the Late Qing Dynasty and the Early Republic of China*, in *Shanxi Archives*, No.8, 2018. 刘志娟，《清末民初民法典的编纂及当下启示》，山西档案，2018 年，第 8 期。

LONG R., *Research on Several Issues of Principle of fairness*, Wuhan University, 2004, p. 2.龙锐，《公平原则若干问题研究》，武汉大学，2004 年，第 2 页。

LUO T. H., *Private loans in the Tang Dynasty*, Taiwan Commercial Press, Taiwan, 2005. 罗彤华，《唐代民间借贷》，台湾商务印书馆，2005 年。

MAHON C.M., *Reasonableness and fairness: a historical theory,* Cambridge University Press , Cambridge , 2016.

MAGUIRE P., *Guide to the Consumer Right Act 2015*, 1 October 2015,

available at www.wrighthassall.co.uk/knowledge-base/guide-to-the-consumer-rights-act-2015.

MARKOVITS D.L, *Theories of the Common Law of Contracts*, in *Stanford Encyclopedia of Philosophy*, 2015, https://plato.stanford.edu/entries/contracts-theories/#Oth.

MARTIN E. A., Oxford dictionary of law, Oxford University Press, Oxford, 2003.

MCINTOSH C. (ed.), *Cambridge Advanced Learner's Dictionary*, 4th ed., Cambridge University Press, Cambridge, 2013.

MCKENDRIC E. (ed.), *Force Majeure and Frustration of Contract*, Lloyd's of London Press, London, 1995.

MENG Y., *On the Determination of Apparent Unfairness in Contracts*, East China University of Political Science and Law, 2019. 孟阳，《论合同显失公平的认定》，华东政法大学，2019.

MERRIAM-WEBSTER (ed.), *Merriam-Webster's Dictionary of Law*, Merriam-Webster, Online, 2016.

MOMBERGURIBE R.A., *The effect of a change of circumstanceson the binding force of contracts*, Intersentia, Cambridge, 2001.

MONATERI P.G. (ed.), *Comparative Contract Law*, Edward Elgar, Cheltenham-Northampton, 2017.

MOU Z.S., *Mind-Substance and Nature-Substan*ce *(the first volume)*, Shanghai Chinese Classics Publishing House, Shanghai, 1999. 牟宗三，《心体与性体》（上册），上海古籍出版社，1999 年版。

MACCORMICK N., *On Reasonableness*, in *Les notions à contenu variable en droit*, C. Perelman & R. Vander Elst (eds.), Bruylant, Brussels, 1984.

NAVARRETTA E, *Good Faith and Reasonableness in European Contract Law*, in J. RUtgers and P. Sirena (Eds.), *Rules and Principles in European Contract Law*, Intersentia, Cambridge, 2015.

NEEDHAMI N. J. T. M., *Science and Civilization in China (seven volumes)*, Oxford University Press. The work was translated in Chinese by the Department of history of science, Shanghai Jiaotong University, the Science Press, Beijing, 2011. 李约瑟，《中国的科学与文明》（第七卷）， 上海交通大学科学史系译，科学出版社, 2011 年。

NÖLKE H. S., FLESNER C. T., EBERS M., *EC Consumer Law Compendium: The Consumer Acquis and its transposition in the Member States*, European Law Publisher, Munich, 2009.

Official Journal of the European Communities , vol.37, 1994. Available at：https://op.europa.eu/en/publication-detail/-/publication/e56809e3-1d1c-44f0-9085-7a66ec581f8c/language-en.

Official Journal of the European Communities, vol. 32, 1989. Available at：https://op.europa.eu/en/publication-detail/-/publication/7d606b38-604c-44a8-a458-c95cc276c299/language-en. The Communities states that: *"whereas unification can be carried out in branches of private law which are highly important for the development of the single market, such as contract law, without this, of course, exhausting the possibilities for unification*".

Official Records of the United Nations Conference on Contracts for the International Sale of Goods, Vienna 10 March - 11 April 1980, A/CONF.97/19, available at : https://www.uncitral.org/pdf/english/texts/sales/cisg/a-conf-97-19-ocred-e.pdf.

OGILVIE M. H., *Reasonable Commercial Contracts and the Unfair Contract Terms Act 1977,* in *Canadian Business Law Journ*al, 1991.

ORLANDO S., T*he Use of Unfair Contractual Terms as an Unfair Commercial Practice,* in *European Review of Contract Law*, 2011.

BENNACCHIO G.A., PASA B., *A Common Law for Europe,* Central European University Press, Budapest, New York, 2005.

PATTERSON E. W., *The Interpretation and Construction of Contracts*, in *Columbia Law Review*, 1964.

PATTI S., *Ragionevolezza (diritto civile)*, in *Digesto delle discipline privatistiche*, 2014.

PATTI S., *Ragionevolezza e clausole generali*, Giuffrè, Milano, 2016.

PENNICINO S., *Legal Reasonableness and the Need for a Linguistic Approach in Comparative Constitutional Law*, in *Comparative Legilinguistics*, vol. 2, 2012.

PERELMAN C., *The Rational and the Reasonable*, in *The New Rhetoric and the Humanities. Essays on Rhetoric and its Applications*, Reidel Publishing Company, Berlin, 1979.

POZZO B. (ed.), *Ordinary Language and Legal Language*, Giuffré, Milano, 2005.

QI Y., *On the Debt of Synergy*, in *Legal and Commercial Studies*, No. 1, 2020. 齐云，《论协同之债》，法商研究,2020，第 1 期。

RACHLINSKI J. J., *Misunderstanding Ability, Misallocating Responsibility*, in *Brook. L. Rev.*, 2003.

RAPSOMANIKAS M. G., *Frustration of Contract in International Trade Law and Comparative Law,* in *Duquesne Law Review,* 1978, available at: https://www.cisg.law.pace.edu/cisg/biblio/rapsomanikas.html

Resolution A2-157/89, 0. J. 1989 C 158.

Resolution A3-0329/94, O.J. 1994 C 205.

RICCI A., *Il criterio della ragionevolezza nel diritto privato*, Cedam, Padova, 2007.

ROSELLI O., *The Ever Changing Legal Dimension and the Controversial Notions of Law and Science*, in *Informatica e diritto*, XXXIX annata, Vol. XXII, 2013.

RUSKOLA T., *Legal Orientalism, China, United States and Modern Law*,

Harward University Press, Massachusetts, 2013.

SAID E. W., *Orientalism*, Pantheon Books, New York, 1978.

SALMOND J., *Book review: jurisprudence,* in Glanville L. Williams (ed.), in *Modern Law Review*, 1947.

SAMMUT I., *Constructing Modern European Private Law: A Hybrid System*, Cambridge Scholars Publisher, Cambridge, 2016.

SARACENI E.G., *L'autorità ragionevole. Premesse per uno studio del diritto canonico amministrativo secondo il principio di ragionevolezza*, Giuffré, Milano.

SCHIPANI S., *The UNIDROIT Principles of International Commercial Contracts*, available at: http://lmydlf.cupl.edu.cn/info/1021/1109.htm.

SCHLECHTRIEM P., *Uniform Sales Law - The UN-Convention on Contracts for the International Sale of Goods*, Manz, Wien, 1986.

SCHWARZ-LIEBERMANN VON WAHLENDOR H.A. f, *Le juge "législateur", L'approche anglaise*, in *Revue internationale de droit comparé*, 1999.

SCHWENZER I., *Global Unification of Contract Law*, in *Uniform Law Review*, vol. 21, issue 1, 2016.

SCHWENZER I., *Regional and Global Unification of Sales Law*, in *European Journal of law Reform*, n. 3, 2011.

SCHWENZER O. I., HACHEM P., KEE C., *Global Sales and Contract Law*, Oxford University Press, Oxford, 2012.

SHIYAN H., *The CISG and the Modernisation of the Chinese Contract Law*, in *International Trade/ADR in South Pacific*, Hors Serie Volume XVII, 2014, p. 67-80.

SHUZO S.G. (Janpanese), *Principle of Chinese Family Law*, translated by J.G. Zhang, Commercial Press, Beijing, 2013. This concept is also related to the collective idea of Chinese society, where it is not the individual interest that is considered, but rather the collectivity. 滋贺秀

三（日），《中国家族法原理》，张建国译，商务印书馆，2013 年。

SMITS J., *Introduction to Special Issue: Harmonisation of Contract Law: An Economic and Behavioural Perspective*, in *European Journal of Law and Economics* vol. 33, issue 3, 2012.

SMYTHE D. J., *Reasonable Standards for Contract Interpretations under the CISG*, in *Cardozo Journal of International and Comparative Law*, issue 1, 2016.

STEVENSON A., C. LINDBERG A. (ed.), *New Oxford English Dictionary* (3rd ed.), Oxford University Press Print, 2011.

STUDY GROUP ON A EUROPEAN CIVIL CODE, *Principles, Definitions and Model Rules of European Private Law - Draft Common Frame of Reference (DCFR) Outline Edition*, Munich, 2009.

SUN M.L., *Changes of Circumstance and Contract Theory,* Beijing Law Press, Beijing, 2004. 孙美兰《情事变动与契约理论》,北京法律出版社，2004 年。

TAN L., *On the Principle of Fairness*, in *Modern Law*, No. 4, 1989,.谭玲，《论公平原则》，现代法学，1989 年第 4 期，第 27 页。

The Contemporary Chinese-English Dictionary, Beijing, 2002.

TIMOTEO M., *China Codifies. The First Book of the Civil Code between Western Models to Chinese Characteristics*, in *Opinio Juris in Comparatione*, 2019.

TIMOTEO M., *Vague Notions in Chinese Contract Law: The Case of Heli*, in *European Review of Private Law*, 2010.

TREITEL G.H., *Frustration and Force Majeure*, Sweet & Maxwell, London, 2004.

TROIANO S., *La «ragionevolezza» nel diritto dei contratti*, CEDAM, Milan, 2005.

TROIANO S., *To What Extent can the Notion of Reasonableness Help to Harmonize European Contract Law? Problems and Prospects from a Civil Law Perspective*， in *European Review of Private Law,* vol. 17, n. 5, 2009.

TWIGG-FLESNER C., *Deep impact? The EC Directive on Unfair Commercial Practices and domestic consumer law*, in *Law Quarterly Review*, 2005.

VENEZIANO A., *The Soft Law Approach to Unification of International Commercial Contracts Law: Future Perspectives in Light of Unidroit Experience*, in *Villanova Law Review*, volume 58, issue 4, 2013.

VIGLIONE F., *Metodi e modelli di interpretazione del contratto, Prospettive di un dialogo tra common law e civil law*, Giappichelli, Torino, 2011.

VILUS J., *Common Law Institutions in the UN Sales Convention*, in *Studios en Homenaje a Jorge Barrera Graf*, vol. II, Universidad Naciond Autónoma de México, Ciudad Universitaria, 1989.

VOOGD C.G. B., CASTERMANS A.G., KNIGGE M.W., VAN DER LINDEN T. , TEN OEVER H.A. (ed.), *The Introduction Core Concepts in the Dutch Civil Code Continuously in Motion,* Kluwer Publisher, Amsterdam, 2016, available at: HTTPS://OPENACCESS.LEIDENUNIV.NL/BITSTREAM/HANDLE/1887/42930/000_04_BWKJ_30_17-03-2016.PDF?SEQUENCE=1.

WALKER D. M., *the Oxford Companion to Law,* Clarendon Press, Oxford, 1980.

WANG K., *The Ancient Chinese Civil Law*, in *Journal of Hubei Radio & TV University*, Vol. 28, 2008.王昆，《浅论古代中国固有民法》，湖北广播电视大学学报，2008 年第 8 期，第 28 卷。

WANG L.M., CUI ,J.Y., *New Theory on Contract Law; General Provisions*, Law Press, Beijing, 1996, p. 322. 王利明、崔建远著：《合同

法新论；总则》，法律出版社，1996 年。

WEI Z.Y, *Principles and Practices of Civil and Commercial Law*, Peking University Press, Beijing, 1995. 魏振瀛：《民商法原理与实务》，北京大学出版，1995 年。

WEISZBERG G., *Le "Raisonnable" en Droit du Commerce International*, thesis Paris II, 2003, Pace Database, n. 33, available at *https://www.lagbd.org/images/e/ef/Pour_le_Pr_TRICOT_%3D_Th%C3%A8se_de_Guillaume_Weiszberg_le_raisonnable_en_droit_du_commerce_international_%282%29.pdf*.

WHITTAKER S., *Theory and Practice of the "general clause" in English Law: General norms and the Structuring of Judicial Discretion*, S. Grundmann, D Mazeaud(eds.), *General Clauses and Standads in European Law*, Kluwer Law International, Hague, 2000.

WILL M. R., *Twenty Years of International Sales Law Under the Cisg: International Bibliography and Case Law Digest*, Kluwer Law International, Hague, 2000.

WINDROW H., *A Short History of Law, Norms and Social Control in Imperial China*, in *Asia Pacific Law and Policy Journal*, 2006.

WITHED C. M., T*he Unidroit Principles of International Commercial Contracts: an Overview of their Utility and the Role they Have Played in Reforming Domestic Contract Law Aorund the Word*, in *ILSA Journal of International and Comparative Law*, 2011.

Working Group on the International Sale of Goods, *Yearbook of the United Nations Commission on International Trade Law, 1973, Volume IV*, available at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/yb_1973_e.pdf.

WORKING GROUP ON THE INTERNATIONAL SALE OF GOODS, *Yearbook of the United Nations Commission on International Trade Law, 1971, Volume II*, available at: https://undocs.org/en/A/CN.9/52.

WORKING GROUP ON THE INTERNATIONAL SALE OF GOODS, *Yearbook of the United Nations Commission on International Trade Law, 1972, Volume IV,* p.57 *available at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/yb_1975_e.pdf.*

WU X.Y., *The Golden Mean and its Modernity Dilemma: Tradition and Transformation of Folk Dispute*, in *Theory and Reform*, No.2. 2017. 邬欣言，《中庸理性与现代性困境:民间纠纷解决场域中实践逻辑的传统与转型》，理论与改革，2017 年第 2 期。

XIE H.F., *The change of the inner system of the contract section of the Civil Code*, in *Journal of Shanxi University (Philosophy and Social Science Edition)*, No. 6, 2020. 谢鸿飞，《<民法典>合同编内在体系的变迁》.山西大学学报(哲学社会科学版),2020,第 6 期。

Xinhua Online Dictionary, 新华在线字典, http://xh.5156edu.com/html5/233385.html.

YANG L.X., *Gorgeous Turn around and Torturous Development of Chinese Civil Law in a Century—Review and Prospect of the 100-year History of Chinese Civil Law*, in *Journal of Henan University of Economics and Law*,No.5, 2011. 杨立新，《百年中的中国民法华丽转身与曲折发展——中国民法一百年历史的回顾与展望》，第 5 期，河南财经政法大学学报，2011 年。

YU R.G., *Traditional Ritual and Chinese Legal System*, China Publishing Group, Beijing, 2016. 俞荣根,《礼法传统与中华法系》，中国民主法制出版社， 2016 年。

ZELLER B., *Mitigation of damages: Comparison between the provisions of the CISG (Art. 77) and the counterpart provisions of the Principles of European Contract Law (Art. 9:505)*, Cambridge University Press, Cambridge, 2007.

ZENG X.Y., *Chinese Legal History*, China Renmin University Press, Beijing, 2003. 曾宪义，《中国法制史》，中国人民大学出版社，2013 年。

ZHANG J. P., *The traditional Chinese Law and the Transform of Modern China*, Law Press, Beijing, 1997. 张晋藩，《中国法律的传统与近代转型》，法律出版社，1997 年。

ZHANG Y. H (ed.), *Jurisprudence in society*, Law Press, Beijing, 2016. 张永和编，《社会中的法理》，法律出版社，2016。

ZHANG Y., *On the Principles of Circumstance Change*s, East China University of Political Science and Law, 2019. 张宇，《论情势变更原则》，华东政法大学，2019 年。

ZHAO W.Y., *Medical Analysis of the fairness Principle of Civil Law*, in *Chongqing Social Sciences*, 2004. 赵万一，《民法公平原则的伦理分析》，重庆社会科学，2004 年，第 2 期。

ZHONG J.H., YU G.H., *China's Uniform Contract Law: Progress and Problems*, in *Pacific Basin Law Journal*, 17(1), 1999.

ZHU X. (Song Dynasty), *The Interpretation of the Golden Mean*, Zhonghua Book Company, Beijing, 1981. 朱熹（宋），《中庸章句序》，中华书局，1981 年。

ZIEGEL J., *The Future of the International Sales Convention from a Common Law Perspective*, in *New Zealand Business Law Quarterly*, 2000.

ZORZETTO S., *The Uses of Reasonableness in the Constitutional Interpretation and Arbitration: A Comparative and Theoretical Analysis about the Law in Action*, in *Magallat Kulliyyat Al-Qanun Al-Kuwaytiyyatal-Alamiyyat*, 2017, available at https://journal.kilaw.edu.kw/wp-content/uploads/2018/12/%D8%B3%D9%8A%D9%84%D9%81%D9%8A%D8%A7-

%D8%B2%D9%88%D8%B1%D9%88%D9%8A%D8%AA%D9%88.pdf.

ZORZETTO S., *Reasonableness*, in *The Italian Law Journal*, vol. 1, n. 1, 2015.

ZWART S. G., *The New International Law of Sales: A Marriage Between Socialist, Third World, Common, and Civil Law Principles*, in *North Carolina Journal of International Law*, 1988.

Cases:

Antaios Compania Naviera SA v Salen Rederierna AB HL 1984

Arnold (Respondent) v Britton and others (Appellants) [2015] UKSC 36

Arnold v Britton & Ors [2015] UKSC 36

Bank of Australia v. Palmer [1897] A.C. 540

Bundesgerichtshof 3 November 1999 [VIII ZR 287/98]

National Westminster Bank Ltd v Halesowen Presswork & Assemblies Ltd [1972] AC 785

BCCI v. ALI [2001] 1 UKHL 8; The "Starsin"[2003] 1 Lloyd's Rep. 571

Case C-210/96, Gut Springenheide and Tusky v Oberkreisdirektor des Kreises Steinfurt, ECLI:EU:C:1998:369.

Case C-52/18, Christian Fülla v Toolport GmbH, ECLI:EU:C:2019:447

Case C-632/16, Dyson Ltd, Dyson BV v. BSH Home Appliances NV, ECLI:EU:C:2018:599.

Cases C-503/13 and C-504/13, Boston Scientific Medizintechnik GmbH v. AOK Sachsen-Anhalt — Die Gesundheitskasse (C-503/13), Betriebskrankenkasse RWE (C-504/13), ECLI:EU:C:2015:148.

Charter Reinsurance Co Ltd v. Fagan [1997] AC 313

Commonwealth Smelting v. GRB [1986] 1 Lloyd's Rep. 121

Companhia de Geração Térmica de Energia Elétrica v Kreditanstalt fur Wiederaufbau Bankengruppe, Special Appeal 1.550.260.

CO-operational whole society Ltd V National Westminster Bank PLC [1995] 1 EGLR 97

Davis Contractors Ltd v Fareham Urban District Council [1956] AC

696 (HL)

Fujian Wanxiang Real Estate Development Co., Ltd. v. You Binqiong, The Supreme People's Court (2016) Zui Gao Fa Min Shen Civil Judgment No.733. 福建省万翔房地产开发有限公司与游斌琼民间借贷纠纷再审案,最高人民法院(2016)最高法民申 733 号民事判决书。

Gardiner v Gray [1815] 4 Camp 144

Goodlife Foods Ltd v Hall Fire Protection Ltd [2018] EWCA Civ 1371.

HIH Casualty and General Insurance Ltd. v. New Hampshire Insurance Co. [2001] 2 Lloyd's Rep.161

Hirji Mulji v. Cheong Yue Steamship Co. Ltd. [1926] A.C.497

Hoddeson v. Koos Bros., 47 N.J. Super. 224, 135 A.2d 702, 1957 N.J. Super. LEXIS 631

Hydrocarbons Great Britain v. Cammell Laird Shipbuilders [1991] 53 B.L.R. 84, CA

ICC Award No. 6281 of 1989, YCA 1990, at 96 et seq.

Investors Compensation Scheme Ltd. v West Bromwich Building Society [1997] UKHL 28

Leader v. Duffery [1888] 12 App. Cas. 294 at 301, HL.

Liverpool City Council v Irwin [1976] UKHL 1.

LLP v Aumm Holdings Ltd [2015] EWHC 2615 (Comm)

Lord Ellenborough in Roberson v. French [1803] East, 130.

Lu Ming v. Xu Yingye, Zhejiang Deqing People's Court (2018) Zhe 0521 Min Chu Zi Civil Judgment No. 1512.吕明诉许颖玉民间借贷纠纷案，浙江省德清县人民法院（2018）浙 0521 民初 1512 号民事判决书。

Macaulay v Schroeder Music Publishing Co Ltd [1974] 1 WLR 1308

Mosvolds Rederi A/S v Food Corporation of India [1986] 2 Lloyds Rep. 68

National Coal Board v. William Neill & Son [1985] Q.B. 300

OGH 27 August 1999, 1 Ob 223/99x, [2000] RdW No. 10

Paradine v Jane [1647] EWHC KB J5

Pioneer Shipping Ltd v BTP Tioxide Ltd (The Nema) [1982] AC 724

Prenn v. Simmonds [1971] 1 W.L.R.

Rainy Sky SA and others y Kookmin Bank [2012] 1 Lloyd's Rep 34

Rainy Sky SA v Kookmin Bank [2011] 1 WLR 2900

Re Coward [1887] 57 L.T. 285 at 291, CA.

Regus (UK) Ltd v Epcot Solutions Ltd, [2008] EWCA Civ 36

Shen Tao, Shen Xiwen and Shanghai Greenland Zhao Xiang Real Estate Co., Ltd ,Shanghai Second Intermediate People's Court (2019) Hu02 Min Zhong No. 6819 civil judgment 上海市第二中级人民法院（2019）沪 02 民终 6819 号民事判决书

Shirlaw v Southern Foundries (1926) Ltd [1939] 2 KB 206

Sigma Finance Corporation [2009] UKSC 2

Smith v Hughes [1871] LR 6 QB 597.

Société Karl Schreiber GmbH v. Société Termo Dynamique Service et autres, 26 May 1999, Cour de Cassation, [2000] Recueil Dalloz 788, http://cisgw3.law.pace.edu/cases/990526f1.html.

Taylor v Caldwell [1863] EWHC QB J1

The "Diana Prosperity" [1976] 2 Lloyd's Rep. 621

The Moorcock[1889] 14 PD 64

Wang Zhoucun,Ren Guixia v. Qinglong Village seven groups, Gazette of the Supreme People's Court , 1990 No.3 (General :23).王周存、

任桂侠诉青龙村七组果园承包合同纠纷案，《最高人民法院公报》 1990 年第 3 期(总:23 期).

Watford Electronics Ltd v Sanderson CFL Ltd [2001] EWCA Civ 317

Wuhan Municipal Coal Gas Corp. v. Chongqing Measuring Instrument Factory, SPC Gazette, Issue 2,1996. 武汉市煤气公司诉重庆检测仪表厂煤气表装配线技术转让合同、煤气表散件购销合同纠纷案，最高人民法院公报，第 21 其，1996 年。

Villager committee of Lutong, Pongshui town, Changzhou district v. Li Yi, Wuzhou , Changzhou District People's Court (2017) Gui 0405 Minchu No. 184 civil judgment; Wuzhou Intermediate People's Court (2018) Gui 04 Min Zhong No. 1206 civil judgment; Wuzhou Intermediate People's Court (2020) Gui 04 Min Zhong No. 852 civil judgment.梧州市长洲区倒水镇路垌村民委员会与黎毅农村土地承包合同纠纷,梧州市长洲区人民法院（2017）桂 0405 民初 184 号民事判决书;梧州市中级人民法院（2018）桂 04 民终 1206 号民事判决书; 梧州市中级人民法院（2020）桂 04 民终 852 号民事判决书

Xinji Maternal and Child Health Care Hospital and villagers committee of Wenjiafangbei Village, Xinji Town Shijiazhuang Municipal Intermediate People's Court (2017) Ji 01 Minzhi No. 2044 Civil Judgment 辛集市妇幼保健院与辛集市辛集镇温家方碑村村民委员会租赁合同纠纷案，石家庄市中级人民法院（2017）冀 01 民终 2044 号民事判决书

Xu Jingshu v. Pingfu Township, Teng County Guohe Feibo Forest Farm, Wuzhou Intermediate People's Court, (2019) Gui 04 Min Zhong No. 659 civil judgment 许景舒与藤县平福国合飞播林场林业承包合同纠纷案，梧州市中级人民法院，（2019）桂 04 民终 659 号民事判决书

Zhao Meiling, Ye Xiusheng, Chen Guimei, Ye Zhichao, Ye Chaoying v. Ge Yuanping Civil Lending Disputes Case, Zhejiang Taizhou Intermediate People's Court (2010) Zhe Tai Shang Zhong Zi Civil

Judgment No.594.赵美玲、叶秀生、陈桂梅、叶智超、叶超英诉葛元平民间借贷纠纷案，浙江省台州市中级人民法院（2010）浙台商终字第 594 号民事判决书。

Shandong Shengyuan Amusement Industry Development Co., Ltd. v. Zibo Jinyang New Egergy Science&Technology Co., Ltd. Shandong Zibo Intermediate People's Court (2018) Lu 03 Min Zhong Civil Judgment No.413. 山东盛圆游乐产业发展有限公司与淄博金阳新能源科技有限公司房屋租赁合同纠纷上诉案，山东省淄博市中级人民法院（2018）鲁 03 民终 413 号民事判决

Zhong Jincai v. Pan Jianxiang, Zhejiang Deqing People's Court (2018) Zhe 0521 Min Chu Zi Civil Judgment No.1689.钟锦财诉潘建祥等民间借贷纠纷案，浙江省德清县人民法院 （2018）浙 0521 民初 1689 号民事判决书。

Zhuang Qingxiang v. Fujian Auanzhou Construction Engineering co., LTD and Zheng Yushan.Fujian Xiamen Tong'an People's Court (2009)Tong Min Chu Zi Civil Judgment No.3059. 庄清祥诉福建省泉州市建筑工程有限公司、郑玉山民间借贷案，福建省厦门市同安区人民法院(2009)同民初字第 3059 号民事判决书。