Contractual Validity According to the UNIDROIT Principles

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A. Introduction

The third chapter of the UNIDROIT Principles, which deals with 'validity', has not, to date, been given much attention in academic writings.[1] Nevertheless, it represents a noteworthy innovation to the road towards international harmonization of private law. Previously, questions of validity had, in large, been left out of international agreements. This is mainly due to the enormous difficulties involved in finding a common denominator. Reference will first be made to Article 4 of the United Nations Convention on the International Sale of Goods (CISG), where this lacuna is explicitly stated. On the other hand we must remember the 1983 Geneva Convention on Agency in the International Sale of Goods, which is based on an UNIDROIT draft, and covers at least a sub-complex of the problem of validity but has not yet come into effect.[2]

The more recent Lando Commission's Principles of European Contract Law (the European Principles) follow the example of the UNIDROIT Principles. In 1997 the Commission submitted a draft chapter on 'validity' which, however, has not yet been officially published.[3] The rules introduced by the third chapter of the UNIDROIT Principles are far from being a complete treatment of all questions of validity. Their

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1 The most important is probably the essay by Drobnig, 'Substantive Validity' in (1992) 40 *American Journal of Comparative Law*, at pp. 635 et seq. The essays by Fabre-Magnan, 'Defects on Consent in Contract Law', at p. 217, Storme, 'The Bonding Character of Contracts – Causa and Consideration', at p. 239 and Howarth, 'The General Conditions of Unlawfulness', at p. 397, all in *Towards a European Civil Code* (Hartkamp et al. (eds.) (1998, 2nd ed.), could no longer be taken into account for this article.

2 On this topic *see* Bonell, 'The 1983 Geneva Convention on Agency in the International Sale of Goods' in (1984) 32 *American Journal of Comparative Law*, p. 717 et seq.

3 Up to now only the section covering performance and non-performance has been published. *See* Lando and Beale (eds.), *The Principles of European Contract Law, Part I: Performance, Non-Performance and Remedies* (1995).

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fragmentary character is explicitly demonstrated by Article 3.1, according to which the Principles do not deal with contractual invalidity arising from:

(a) lack of capacity;
(b) lack of authority;
(c) immorality or illegality.

The exclusion of problems deriving from lack of authority is presumably based on the view that such issues had already been adequately dealt with by the Geneva Convention.[4] The exclusion of immorality and illegality indicates that the UNIDROIT Principles do not cover 'substantive unfairness'[5] or, to use the words of § 2-302 of the Uniform Commercial Code (UCC), the 'unconscionability' of a contract. Therefore, the fairness or unfairness of terms and conditions in standard form contracts cannot be reviewed under the Principles either. As Anton K. Schnyder has pointed out,[6] where the Principles refer to terms and conditions of form contracts in Articles 2.19 to 2.22, they address only problems related to the formation of contracts. Even Article 2.20, the provision dealing with 'surprising terms', fails to provide for a substantive review of contractual terms. In this respect, the European Principles surpass the UNIDROIT Principles by providing, in Article 4.110, paragraph 1 of the draft, a general clause for the elusion of 'unfair terms' which were not individually negotiated.[7] The specific rules introduced by Articles 7.1.6 and 7.4.13 of the UNIDROIT Principles, and their inception of a substantive review of contracts, shall be considered in more detail later.

The problem of 'substantive unfairness' of contractual terms is to some degree the background of Article 3.10 of the Principles dealing with 'gross disparity' (excessive advantage). However, just as in the case of unfair advantage under Article 21 of the Swiss Code of Obligations (OR) or in the case of usury under § 138, paragraph 2 of

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[4] This is also assumed by Karollus, in a review in (1997) 61 *RabelsZ*, at p. 584.

[5] On the distinction between 'procedural contractual justice' and 'substantive contractual justice' *see* particularly von Mehren, 'A General Review of Contract' in *International Encyclopedia of Comparative Law*, Vol. VII, Chap. 1, at p. 64 et seq. In relation to the UNIDROIT Principles, Bonell, *An International Restatement of Contract Law* (1997, 2nd ed.) at p. 150 et seq., distinguishes between tests for the 'substantive unfairness' and the 'procedural unfairness' of a contract; *see also* Bonell, 'Policing the International Commercial Contract against Unfairness under the UNIDROIT Principles' in (1995) 3 *Tulane Journal of International and Comparative Law*, at p. 72 et seq.

[6] *See* pp. 63 of this issue.

[7] Art. 4.110 para. 1 of the European Principles: 'A party may avoid a term which has not been negotiated individually if, contrary to the requirements of good faith and fair dealing, it causes a significant imbalance in the parties' rights and obligations arising under the contract to the detriment of that party, taking into account the nature of the performance to be made under the contract, all the other terms of the contract and the circumstances at the time the contract was concluded.'

the German BGB,[8] 'substantive unfairness' of contractual terms, or a gross disparity between the obligations of the parties, is not sufficient as such. Unless there is an element of 'procedural unfairness', a contract cannot be avoided under Article 3.10 of the Principles, as will be shown.[9] Strictly speaking, therefore, Article 3.10 does not provide for a substantive test of contractual terms either.[10]

The fact that the UNIDROIT Principles dispense with a comprehensive treatment of the substantive review of contracts may be regrettable. It becomes at least understandable if one considers that the Principles were conceived for international commercial agreements and not for consumer contracts. For the latter, rules on the substantive review of terms and conditions in standard form contracts, and generally an adequate balance between the parties' obligations, are of central importance, a fact which also explains why a growing number of EU Directives deal with terms in consumer contracts.[11] From this point of view, it is move problematic that the Principles also dispense with any provisions for the consequences of illegality of contracts. The many possible forms of illegality of international commercial agreements are well known.[12]

B. Main Part

I. 'Negative' Rules Concerning Questions of Validity

The practical relevance of the chapter on validity is limited by the following three clarifying, or 'negative', rules in the Principles.

1. Article 3.2

According to Article 3.2. the contract is concluded by mere agreement of the parties, without any further requirements, and thus purely on the basis of consensus. This rule, which appears self-evident to Swiss or German lawyers, does not serve as an implicit recognition of the principle that there are no general requirements as to form, since the latter principle is already postulated in Article 1.2. Therefore, Article 3.2 clarifies that, according to the UNIDROIT Principles, the contract's validity

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[8] Further comparative remarks can be found in Kramer, in *Berner Kommentar zum Obligationenrecht*: Arts. 19–21 OR (1991), Art. 21, note 9.

[9] *See infra* B VI 1. 'Gross Disparity General considerations on the ratio legis.'

[10] *See* Bonell *supra* note 5 at p. 162 et seq., speaks of 'policing the combination of procedural and substantive unfairness'.

[11] E.g. Council Directive 93/13/EEC of 5 April 1993, OJ 1993 L 85/21.

[12] On this topic *see also infra* B II 4. Equally, the European Principles do not contain rules on 'illegality' and its consequences in their 1997 draft.

does not require 'consideration'[13] or (as in the Roman legal tradition) a 'cause'.[14] This requirement is generally known to be somewhat obscure and was consequently abandoned in the new Dutch Civil Code (NBW).[15] Article 3.2 further clarifies that, by contrast to certain civil law systems such as the French system,[16] the UNIDROIT Principles do not know the notion of 'real' contracts, where a contract is formed only at the time of performance.

2. *Article 3.3*

By contrast to many civil law systems,[17] where Celsus is still the authority (*impossibilium nulla obligatio est*),[18] the Principles, in the tradition of common law, make it clear in Article 3.3, paragraph 1 that the initial impossibility of performance, as such, does not lead to the invalidation of the contract. This is a correct and important clarification which is lacking in the CISG. With respect to that Convention, the question has been raised, therefore, whether the initial impossibility should be seen as a problem of validity (which, according to its Art. 4, the Convention does not cover), or whether initial impossibility is a form of breach of contract on the seller's part and thus a problem of non-performance,[19] the legal consequences of which are regulated exclusively by the CISG.[20] Article 3.3, paragraph 2 further clarifies that the mere fact that at the time of the conclusion of the contract a party was not entitled to dispose of the assets to which the contract relates, for instance because as seller she was not the owner of the respective goods, again does not affect the contract's validity.[21]

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[13] *See* Comment 1 on Art. 3.1 of the Principles in the official edition of 1994. On the endeavours for reform in England, *see* for instance, Treitel, *The Law of Contract* (1995, 9th ed.) at p. 147 et seq.

[14] *See* the description by Kötz, *Europäisches Vertragsrecht* (Vol. 1, 1996), at p. 81 et seq.

[15] *See* Bassani and Mincke, 'Europa sine causa' in (1997) *ZEuP*, at p. 604. On Italian law, from the point of view of comparative law, *see recently* Broggini, *Causa e contratto nella prospettiva storico-comparatistica* (Vacca (ed.)) (1997) at p. 26 et seq.

[16] *See* for example Ghestin, 'Les obligations: Formation' in *Traité de droit civil* (1993, 3rd ed.) at note 447 et seq. (pp. 413 et seq.).

[17] Many further references can be found in Bonell *supra* note 5 at p. 127 et seq, note 51.

[18] Dig. 50, 70, 185. On this tradition *see* Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (1990) at p. 686 et seq. For an illumination of the background to Art. 3.3 of the Principles from the point of view of comparative law and philosophy of law, *see* M.E. Franke et al. (eds.), 'Europees contractenrecht' in *BW-krant jaarboek* (1995) at p. 127 et seq.

[19] On this correct interpretation *see also* Stoll, in von Caemmerer and Schlechtriem, *Kommentar zum Einheitlichen UN-Kaufrecht* (1995, 2nd ed.) Art. 79, note 19.

[20] Art. 3.3 of the Principles naturally does not rule out that initial impossibility and a common mistake can coincide, *see* Drobnig, 'Substantive Validity' in (1992) 40 *American Journal of Comparative Law*, at p. 641. In this case, however, avoidance cannot be used because of Art. 3.7 of the Principles (*see infra* at B I 3).

[21] *See* Comment 2 on Art. 3.3 of the official 1997 edition of the Principles; *see also* Perillo, 'UNIDROIT Principles of International Commercial Contracts: The Black Letter Text and a Review' in (1994) LXIII *Fordham Law Review*, at p. 291 et seq.

3. Article 3.7

The third important negative clarification in the Principles can be found in Article 3.7. It concerns the relationship between avoidance for mistake and remedies for non-performance. According to this rule, avoidance for mistake is a secondary remedy which is not available when the circumstances on which the mistaken party relies afford, or could have afforded, a remedy for non-performance. Again, this is a clear and unambiguous rule for a problem which leads to considerable difficulties under the CISG. Namely, whether avoidance for mistake is indeed a question of validity to which the Convention, according to Article 4, does not apply and which, therefore, has to be solved by reference to the national legal system applicable under private international law, or whether the rules of the CISG prevail and are applicable on an exclusive basis.[22] This is especially relevant in the case of mistake on behalf of the buyer about certain qualities of the goods and a corresponding breach of contract on the seller's part. An example would be the sale of a false painting, claimed to be a Van Gogh or Picasso, to allude to two much debated decisions of the Swiss Federal Court.[23]

When comparing CISG and UNIDROIT Principles, one should, however, bear in mind that the question of the exclusivity of remedies for non-performance, as opposed to avoidance for mistake, plays an entirely different role in the Principles than in the CISG. Where the CISG is applicable, the fundamental question is whether the harmonization of the law on non-performance achieved by it should be undermined by recourse to the national rules on mistake which are applicable according to private international law. Where the UNIDROIT Principles are applicable, on the other hand, the entire question is significantly less dramatic, since it concerns the relationship between two legal themes (avoidance on the ground of mistake and non-performance) which are both regulated in the Principles.

II. Clear and Certain Content of Contracts; Substantive Review in Particular Cases; Refusal of Governmental Permission

1. Article 5.7 paragraph 1

According to the civil law tradition, contracts are invalid if their content is not sufficiently clear. In particular, French law follows the principle of *pretium*

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[22] This majority view is shared for example by Schlechtriem, *Internationales UN-Kaufrecht* (1996) at p. 22 et seq.; for a thorough analysis of the justification for these decisions *see* P. Huber, 'UN-Kaufrecht und Irrtumsanfedstung' in (1994) *ZEuP*, at p. 585 et seq.; *see also* Kramer, 'Uniforme Interpretation von Einheitsprivatrecht-mit besonder Berüsicktigung von Art. 7 UN-Kaufrecht' in (1996) *JBl*, at p. 150 et seq. Further references concerning this discussion can be found in *Magnus*, in *Staudinger Kommentar: Wiener UN-Kaufrecht* (CISG) 1994, 13th ed., Art. 4, note 48.

[23] BGE, 82 II 411 et seq.; 114 II 131 et seq.

certum.[24] Article 5.7, paragraph 1 of the Principles introduces an important limitation to this notion in favour of the commerce friendly principle of *favor negotii*: 'Where a contract does not fix or make provisions for determining the price', it does not become invalid. Rather, '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'. This is almost verbatim the language used in Article 55 of the CISG. However, under the CISG there is an immanent contradiction due to the rather rigid requirement for the certainty of offers. Article 14, paragraph 1 of the CISG demands that the offer, if it is to be effective, either explicitly or tacitly determines the price or at least makes its determination possible.[25] The approach in the UNIDROIT Principles is much more pragmatic. In Article 2.2 they only require that the offer be sufficiently certain and thus avoid the contradiction found in the CISG.

2. *Articles 7.1.6 and 7.4.13*

Articles 7.1.6 and 7.4.13 contain particular rules for substantive review, which, as explained, is otherwise not covered by the Principles. According to the first of these rules, '[a] clause which limits or excludes ... liability for non-performance or which permits one party to tender performance substantially different from what the other party reasonably expected may not be invoked if it would be grossly unfair to do so, having regard to the purpose of the contract'.[26] By contrast to the approach taken, for example, in Articles 100 and 101 of the Swiss OR, the Principles do not only look at the degree of culpability but provide a much more flexible, albeit also vaguer, may be too vague solution. It is reasonably safe, however, to presume that the limitation or exclusion of liability can never be invoked in cases of gross negligence on the debtor's part.[27] For cases of (malignant) intent, this is self-evident. However, and this is where the Principles are more flexible than the above-mentioned provisions of Swiss law, the invocation of a clause which limits or excludes liability can also be

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[24] *See* Kötz *supra* note 14 at p. 64 et seq. The decisions of the *Cour de Cassation* have recently become more flexible, however. *See* Cass. civ. 29 November 1994 J.C.P. 1995 II 22371 (with annotation by Ghestin) = D 1995, 112 (with annotation by Aynès) and subsequently Cass. (*assemblée pléniére*) 1 December 1995 D 1996, 13 (with annotation by Aynès); *see* the detailed discussion by Witz and Wolter, 'Das Ende der Problematik des unbestimmten Preises in Frankreich' in (1996) *ZEuP*, at p. 648 et seq.; and Brunet and Ghozi, 'La jurisprudence de l'Assemblée plenière sur le prix du point de vue de la théorie du contrat' D 1998, chap. 1 et seq.

[25] Concerning the solution of this conflict *see* for example Schlechtriem, in von Caemmerer and Schlechtriem, *Kommentar zum Einheitlichen UN-Kaufrecht*, (1995, 2nd ed.) Art. 14, note 10 et seq.

[26] Art. 7.1.6 does not, however, attempt to formulate a real and general test of contents but is rather an abuse test for particular cases.

[27] *See* Comment 5 on Art. 7.1.6 of the Principles, in the official edition of 1994.

denied in cases of ordinary or even slight negligence, as anything else would be grossly unfair.

As cited above, Article 7.1.6 also covers clauses which permit one party to tender performance in a way that differs substantially from what the other party reasonably expected.[28] Swiss law lacks a corresponding rule; German law has one in § 10 Nr. 4 Standard Form Contracts Act (AGBG),[29] which is, however, limited to clauses in standard form contracts.

3. Article 7.4.13

Article 7.4.13, paragraph 2 provides a possibility for the judge or arbiter to modify contractual penalties for non-performance, if the stipulated amount is 'grossly excessive in relation to the harm resulting from the non-performance and to the other circumstances'. Such a rule is familiar to most civil law legal systems,[30] but is in a certain contrast to common law with its traditional distinction[31] between legitimate 'liquidated damages clauses' (rules on lump sum damages) and 'penalty clauses'. The latter are clauses fixing remarkably high penalties in a prophylactic attempt to enforce performance. Under common law they are considered unlawful and invalid.

4. Article 6.1.17

Article 6.1.17, paragraph 1 deals with the consequences of a refusal of a (governmental) permission affecting the validity of the contract. As a rule, the contract is null and void in such a case. However, if the refusal affects only the validity of some terms of the contract, 'only such terms are void if, having regard to the circumstances, it is reasonable to uphold the remaining contract'.

It should be considered whether this solution, already familiar to Swiss lawyers as Article 20, paragraph 2 of the OR, could be applied by analogy to the much more significant set of problems posed by partial nullity on grounds of illegality. However, even if this would seem reasonable, it is ruled out by Article 3.1. According to this provision, the Principles do not cover invalidity arising from illegality. Where the

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[28] *See* the illustration of Comment 2 on Art. 7.1.6 of the Principles, in the official edition of 1994.

[29] According to this provision the agreement that the user shall be entitled to modify the promised performance or deviate from it is not valid unless such an agreement on the modification or deviation would not be unreasonable in light of the interests of the other party to the contract. Similar provisions can be found in § 6, para. 2(3) of the Austrian consumer protection law and Art. 237, lit. c of Book 6 of the Dutch NBW.

[30] Examples are Art. 163, para. 3, OR; § 343 BGB; § 1336, para. 2 ABGB; Art. 1152, 2nd clause, Code Civil.

[31] *See* Comment 1 on Art. 7.4.13 of the Principles in the official edition of 1994; *see also* Perillo, in 'UNIDROIT Principles of International Commercial Contracts: The Black Letter Text and a Review' in (1994) LXIII *Fordham Law Review*, at p. 313 et seq. For details on English law *see Chitty on Contracts, Vol. I, General Principles* (1994, 27th ed.) at pp. 26-061.

refusal of a permission renders the performance of the contract impossible in whole or in part, Article 6.1.17, paragraph 2 of the Principles, provides that the rules on non-performance are to be applied.

III. Rules on Mistake

The rules on avoidance for mistake are without doubt the most interesting and innovative part of the third chapter of the UNIDROIT Principles. They represent a first attempt at an international harmonization of this extremely difficult subject, which Hugo Grotius himself described as 'bewildering'.[32] A draft regulation published in 1968 by the Max-Planck-Institute in Hamburg for the attention of UNIDROIT laid important groundwork for the rules now contained in the Principles.[33]

Analysis of the confusing abundance of approaches developed around the world to deal with questions of mistake shows, in very simplified terms, three basic conceptions.[34] First, there is the 'casuistic approach', which, in the tradition of Roman law, distinguishes various types of mistakes, such as *error in persona*, *in substantia*, *in negotio*, and so on, which are considered relevant for a possible avoidance of the contract. This casuistic approach is reflected *inter alia* in Swiss law and a number of codifications in Romanic legal systems. It is also characteristic of English law.

Secondly, there is the approach of German and French law, attempting a general solution on the basis of abstract or psychological considerations. Under French law, it is decisive whether or not the mistake concerns *la subtance même de la chose* (Art. 1110 Code Civil). Under the German BGB (§ 119) the question is whether the mistake is in a declaration by the mistaken party or whether it merely refers to circumstances which affected the intention of the mistaken party prior to the declaration. Where the mistake happened prior to, and outside of the declaration of intent, another differentiation is made between relevant mistakes concerning important characteristics of the contractual performance and irrelevant mistakes in the motivation.

The third and final approach attempts a general solution with the help of substantive considerations concerning the following question: under which circumstances would it be justified, as an exception, to ascribe part of the risk of

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[32] *De iure belli ac pacis*, book II, chap. XI, VI I: *'De pacto errantis perplexa satis tractatio.'*

[33] A reprint of the draft can be found in (1968) 32 *RabelsZ*, at p. 342 et seq.; explanations are provided by Zweigert et al., 'Der Entwurf eines einheitlichen Gesetzes über die materielle Gültigkeit internationaler Kaufverträge über bewegliche Sachen' in (1968) 32 *RabelsZ*, at p. 201 et seq.

[34] Kötz *supra* note 14 at p. 62 et seq., offers an excellent overview of the European legal systems. For a world-wide comparison of law *see* Kramer, *Der Irrtum beim Vertragsschluss. Eine weltweit rechtsvergleichende Bestandsaufnahme* (1998). The following structure is a simplified version of the latter text.

mistake and misconception at the time of formation of a contract to the partner of the party making the mistake? This generally convincing approach was already followed by the Austrian ABGB of 1811 with its pioneering § 871, according to which a contract may be avoided on account of a 'mistake as to the content of the contract' (*Geschäftsirrtum*) if the contracting partner ought to have been aware of the mistake or caused the mistake or the erring party can clarify its mistake in good time. The list of reasons was subsequently expanded in doctrine and court rulings by a possibility to avoid a contract on account of a common mistake made by both parties. The question whether or not it would have been possible to detect the mistake is decisive also in the Italian Codice Civile and Scandinavian contract law. The question whether the other party caused the mistake, on the other hand, is central to common law, in the form of 'innocent misrepresentation', as well as to the new Dutch NBW (Art. 228 of Book 6).[35] The question whether both sides were mistaken is also taken into consideration in this most modern West-European codification of private law. It is equally central to US mistake law. In French law and in many codifications of Romanic legal systems,[36] as well as in US law, another question is whether or not the mistake was caused by negligence or even gross negligence on behalf of the party committing the mistake.

The UNIDROIT Principles attempt to do justice to all of these approaches. The concept of mistake is defined in Article 3.4, which clarifies that erroneous assumptions relating to facts and those relating to law are to be treated equally.[37] The central rule is contained in Article 3.5. The article emphasizes that avoidance for mistake is possible only:

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[35] On the Dutch law on errors, from a background of comparative law, *see*, van Rossum, 'Defects in Consent and Capacity in Contract Law' in *Toward a European Civil Code* (Hartkamp et al. (eds.)) (1994, 1st ed.) at p. 147 et seq., and van Rossum, 'The Concept of Dwaling under the new Civil Code compared to the Doctrine of Misrepresentation' in (1992) 39 *Netherlands International Law Review*, at p. 303 et seq.

[36] Most recently in the 1991 Code Civil of Quebec (Art. 1400, para. 2).

[37] This is in line with the modern and very welcome trend and is now even spreading into the realm of common law, *see* the New Zealand Contractual Mistakes Act 1977, s. 2.
It follows from the definition of 'mistake' in Art. 3.4 of the Principles and (with final clarity) from the explanations in Comment 2 to Art. 3.4 of the Principles in the official edition of 1994: 'that the mistake involves an erroneous assumption relating to the factual or legal circumstances that exist at the time of the conclusion of the contract.' Mistakes concerning future developments are not covered by rules on mistake (most recently and explicitly, Art. 228, para. 2, Book 6, NBW). However such a mistake can sometimes become relevant under Art. 6.2.2 ('hardship'). The inverse, however, is not necessarily the case, namely that 'hardship' requires that the events which change the balance of the contract must have occurred subsequent to the conclusion of the contract. Art. 6.2.2, lit. a also covers events of which the disadvantaged party became aware only after the conclusion of the contract even though they existed already at the time of the conclusion. It follows from this that Art. 6.2.2 is sometimes in competition with the rules on mistake. In those cases there is then a choice of legal remedy with Art. 6.2.3 on the one and Art. 3.13 et seq. on the other hand.

> if ... the mistake was of such importance that a reasonable person in the same situation of the party would not have concluded [the contract] at all if the true state of affairs had been known.[38]

If this is the case, avoidance is possible if:

> (1) the other party made the same mistake, or caused the mistake, or knew or ought to have known of the mistake and it was contrary to reasonable commercial standards of fair dealing to leave the mistaken party in error; or (2) the other party had not at the time of avoidance acted in reliance on the contract.

According to Article 3.5, paragraph 2 avoidance is excluded, even if the criteria of paragraph 1 are met, if the party making the mistake:

> (1) ... was grossly negligent in committing the mistake; or (2) the mistake relates to a matter in regard to which the risk of mistake was assumed or, having regard to the circumstances, should be borne by the mistaken party.

On the whole, this solution appears very convincing although one point causes some concern. This is namely the idea, which can also be found in Austrian law that avoidance for mistake should be allowed if 'the other party had not at the time of avoidance acted in reliance on the contract', i.e. had not yet made any dispositions of a legal or factual character and, therefore, would not suffer damages through relying on the contract.[39] The problem is that this possibility for avoidance would be available even in those cases, where the contracting partner's good faith with regard to the formation of the contract is entirely worthy of protection, because he neither made the same mistake nor caused the mistake of the party in error, nor knew or ought to have known of the mistake. It is submitted that, in such a situation, at least as far as commercial business is concerned, the good faith in the formation and performance of the contract should be fully protected and the possibility of avoidance should be ruled out. This would seem especially important for errors in expression or transmission (Art. 3.6 of the Principles). At least as far as commercial business relations are concerned, the risk of such an error should be borne by the one making the declaration.[40] It is, therefore, to be welcomed that the European

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[38] For a similar attempt to make the subjective view of what is relevant more objective see § 119, para. 1, BGB.

[39] For further reasons for this criticism *see* Kramer, in 1 *Münchener Kommentar zum BGB*, (1993, 3rd ed.) at § 119, note 101.

[40] The Dutch NBW (Art. 35 of Book 3) explicitly standardizes that a notice of avoidance for mistake in the declaration itself is ruled out insofar as the recipient of the declaration objectively, correctly interpreted it. (*See also* Art. 37, para. 4, NBW on mistakes in transmission.) In an innovative decision in Germany, the Landgericht Tübingen recently rejected an attempt of avoidance for mistake based on a businessman's error in the declaration (1997) *JZ*, at p. 312 et seq. with annotation by Lindemann.

Principles in their 1997 draft, whose basic rules on avoidance follow the concept of the UNIDROIT Principles,[41] do not foresee the possibility to avoid merely because the mistake has been discovered before the other party acted in reliance on the contract.

IV. Fraud

According to Article 3.8, avoidance is possible when one contracting party:

> has been led to conclude the contract by the other party's fraudulent representation, including language or practices, or fraudulent non-disclosure of circumstances which, according to reasonable commercial standards of fair dealing, the latter party should have disclosed.

In itself, this rule is not particularly remarkable.[42] Nevertheless, it is noteworthy that fraudulent representation concerning language terminology is expressly mentioned.[43] At first sight the solution of Article 3.8 doesn't seem problematic at all. However, it leaves open a crucial question concerning cases of fraudulent non-disclosure. Nothing definite is said about the facts and circumstances which, according to reasonable commercial standards of fair dealing, must be disclosed at the time of the formation of the contract. Incidentally, this problem also arises in cases of failure to clarify an obvious mistake[44] or mistakes caused by silence of the other party on a specific point.[45]

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[41] Art. 4.103 of the European Principles: '(1) A party may avoid a contract for mistake of fact or law existing when the contract was concluded if: (a) (i) the mistake was caused by information given by the other party; (ii) the other party knew or ought to have known of the mistake and it was contrary to good faith and fair dealing to leave the mistaken party in error; or (iii) the other party made the same mistake; and (b) the other party knew or should have known that the mistaken party, had he known the truth, would not have entered the contract or would have done so only on fundamentally different terms.
(2) However a party may not avoid the contract if: (a) in the circumstances his mistake was inexcusable; or (b) the risk of the mistake was assumed, or in circumstances should be borne by him.'

[42] As far as rules on avoidance based on fraudulent representation or unjustified threats are concerned, the same result can also be found in common law. See Perillo, 'UNIDROIT Principles of International Commercial Contracts: The Black Letter Text and a Review' in (1994) LXIII *Fordham Law Review*, at p. 292: 'the themes and solutions are familiar to common lawyers.' A comprehensive stock taking of the problems of fraud and threat at the time of conclusion of the contract, from the point of view of comparative law, can be found in Probst, *Deception and Coercion in the Formation of Contracts* (Basler Habilitationsschrift (in print)).

[43] *See* Art. 3.8: 'by the other party's fraudulent representation, including language.' On German law *see* Kramer *supra* note 39 at § 123 note 10.

[44] *See* Art. 3.5, para. 1, lit. a of the Principles.

[45] The possibility of causing a mistake (in the sense of Art. 3.5, para. 1, lit. a of the Principles) through silence over facts, is emphasized explicitly by Comment 2 to Art. 3.5 of the Principles, in the official edition of 1997: 'Even silence may cause an error.'

Opinion about the duty of disclosure as is well known differs widely throughout the world. This is particularly true when comparing civil law, which is heavily influenced by the doctrine of *culpa in contrahendo* in its Germanic form,[46] and common law, which is equally heavily influenced by English law in the form of the *caveat emptor* principle, as it was formulated by Lord Atkin in *Bell v. Lever Bros. Ltd.* where he stated that: 'The failure to disclose a material fact which might influence the mind of a prudent contracting party does not give the right to avoid the contract.'[47] The question is, therefore, which standards should be used in applying the UNIDROIT Principles: the softer ethic of disclosure of continental civil law or the considerably stricter rules for commercial business found in common law? It is easy to predict that judges or arbiters[48] who have to deal with this question will apply the interpretation which is nearest to their domestic approach for lack of an internationally harmonized standard. This, in turn, will limit the harmonization to be achieved by the UNIDROIT Principles.[49]

It is worth mentioning that under Article 3.11, paragraph 2 avoidance is permitted also in cases where fraud 'is imputable to a third person for whose acts the other party is *not* responsible'[50] (emphasis added), provided the party 'knew or ought to have known of the fraud'[51] or 'has not at the time of avoidance acted in reliance on

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[46] For instructive comparative analysis *see* G. Müller, *Vorvertragliche und vertragliche Informationspflichten nach englischem und deutschem Recht* (1994); and Caruso, *La culpa in contrahendo: L'esperienza statunitense e quella italiana* (1993).

[47] *Bell v. Lever Bros. Ltd.* [1932] AC 161, at p. 272; *see also* Nicholas, 'The Pre-Contractual Obligation to Disclose Information – English Report' in *Contract Law Today: Anglo-French Comparisons* (Harris and Tallon (eds.)) (1989) at p. 168 et seq.; Legrand, 'Pre-Contractual Disclosure and Information: English and French Law compared' in (1986) 6 *Oxford Journal of Legal Studies*, at p. 330 et seq.; Goode, The Concept of 'Good Faith' in English Law (Saggi, Conferenze e Seminari, no. 2, 1992, of the 'Centro di studi e ricerche di diritto comparato e straniero' (lead by Bonell)) at p. 7 et seq.; Waddams, 'Pre-Contractual Duties of Disclosure' in *Essays for Patrick Atiyah* (Cane and Stapleton (eds.)) (1991) at p. 237 et seq. On US law, *see* Farnsworth, 'Duties of Good Faith and Fair Dealing Under the UNIDROIT Principles, Relevant International Conventions and National Laws' in (1991) 3 *Tulane Journal of International and Comparative Law*: 'Common law judges have always taken what I have called an aleatory view of negotiation.'

[48] For references to arbitration on this matter *see* Kahn, 'Les Principes généraux du droit devant les abitres du commerce international' in (1989) *JDI*, at p. 319 et seq.; Osman, *Les Principes généraux de la lex mercatoria* (1992) at p. 48.

[49] *See also* Kramer, in *Contratti internazionali e principi UNIDROIT* (Bonell and Bonelli (eds.)) (1997) at p. 167 et seq.

[50] Art. 3.11, para. 1 of the Principles deals with cases of fraud, threat, 'gross disparity' or mistake where these are directly imputable to or were known or should have been known by 'a third person for whose acts the other party is responsible'. However this issue shall not be further elaborated here.

[51] This corresponds more or less to § 123, para. 2, 1st sentence BGB, Art. 28, para. 2, OR as well as, in essence, § 875 ABGB, and Art. 44, para. 5 of the 3rd Book of the Dutch NBW. On the other hand, Art. 1439, para. 2, Codice Civile requires positive knowledge of the third party's threat.

the contract'. Once again, it would not seem appropriate in commercial business to grant a right of avoidance merely because the other party has not yet acted in reliance on the contract. The deceived party's right to claim damages from the third person would seem sufficient in these cases.

V. Threat

Article 3.9 deals only with cases of 'psychological compulsion' (*vis compulsiva*), and not with cases of 'physical compulsion' (*vis absoluta*). In the latter cases, the threatened person has no alternative whatsoever. This, in turn, rules out a wilful declaration of intent (offer or acceptance) in the sense of contract law.[52]

According to Article 3.9 the threat must be 'unjustified' or illegal and, 'having regard to the circumstances', must be 'so imminent and serious as to leave the [threatened] party no reasonable alternative'. A threat will be considered illegal mainly 'if the act or omission with which a party has been threatened is wrongful in itself, or is wrong to use it as a means to obtain the conclusion of the contract'. A straightforward example would be a statement such as 'If you refuse to give me a loan, I will burn your house down'. However, as clearly stated in the second sentence of Article 3.9, an unjustified threat can also be assumed if an act or omission is lawful *per se*, such as a threat to sue for repayment of a loan, but is still wrong if used to obtain the formation of a certain type of contract under conditions dictated by the threatening party (illegal relationship between ends and means).[53] A classical example is the threat of notifying an offence committed in military service to obtain a concession in a business transaction from the threatened party.

The threat must be 'so imminent and serious as to leave the [threatened] party no reasonable alternative' but to comply. Article 30, paragraph 1 of the Swiss OR defines objectively grounded fear fairly precisely[54] and can thus be helpful in the search for a more specific definition of the blanket clause regulation in the UNIDROIT Principles. In this context, it should be noted that even a threat to financial interests, particularly the financial reputation of the threatened party, may establish an objectively serious state of compulsion.[55]

In case of a threat imputable to a third party for whose acts the contracting party

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[52] This interpretation is probably accepted world-wide. For Italian law *see* Sacco in Sacco and De Nova, *Il contratto* (1993) t. 1, at p. 323.

[53] This is the short formula used for Swiss law by A. Koller, *Schweizerisches Obligationenrecht Allgemeiner Teil, Vol. I*; (1996) note 1251. Further references from a comparative point of view can be found in Kötz *supra* note 14 at p. 321.

[54] 'The fear is well-justified for a person who must assume in the given circumstances that he or a person close to him is threatened with an imminent and serious danger to life and limb, honour or property'. (author's translation).

[55] This is also emphasized by Comment 3 to Art. 3.9 of the Principles in the official edition of 1994.

is not responsible,[56] Article 3.11, paragraph 2 of the Principles, once again, provides a possibility of avoidance only if the contracting party knew or ought to have known of the threat or if the other partner has not yet acted in reliance on the contract. This contradicts the solution provided under Swiss and German law[57] as well as other legal orders based on the Roman legal tradition.[58] Due to the perception of a threat as a more serious offence, and restriction of the free will of the parties, these legal systems generally allow avoidance in cases of threat and do not impose additional conditions for cases where the threat is imputable to third parties. Where appropriate, Swiss law (Art. 29, para. 2, OR) combines the right to avoidance of the threatened party with a right to damages of the other party, where the latter acted in good faith.

VI. Gross Disparity

1. General considerations on the ratio legis

In a treatise on 'gross disparity' in the UNIDROIT Principles, Drobnig explained how he was *prima vista* struck by an apparent *contradictio in adiecto* in Article 3.10, which strives to protect the weaker partner:[59]

> Are we not accustomed to conceive of such protection as the general characteristic of consumer law? And do we not regard the parties to international commercial contracts as mature, experienced persons; or even as crafty, shrewd traders who are fully able to protect themselves?

However, he continues by explaining that a closer examination quickly dispels these doubts. It was obvious that a need for the protection of structurally or individually weaker parties could also exist in the realm of international commercial agreements, as for example in the case of a small trader without expansive economic resources or experience or in cases of newcomers from the former socialist countries or a developing country.

As already referred to, a gross disparity, and hence a 'substantive unfairness', alone is not sufficient for avoidance under Article 3.10. As will be more closely examined now, further elements of 'procedural unfairness' must be taken into

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[56] Threats directly imputable to a third person for whom the other party is responsible are covered by Art. 3.11, para. 1 of the Principles, as was the case for fraud.

[57] *See* § 123 BGB; Art. 29, para. 1, OR. But see § 875 ABGB, which is essentially the same as Art. 3.11, para. 1 of the Principles.

[58] *See* for example Art. 1434 Codice Civile and Art. 1268 of the Spanish Código Civil; similar, even though somewhat more restrictive, also Art. 256 of the Portuguese Código Civil. For further references from the point of view of comparative law *see* Kötz *supra* note 14 at p. 324 et seq.

[59] In Drobnig, 'Protection of the Weaker Party' in *Contratti internazionali e principi UNIDROIT* (Bonell and Bonelli (eds.)) (1997) at p. 217.

consideration. Article 3.10 requires that gross disparity exist at the time of the conclusion of the contract. This distinguishes it from 'hardship' according to Article 6.2.2 where an event 'fundamentally alters the equilibrium of the contract' and where this either happens or becomes known only after the conclusion of the contract.[60]

2. *Interpretation of Article 3.10*

Article 3.10 is a relatively complicated and not necessarily very clear rule which cannot be explained here extensively. To begin with, there is the question, what does 'excessive advantage' mean in the first sentence of paragraph 1? According to the official commentary,[61] the term is to be interpreted in a relatively narrow manner. Only if the imbalance is 'so great as to shock the conscience of a reasonable person' does it become relevant for avoidance. In order to find out how to interpret 'shocking', reference can be made to the official explanation to Article 6.2.2,[62] which also concerns itself with the balance or rather imbalance between the duties of the parties to a contract. This approach leads to the old concept of a *laesio enormis* (which is still embodied in § 934 of the Austrian ABGB).[63] If the obligation of one contracting party is worth less than half the return, 'gross disparity' should be considered.[64]

By contrast to the traditional concept of usury,[65] it is possible under Article 3.10, paragraph 1 to examine individual contractual terms for gross imbalance.[66] Thus, it

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[60] On the other hand, a small degree of overlap may result from the fact that according to Art. 6.2.2, lit. a of the Principles, those events which fundamentally alter the equilibrium of the contract could already have existed at the moment of the conclusion of the contract but became known to the disadvantaged party only after the conclusion of the contract. Should the other party take unfair advantage of the disadvantaged party's ignorance in such a situation, then both Art. 3.10 on gross disparity and the rules on 'hardship' are applicable.

[61] Comment 1 on Art. 3.10 of the Principles, in the official edition of 1994.

[62] Comment 2 on Art. 6.2.2 of the Principles, in the official edition of 1994 ('alteration amounting to 50 per cent or more of the cost or devalue of the performance'). The idea of using the explanation given for Art. 6.6.2 of the Principles also for the interpretation of Art. 3.10 can already be found in Drobnig *supra* note 59 at p. 220.

[63] According to § 934 ABGB avoidance of a contract can be justified if, in a mutually binding transaction, one side should receive less than half of what he has given the other. The same boundary line (excessive advantage *'ultra dimidium'*) is known in Italian law (Art. 1448, para. 2, Codice Civile); *see also* Spanish regional law ('leyes forales') [for example ley 499 of the Compilación of Navarra or Arts. 323–325 Compilación of Catalonia]; for further references *see* Álvarez Vigaray and de Aymerich de Rentería, *La rescisión por lesión en el derecho civil español común y foral* (1989) at p. 199 et seq. Italian law and Spanish regional law ('leyes forales') are otherwise to a large degree similar to the Swiss and German approach to usury, while § 934 ABGB (similar to 'unconscionability' according to § 2-302 UCC) does not require exploitation of a subjective predicament or other deficiencies of the disadvantaged party. For further references *see* Zimmermann *supra* note 18 at p. 268 et seq.

[64] Similar, for German law (§ 138, para. 2, BGB), Mayer-Maly, in 1 *Münchener Kommentar zum BGB*, (1993, 3rd ed.) at § 138, note 119.

[65] *See* § 138, para. 2, BGB; Art. 21, OR; or § 879, para. 1(4), ABGB.

[66] Likewise the state of 'unconscionability' according to § 2-302 UCC.

is not necessary to always carry out an overall assessment of the contract. This opens the door at least a little bit for substantive review of clauses in standard form contracts, since it is frequently safe to presume that 'improvidence, ignorance, inexperience or lack of bargaining skill' on behalf of the disadvantaged party has been taken advantage of in the sense of Article 3.10, paragraph 1, lit. a.

When examining the question whether one contracting party has unjustly gained an excessive advantage:

> [r]egard is to be had, among other factors, to: (1) the fact that the other party has taken unfair advantage of the first party's dependence, economic distress or urgent needs, or of its improvidence, ignorance, inexperience or lack of bargaining skill; and (2) the nature and purpose of the contract.

It is not clear whether the party taking the unfair advantage must have been aware of the subjective deficiencies of the contracting partner, and must have consciously exploited these, or whether it is sufficient that he or she has objectively taken advantage of them. The first interpretation appears to be preferable.[67] However, there should not be a requirement that the party taking the unfair advantage was aware of the excessiveness or unfairness of the advantage. It should suffice that he or she consciously exploited the other party's weakness to his or her own advantage.

'Gross disparity' does not necessarily make the contract null and void altogether. According to Article 3.10, paragraph 2, the party entitled to avoidance may request contractual adaptation[68] in court, 'in order to make [the contract or the clause] accord with reasonable commercial standards of fair dealing'.[69] According to Article 3.10, paragraph 3 the adaptation may be done 'upon the request of the party receiving the avoidance', i.e. the party taking the excessive advantage, 'provided that that party informs the other party of its request promptly after receiving such notice and before the other party has acted in reliance on [the avoidance]'.

3. *Article 3.11, paragraph 2*

Article 3.1.1 paragraph 2 is quite obscure in its stipulation that, where gross imbalance 'is imputable to a third person for whose acts the other party is not responsible, the contract may be avoided if that party knew or ought to have known

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[67] *See also* Drobnig *supra* note 59 at p. 222, who discusses whether it does not suffice that the other party ought to have been aware of the subjective deficiencies of the disadvantaged party. This, in fact, is the solution in Art. 4.109, para. 1, lit. b of the 1997 draft of the European Principles.

[68] A recent and important decision on usury in Switzerland has opted for judicial adaptation of the contract in spite of the wording of Art. 21 OR, which only provides for total avoidance in these cases, *see* BGE 123 III 292 et seq.

[69] Similar or equivalent in effect the rule in the 1997 draft of the European Principles: 'accordance with what might have been agreed had standards of good faith and fair dealing been used.' (Art. 4.109, para. 2).

of the ... disparity'. It is difficult to imagine how a disparity can be attributed to an independent third person. One might think of false information given by a third person or maybe of economic duress of the cheated party in relation to the third person as reasons for the formation of the unfavourable contract. But is it reasonable in such a case to require that the contracting party taking the unfair advantage 'knew or ought to have known of *the disparity*', as Article 3.11, paragraph 2 does? Surely it is much more important that the party was aware of *the circumstances* which made it possible to conclude a contract with grossly disparate terms?[70]

VII. Modalities of Avoidance; Damages

While the UNIDROIT Principles generally provide uniform rules for the exercise of avoidance and any claims to damages regardless of the reason for the avoidance, some of the rules examined below differentiate somewhat, depending on the respective grounds for avoidance.[71]

1. Notice of Avoidance; Time Limits

While quite a number of legal systems, in particular the Romanic legal systems which are influenced by the French Code Civil[72] but also US law,[73] require legal action, i.e. a suit or petition in court, for the exercise of avoidance, a unilateral notice to the other party is sufficient according to Article 3.14 of the UNIDROIT Principles, as is the case in Swiss and German law. The time limit for the notice of avoidance is not defined precisely, as it is traditional in common law.[74] Article 3.15, paragraph 1 refers to a 'reasonable time', which begins to run 'after the avoiding party knew or could not have been unaware of the relevant facts or became capable of acting freely'.

Whether or not it is due to the author's affiliation with the continental legal systems, it is submitted that the discretionary power introduced by the term 'reasonable time' is not satisfactory, when it would seem of paramount importance that the parties to an international commercial agreement are able to determine their course of action with as much legal certainty as possible. The civil law model with

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[70] Equivalent and correct the 1997 draft of the European Principles (Art. 4.111, para. 2, lit. d: 'if the other party knew or ought to have known of relevant facts'.)

[71] *See* for example Art. 3.13, which only applies to the right to avoid the contract for mistake.

[72] On the requirement of an 'action en nullité relative' in French law *see* Art. 1117 Code Civil; in Italian law *see* Art. 1428 in connection with Arts. 1441 et seq. Codice Civile; and *see* Art. 1300 et seq. of the Spanish Código Civil. In Dutch law there is a right to choose between a judicial decision and an extra-judicial declaration of avoidance, *see* Art. 49 of the 3rd Book of the NBW.

[73] On law suits about 'rescission' for 'misrepresentation' *see* for instance *Farnsworth on Contracts Vol. I* (1990) at p. 426. The possibility of a law suit for the establishment of the invalidity of an avoidable contract is, by the way, now also provided by the Russian Civil Code (Art. 181, para. 2).

[74] On 'rescission' for 'misrepresentation' *see* Farnsworth *supra* note 73 at p. 427.

more precise time limits, especially in a combination of relative and absolute time limits,[75] would seem to be clearly preferable. However, the fact that the time limit for avoidance, according to Article 3.15, does not necessarily begin to run only after the avoiding party had positive knowledge of the reasons entitling it to avoid but may begin to run when he or she 'could not have been unaware of the relevant facts' except for gross negligence,[76] deserves to be supported.

2. *Loss of the Right to Avoid (Art. 3.12; Art. 3.13)*

According to Article 3.12 avoidance of a contract is excluded 'if the party entitled to avoid ... expressly or impliedly confirms the contract after the period of time for giving notice of avoidance has begun to run'. In particular, the unreserved contractual performance in full knowledge of the right to avoid would have to be seen as implied confirmation in the sense of this Article. In this context, Article 3.19 should not be overlooked, according to which the rules on avoidance for mistake are not mandatory but may be altered by agreement of the parties to a contract.[77] Prior agreement excluding avoidance for fraud or threat, as well as for gross disparity, is excluded by the same Article. However, as can be inferred from Article 3.12, subsequent renunciation of the right to avoid is possible even in the latter cases.

The provision of Article 3.13 has a number of corresponding models in different legal systems around the world.[78] It is inspired by the idea that contradictory behaviour (*venire contra factum proprium*) is not allowed:

> If a party is entitled to avoid the contract for mistake but the other party declares itself willing to perform or performs the contract as it was understood by the party entitled to avoidance, the contract is considered to have been concluded as the latter party understood it. The other party must make such a declaration or render performance promptly after having been informed of the manner in which the party entitled to avoidance had understood the contract and before that party has acted in reliance on a notice of avoidance.

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[75] German law is paradigmatic here: it demands at the same time immediate rescission as soon as the party becomes aware of the mistake (relative time limit according to § 121, para. 1 BGB) and rescission at the latest within 30 years (absolute time limit according to § 121, para. 2 BGB).

[76] Likewise for English law, Lord Denning in *Leaf v. International Galleries* [1950] 2 KB 86, at p. 91.

[77] Differentiating, Art. 4.118 of the draft of the European Principles: 'The parties may exclude or restrict remedies in respect of mistake and incorrect information except if the exclusion or restriction is unreasonable.'

[78] Similar solutions can be found in Art. 1432 Codice Civile; Art. 25 para. 2, OR; Art. 248 of the Portuguese Código Civil; and Art. 1951, Civil Code of Louisiana. An instructive comparison between Art. 3.13 of the Principles, Art. 1432, Codice Civile and Art. 230 of the 6th book of the Dutch NBW can be found in Heselink, in *Europees contractenrecht BW-krant jaarboek* (M.E. Franke et al. (eds.)) (1995) at p. 39 et seq.

3. Partial Avoidance (Art. 3.16)

Article 3.16 is based on the principle of partial nullity, or the remaining validity of the contract, where a ground of avoidance affects only individual terms of the contract.[79] In such a case the entire contract will only be annulled exceptionally, if 'having regard to the circumstances, it is unreasonable to uphold the remaining contract'.

4. Retroactive Effects of Avoidance (Art. 3.17)

According to Article 3.17, avoidance takes effect retroactively, as will be familiar to the reader. Peter Schlechtriem examines the difficult problems involved with restitution according to Article 3.17, paragraph 2 in more detail.[80]

5. Damages

Article 3.18 stipulates liability for damages of 'the party who knew or ought to have known of the ground for avoidance ... so as to put the other party in the same position in which it would have been if it had not concluded the contract'. The claim to the reliance loss (or 'negative interest'),[81] is first and foremost granted to the victim of fraud, threat, or gross imbalance. Damages may also be claimed by a party having made a mistake, provided the other party knew or ought to have known of the ground for avoidance, or, even though this is not expressly mentioned in the rule, if the other party caused the mistake negligently. Article 3.18 explicitly provides for liability for damages '[i]rrespective of whether or not the contract has been avoided'.[82] This provision leaves many questions open. Presumably, it would include cases where avoidance was attempted too late. As the European Principles explicitly state in their Article 4.117, paragraph 2[83] for damage claims without simultaneous avoidance, compensation should be made for any losses suffered on account of the contract's economically disadvantageous nature (or even complete uselessness). In such cases it would have to be presumed, and probably to be proven, that the contract would not have been concluded absent the fraud, threat, mistake, or

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[79] Likewise for instance Art. 19 of the Israeli Contracts (General Part) Law; *see also* s. 7 of the New Zealand Contractual Mistakes Act 1977, and Art. 180 of the new Russian Civil Code.

[80] See pp. 125 of this issue.

[81] *See* Comment 2 on Art. 3.18 of the Principles, in their official 1994 edition.

[82] Likewise, but only for cases of deceit or threat, Art. 31, para. 3, OR. *See also* Schmidlin, in (1995) *Berner Kommentar zum OR*, Art. 31 note 152 et seq. For French law *see* (in connection to deceit) Cass. civ. 4.2 1975, JCP 1975 II, No. 18100 (with annotation by Larroumet) = D 1975, 405 (with annotation by Gaury). According to s. 2(2) of the English Misrepresentation Act 1967 the judge may simply grant damages to the misled party instead of a 'rescission'; *see also* Art. 1952 para. 2 Louisiana Civil Code ('reasonable compensation' instead of 'rescission').

[83] 'damages limited to the loss caused to him by the mistake'. This excludes in particular the possibility of not using rescission and then demanding reimbursement for expenses incurred in the conclusion of the contract.

economic distress, or at least not with the unfavourable content it now has.[84]

Liability for damages may also be upon the party entitled to avoid the contract. As is self-evident, this can only be the case where avoidance is based on mistake. However, as follows from Article 3.5, lit. a, the other party is not entitled to damages if it caused the mistake, knew or ought to have known of it, or made the same mistake. On the other hand, liability for damages can be possible when the other party has not yet, at the time of avoidance, acted in reliance on the contract in the sense of Article 3.5, lit. b. In this case, damages will primarily focus on compensation of expenditures related to the formation of the contract.[85] It should be required, however, that the avoiding party is somehow at fault, for example that the mistake was caused by a certain negligence because he or she ought to have recognized his or her mistake in the sense of Article 3.18, while in cases of gross negligence, avoidance would be excluded by Article 3.5, paragraph 2, lit. a anyway.

C. Summary and Outlook

In brief, the author's impression of the chapter on validity is very favourable indeed. So far, the famous phrase of Albrecht von Haller, 'We all err together, but each errs differently',[86] would have to be modified to something like, 'All legislators make mistakes when regulating mistake but each makes different mistakes.'[87] Now there is a highly consistent solution for the most difficult aspects of validity in the form of the UNIDROIT Principles, a solution that seems to be capable of world-wide consensus. Without any doubt, this is the most important achievement of the Principles in the chapter on validity. As indicated, there may be some imperfections in certain details but these can surely be corrected in practice. What is more serious is the fact that the Principles omit certain important questions of validity. Thus, it would seem very desirable to have clearer rules on the consequences of nullity, in particular for cases of illegal contracts, as well as a set of rules for the substantive review of clauses in standard form contracts.

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[84] On German law *see* BGH NJW 1977, 1538 (1539), concerning the demand based on *culpa in contrahendo*; *see also* BGH NJW 1994, at p. 663 et seq. Full compensation for all damages incurred by the erring party as a consequence of the non-performance of the contract is thus ruled out. This is similar to the rule in Art. 44 CISG ('damage compensation, except lost profits').

[85] Reimbursement of expenses or losses incurred subsequent to the conclusion of the contract is ruled out because at that point 'the other party had acted in reliance on the contract' in the sense of Art. 3.5, para. 1, lit. b of the Principles and avoidance is not possible according to this rule.

[86] Albrecht von Haller (1708–1777) in his 'Gedanken über Vernunft, Aberglauben und Unglauben'.

[87] Zweigert, in (1966) *ZfRV*, at p. 12 et seq., already spoke of 'Errors concerning Error.'