

CONVERGENCE OF CIVIL LAW AND COMMON LAW CONTRACTS IN THE SPACE FIELD

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This article explores the evolution of civil law and common law towards convergence, briefly addressing the history of the theoretical and philosophical perspectives that contributed to shape evolution and change within these two systems. The article analyses general features of the central aspects of contract theory in civil law and common law jurisdictions. As an example of convergence in the commercial contract realm, the article focuses on the analysis of the structure, characteristics and main clauses of the commercial space launch services agreements in both systems, stressing their similarities in structure, treatment and consequences.

Introduction

Common law and civil law contracts have been traditionally seen as distinctive and fairly diverse.¹ Each belongs to a tradition that has been regarded as quite different.² However, in several areas common law and civil law have been increasingly marching toward convergence.³ The purpose of this article is to show that commercial space agreements constitute an area where there is a clear convergence between these two systems. Underlying this premise is our conception that despite the view of the majority of authors, common law – especially as applied in the United States – and civil law should be considered as one legal tradition, ie the so called western legal tradition.⁴ In other words, the similarities of civil law and US common law vis-à-vis other legal traditions outweigh their differences.⁵ This is especially visible in the commercial contract realm, where the selected contracts are but one example. And even in those areas where there are still striking differences both systems are slowly heading toward convergence.⁶

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¹ Glenn, P.H., “Are Legal Traditions Incommensurable?” (2001) 49 *Am J Comp L* 133; Merryman, J.H., *The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America* (Stanford: Stanford University Press, 1985), p 1.

² Rua, C. and Cesar, J., “The Future of the Civil Law” (1977) 37 *La L Rev* 645.

³ Gordley, J., *The Philosophical Origins of Modern Contract* (Oxford: Clarendon Press, 1991), p 1.

⁴ Rene, D. and Brierley, J.E.C., *Major Legal Systems in the World Today* (London: Stevens & Sons, 3rd edn, 1985), p 25.

⁵ Rene, D., “Existe-t-il un droit occidental?” in Kurt H. Nadelmann, Arthur T. von Mehren and John N. Hazard (eds), *XXth Century Comparative and Conflicts Law: Legal Essays in Honor of Hessel E. Yntema* (Leiden: A.W. Sijthoff, 1961), p 56.

⁶ See Gordley (n 3 above), p 1.

This article starts by examining the evolution of civil law and common law toward convergence, briefly addressing the history of the theoretical and philosophical perspectives that contributed to shape evolution and change within these two systems. Then, the article analyses general features of the central aspects of contract theory in the civil law and common law jurisdictions. Finally, this work focuses on the analysis of the structure, characteristics and main clauses of the commercial space launch services contracts in both systems, stressing their similarities in structure, treatment and consequences.

The findings of this work are expected to shed some light on future research on other areas where civil law and common law also present a high degree of uniformity.⁷

Convergence

Comparative Law has long been concerned with convergence between legal traditions.⁸ Convergence constitutes the evolution of the legal institutions of different legal systems where the legal institution of one system resembles the other and the legal norms, principles, and scholarly comments of both are used in equal measure and even regarded with equal authority.⁹ Unlike harmonisation, which implies a deliberate and negotiated process aimed at producing a legislative or other conventional act, convergence constitutes a natural, or unconscious, common development of legal institutions through mutual interest.¹⁰ Natural convergence is the result of a tendency in similar nations to have similar problems and to arrive at similar ways of perceiving and dealing with them.¹¹ It is postulated that this is the case in the law dealing with commercial space launch services contracts. However, this is the culmination of a phenomenon of convergence which widely exceeds the area of commercial space practice.¹² It is not an isolated instance, but rather the natural route that civil law and common law have been taking.¹³

Convergence between areas of common law and civil law is not new.¹⁴ It traces its roots to the Enlightenment and has been a slow and gradual process.¹⁵ In England the Inns of Court planted the first seeds of the process of integration between common law and civil law in the early sixteenth century. Inspired by Roman law concepts, Littleton, Blackstone and other comparative scholars produced seminal works which also helped toward this, still slow, direction.¹⁶ As emphasised by Glenn, by the nineteenth century

⁷ Hendler, E.S., *Derecho Penal y Procesal Penal de los Estados Unidos* (Buenos Aires: Ad Hoc, 1996), p 36.

⁸ Duca, D., "A Historic Convergence of Civil Law and Common Law Systems – Italy's New Adversarial Criminal Procedure System" (1991) 10 *Dick J Int'l L* 73.

⁹ De Cruz, P., *A Modern Approach to Comparative Law* (Deventer: Kluwer, 1993), p 34.

¹⁰ Carol Harlow, "Voices of Difference in a Plural Community" (2002) 50 *Am J Comp L* 339, 342.

¹¹ Merryman, J.H., "On the Convergence (and the Divergence) of the Civil Law and the Common Law" (1987) 17 *Stanford J of Int L* 357.

¹² See Gordley (n 3 above), p 134.

¹³ Stevens, D. and Neyers, J.W., "What's Wrong with Restitution?" (1999) 37 *Alberta L Rev* 221.

¹⁴ Schadbach, K., "The Benefits of Comparative Law: A Continental European View" (1998) 16 *B U Int'l L J* 331.

¹⁵ Glenn, P.H., *Legal Traditions of the World* (New York: Oxford University Press, 2000), p 226.

¹⁶ See Schadbach (n 14 above), p 331.

English thought had developed a large measure of compatibility,¹⁷ which was later reinforced with the advent of the European integration.¹⁸

In the United States, this process has been more remarkable and radical.¹⁹ Highly respected authors have even suggested that US law “represents a deliberate rejection of common law principle, with preference being given to more affirmative ideas clearly derived from civil law”.²⁰ While this affirmation may seem rather extreme, the United States was undoubtedly greatly influenced by civil law sources in the nineteenth century, especially by German scholars, whose influence moulded the shape of US common law.²¹ This was evident in substantive law, especially in the reception of ideas of rights, virtually unknown at the time in the United Kingdom, but even more evident in terms of structures and sources of law.²² Legislation in the United States has also been influenced by civil law.²³ Apart from the obvious adoption of codes, courts often interpret legislation by resorting to civilian methodologies under a civil law philosophy.²⁴ Specifically, in contract law the whole concept of adhesion contracts²⁵ was directly taken from France, especially from Salleilles, a nineteenth-century French jurist.²⁶ Interestingly, as observed by Glenn, these civil law phenomena are often exported back to Europe and the rest of the civil law world in decanted common law form.²⁷

At the same time, common law ideas, styles and conceptions have greatly influenced civil law. Many civil law jurisdictions have a statute law that is heavily influenced by common law.²⁸ Entire legal areas, such as the regulation of securities, commercial papers and even constitutional law have been extrapolated from the United States to several civil law countries²⁹ and courts around the world heavily rely on US

¹⁷ See Glenn (n 15 above), p 226.

¹⁸ Levasseur, A.A., Scott, R.F., *The Law of the European Union: A New Constitutional Order* (Durham: Academic Press, 2001), p 1.

¹⁹ An interesting phenomenon of the civil law influence in US procedure law is the apparently increasingly common practice of American appellate courts to publish slip opinions with a warning that the opinions are not to be cited. This behaviour, viewed systemically, might represent a retreat from *stare decisis*, and perhaps even a movement toward continental-style adjudication. Bhala, Raj, “The Myth about *Stare Decisis* and International Trade Law” (1999) 14 *Am U Int'l L Rev* 845.

²⁰ See Glenn (n 15 above), p 230.

²¹ German scholars, such as Kessler and Ehrenzweig played an important role in the development of US contract law. *Siegelman v Conard White Star Ltd* F 2d 189, 204–205 (2nd Circuit, 1955).

²² See Glenn (n 15 above), p 230.

²³ Frank, J., “Influence of Civil Law in Common Law” (1956) *Pennsylvania Law Review* 1.

²⁴ Stone, H.F., “The Common Law in the United States” (1936) 50 *Harv L Rev* 13.

²⁵ An adhesion contract is a standardised contract drafted by only one party where the other party’s only choice is to adhere to it or reject it. “The weaker party, in need of the goods or services, is frequently not in a position to shop around for better terms, either because the author of the standard contract has a monopoly (natural or artificial) or because all competitors use the same clauses. His contractual intention is but a subjection more or less voluntary to terms dictated by the stronger party, terms whose consequences are often understood in a vague way, if at all.” Kessler, Friedrich “Contracts of Adhesion – Some Thoughts About Freedom of Contract” (1943) 43 *Colum L Rev* 629, 632.

²⁶ See Frank (n 23 above), p 1.

²⁷ See Glenn (n 15 above), p 230. The US also exports these phenomena to Canada and England and thus these countries are also shaping their common law structure.

²⁸ Tetley, W., “Mixed jurisdictions: common law vs civil law (codified and uncoded)” (2000) 60 *La L Rev* 677.

²⁹ Henkin, L., “Constitutionalism and Human Rights” in Louis Henkin (ed), *Constitutionalism and Rights* (1990) 392–395.

precedents to reach their decisions.³⁰ Additionally, a mosaic of common law institutions, such as probation as an alternative to punishment for criminal conduct, cramdown procedures for the approval of bankruptcy plans, class actions for collective litigation, and transfer pricing for the taxation of related companies have been introduced in civil law countries directly from the United States.³¹ Furthermore, the United States also greatly influenced the structure and organisation of the legal profession and more and more countries now have a bar that resembles the US model. This is especially notable in lawyers practicing international business law in Western Europe and the major Latin American countries.³²

This process toward convergence does not mean that civil law and common law are one and the same.³³ On the contrary, as will be analysed below, there are still important differences in virtually every area of these two systems. However, these differences mainly deal with a different order of priority in sources, ie civil law gives predominance to doctrine (including the codifiers' reports) over jurisprudence, while the opposite is true in the common law.³⁴ The style of judicial decisions is also different, eg civil law judgments use a more formalistic discourse than common law decisions.³⁵ The style followed by scholarly authors also differs in both systems. Common law authors focus on fact patterns and analyse cases presenting similar but not identical facts, extracting the specific rules, and then, through deduction, determine the often very narrow scope of each rule, and sometimes propose new rules to cover facts that have not yet presented themselves, while the civil law authors focus rather on legal principles and trace their history, identify their function, determine their domain of application, and explain their effects in terms of rights and obligations to deduce general and exceptional effects.³⁶ The differences also encompass diverse interpretation methods, ie in civil law jurisdictions, the first step in interpreting an ambiguous law is to discover the intention of the legislator by examining the legislation as a whole, including the preparatory works, as well as the provisions more immediately surrounding the obscure text, while in common law jurisdictions, statutes are to be objectively constructed according to certain rules standing by themselves against a case law background.³⁷

³⁰ Lester, A., "The Overseas Trade in the American Bill of Rights" (1988) 88 *Colum L Rev* 537–541.

³¹ Hermida, J., *Legal Basis for a National Space Legislation* (Dordrecht, Boston, and London: Kluwer Academic Publishers, 2004), p 35.

³² Steenhoff, G., "Teaching Comparative Law, Comparative Law Teaching" (2002) 6 *EJCL*.

³³ See Merryman (n 11 above), p 357. For Merryman there is now a process of convergence and divergence taking place at the same time. Merryman sees the root of divergence in the redistribution of local power and major separatist movements in the Western world.

³⁴ See Tetley (n 28 above), p 677. Tetley explains this difference in priority through the role of the legislator in both traditions. French civil law adopts Montesquieu's theory of separation of powers, whereby the function of the legislator is to legislate, and the function of the courts is to apply the law. Common law, on the other hand, finds in judge-made precedent the core of its law.

³⁵ *Ibid.* Civil law decisions are indeed shorter than common law decisions, and are separated into two parts – the *motifs* (reasons) and the *dispositif* (order). This is because civil law judges are trained in special schools created for the purpose, while common law judges are appointed from amongst practising lawyers, without special training.

³⁶ *Ibid.*

³⁷ *Ibid.*

However, when analysed in light of the other traditions, such as Talmudic, Islamic, Hindu or Asian, it is easy to observe that the similarities between civil law and common law outweigh their differences. For example, Talmudic and Islamic traditions are rooted in the word of God as revealed in sacred books.³⁸ Hindu law is wrapped in Hindu philosophy and theology.³⁹ The differences between common law and civil law are, as outlined above, mainly in style, terminology, interpretation, conception and emphasis on certain elements over others rather than on their structure or fundamental philosophical conceptions. Both civil law and common law share similar fundamental social objectives, which include the protection and encouragement of individual and personal rights and are both enrolled in a liberal philosophy and conception of the world. Thus, for example, their doctrinal structure is based on similar legal concepts. They both divide private law into large legal fields, such as property, tort, and contracts, among others, and analyse these fields in a similar way. The organisation of the law and its larger concepts are also alike even if particular rules are not.⁴⁰

Comparison Between Common Law and Civil Law Contracts

Historical Developments of Contracts

Common law contract theory, like any human concept, is a tributary of its history and the history of ideas that influenced its development.⁴¹ Contract law in Anglo-American Law traces its origins to primitive Roman law concepts.⁴² In the early common law there was no means whereby strangers could enter into executory relationships.⁴³ In medieval English common law the only way to assume an obligation was by means of an act subject to special formalities called deed under seal. As a consequence of new commercial pressures, the evolution toward the enforceability of promises began in the fourteenth century. This evolution was done through two forms of action: action of debt (*indebitatus assumpsit*) and action of assumpsit.⁴⁴ The gist of the action of debt, which derives from German Law, is that the defendant owes the plaintiff and wrongfully withholds the debt.⁴⁵ The assumpsit action was based on a fictitious promise to pay an antecedent debt. Such an action could be brought on a simple contract debt, and the subsequent promise could be set up by way of replication to a plea of the statute of limitations.⁴⁶

³⁸ Lukito, R., *Islamic Law and Adat Encounter: the Experience of Indonesia* (Jakarta: Logos, 2000), p 1.

³⁹ See Glenn (n 15 above), p 160.

⁴⁰ See Gordley (n 3 above), p 4.

⁴¹ Holmes, O.W., *The Common Law* (Boston: Little Brown and Company, 1881), p 246.

⁴² Alterini, A.A., *Contratos Civiles, Comerciales, de Consumo. Teoria General* (Buenos Aires: Abeledo-Perrot, 1999), p 15. The terminology of both common law and Roman law is curiously parallel. W.W. Buckland and Arnold McNair, *Roman Law and Common Law, A Comparative in Outline* (Cambridge: Cambridge University Press, 1952), p 195.

⁴³ Nichols, P. M., "A Legal Theory of Emerging Economies" (1999) 39 *Va J Int'l L* 229, 293. According to Nichols, "those means that did exist were based on religion, social status, or exogenous relationships – indicia of a relational system".

⁴⁴ Ames, J., "The History of Assumpsit" (1888) 2 *Harv L Rev* at 16.

⁴⁵ See Holmes (n 41 above), p 246.

⁴⁶ Restat 2d of Contracts, § 82.

Only as a result of commercial pressure, as well as cultural and intellectual influences in the eighteenth and nineteenth centuries, did common law evolve toward a modern conception of contract.⁴⁷ Before Powell's first treatise on contract law there was no theory of contract law. After Powell's *Essay upon the Law of Contracts and Agreements*,⁴⁸ common law authors began to systematise the doctrine of contracts in the Anglo-American world and they did so based on the works of French scholars, such as Jean Domat and Robert Pothier – who directly influenced the French Civil Code of 1804 – and other natural law jurists, such as Hugo Grotius and Pufendorf, who in turn had been influenced by the Spanish school of natural law also known as the late scholastics.⁴⁹ As clearly put forward by Gordley, common law lawyers illustrated these civil law doctrines with English cases, which the courts did certainly not have in mind when they decided those cases.⁵⁰

All civil law theory has also its origin in Roman law, as codified in the *Corpus Juris Civilis* of Justinian, and as subsequently developed in Continental Europe and around the world. However, civil law developed from the most modern Roman law solutions.⁵¹ Much of modern civil law consists of codified Roman law, whose landmark is the French Civil Code of 1804, which was rapidly extended throughout Continental Europe, Latin America, Quebec, Louisiana, and even some African and Asian countries, among other states.⁵² Civil law contract theory, in particular, is rooted on Aristotelian ideas of equality in exchange and liberality as shaped by the late scholastics school and other jurists of the seventeenth and eighteenth century, who, as noted above, also influenced the doctrinal structure of common law contracts.⁵³ These jurists rebuilt the Roman law by providing it with a systematic doctrinal organisation that it had previously lacked.⁵⁴

The Notion of Contracts

Civil law jurisprudence places a considerably higher importance on definitions and classifications than its common law counterpart. This difference stems from the origins of both systems. Civil law has emerged as a rational instrument, based on the Greek tradition of rational enquiry, the Aristotelian concept of the excluded middle, deductive thought and constructions with a great normative and explanatory force.⁵⁵ It is therefore highly systematised and structured and it relies on declarations of broad, general principles, often ignoring details.⁵⁶ The whole theory of contract law in civil law jurisdictions reflects the origin and methodology of civil law. The modern civil codes usually treat contracts in two ways. First, they delineate a general law of contracts (*lex*

⁴⁷ See Nichols (n 43 above), p 260.

⁴⁸ Powell, J., *Essay upon the Law of Contracts and Agreements* (Dublin: P. Byrne, J. Moore, J. Rice and W. Jones, 1796), p 1.

⁴⁹ See Gordley (n 3 above), p 4. Natural law influence can be seen, *inter alia*, in the idea of consent and agreement embedded in the notion of contracts.

⁵⁰ *Ibid.*

⁵¹ See Alterini (n 42 above), p 15.

⁵² See Tetley (n 28 above), p 677.

⁵³ See Merryman (n 11 above), p 1; Gordley (n 3 above), p 1.

⁵⁴ Gordley, J., "Enforcing Promises" (1995) 83 *Calif L Rev* 547.

⁵⁵ See Glenn (n 15 above), p 132.

⁵⁶ See Tetley (n 28 above), p 677.

generalis), which contains the definition, classification, capacity to enter into contracts, the object, formalities, evidence and effect of contracts. Secondly, the codes deal with the special law of several individual nominate contracts (*lex specialis*).⁵⁷ In addition, many civil codes contain a general part common to all civil law issues, which also encompass all contractual obligations.⁵⁸

Basically, a contract is generally defined as an agreement by several persons about a common declaration of will, destined to regulate their rights.⁵⁹ The French Civil Code defines a contract as “an agreement which binds one or more persons, towards another or several others, to give, to do, or not to do something”.⁶⁰ This definition of contracts, reproduced in similar terms in virtually all modern civil codes,⁶¹ is rooted on the notion of agreement or consent. Therefore, in civil law, a contract results from an agreement or consent and it is compulsory because as from the moment the parties reach that agreement they are obliged to fulfil its terms, subject to specific performance and compensation of damages.⁶² Thus, this reflects the primary significance of the autonomy of the will and Aristotle’s distinction between liberality and commutative justice.⁶³ Agreements legally formed are considered to have the force of law⁶⁴ over the parties to the contract.⁶⁵

Civil law codes and scholars often classify contracts into a set of several mutually exclusive types. In principle, this classification would serve to facilitate the identification of the legal nature of contracts.⁶⁶ Some of the categories of contracts include nominated and innominate, consensual and real, bilateral and unilateral, and commutative and aleatory, among others. Nominated contracts are those contracts that have been named in the civil code and that are thus generally regulated whereas innominate contracts or contracts without title are those which have not received an express treatment in the civil code or in another statute.⁶⁷ The existence of nominated contracts derives from the

⁵⁷ Osakwe, C., “Modern Russian Law of Contracts: A Functional Analysis” (2002) 24 *Loy LA Int’l & Comp L Rev* 122.

⁵⁸ For example, the German Civil Code contains a general part which sets principles – drafted at the highest level of abstraction – for all civil law areas. Subsequently, it proceeds through descending levels of generality to cover all obligations, contractual obligations, then particular contracts, etc. Herman, Shael & Hoskins, David “Perspectives on Code Structure: Historical Experience, Modern Formats, and Policy Considerations” (1980) 54 *Tul L Rev* 987, 1021.

⁵⁹ Argentine Civil Code, Art 1137.

⁶⁰ French Civil Code, Art 1101. The Louisiana Civil Code defines it as “an agreement by two or more parties whereby obligations are created, modified, or extinguished.” Louisiana Civil Code, Art 1906.

⁶¹ Spanish Civil Code, Art 1254; Italian Civil Code, Art 1321. Other codes do not define the concept of contracts, eg German, Swiss, Brazilian, Portuguese, Paraguayan. In these cases the concept of contracts is included within the definition of legal act, eg section 305 of the German Civil Code.

⁶² See Alterini (n 42 above), p 15.

⁶³ See Gordley (n 3 above), p 4.

⁶⁴ French Civil Code, Art 1134.

⁶⁵ Gorla, G., “The Theory of Object: A Critical Analysis by Means of the Comparative Method” (1954) 28 *Tulane Law Review* 456. The civil law concept of contracts thus conceives contractual obligations as a duty to maintain a certain conduct, which also reflects a fusion between a contract as a promise and a contract as an act of transfer. Common Law conceives a contractual obligation as a guarantee of a certain result.

⁶⁶ Le Pera, S., *La Naturaleza Jurídica* (Buenos Aires: Ediciones Pannedille, 1971) p 1.

⁶⁷ These would depend on each jurisdiction. However, certain international commercial agreements, such as launch services, transponder lease, purchase or transponder sales back contracts are un-nominated in all civil law jurisdictions.

Roman law need to name the contract when an action was filed.⁶⁸ In modern civil law this classification has become obsolete⁶⁹ and it entails no consequences at all, especially when most civil codes contain a general principle establishing that a contract is to be analysed and considered depending on its actual terms and regardless of the name that the parties gave to it.⁷⁰ Another classification often found in civil codes is that of bilateral, such as sale of property or lease, among others, and unilateral contracts, eg donation, *mandatus*, life rent, *mutuum*, *commodatum*, etc. A unilateral contract is one where only one of the parties is obliged towards the other. Bilateral contracts are those contracts where both parties are reciprocally obliged to each other.⁷¹ This classification is not unknown in common law contract theory, where contracts are also divided as bilateral and unilateral. As in civil law, a bilateral contract is considered to be a contract in which both sides make promises. However, a common law unilateral contract does not equate to the concept of unilateral contracts of civil law but rather to the civil law notion of unilateral promises, which are not considered contracts but rather unilateral manifestations of will or unilateral acts.⁷² In common law, a unilateral contract is one which involves an exchange of the offeror's promise for the offeree's act, ie the offeree does not make a promise, but instead simply acts. In common law, this difference is important mainly in the cases of revocation of offers and acceptance where the rules vary according to whether the contract is unilateral or bilateral. Revocation of offers and acceptance is not dependent upon the bilateral or unilateral nature of contracts in civil law.⁷³

Another civil law classification divides contracts according to the moment and mode they become effective. Thus, contracts whose legal effects begin as from the moment the parties give their consent to be bound are considered to be consensual. Real contracts are those that need the delivery or conveyance of the thing to produce legal effects. This also derives from Roman law, where the contracts of sale, lease, partnership, and *mandatum* (a kind of gratuitous agency) were enforceable upon consent. But contracts to loan property gratuitously for consumption (*mutuum*), or use (*commodatum*),

⁶⁸ See Alterini (n 42 above), p 15.

⁶⁹ The Louisiana Civil Code subjects all contracts, nominate and innominate, to the general rules applicable to all contracts, but nominate contracts are also subject to the special rules of the respective titles when those rules modify, complement, or depart from the rules of the general norms for all contracts. Louisiana Civil Code, Arts 1915 and 1916.

⁷⁰ Argentine Civil Code, Art 1326.

⁷¹ Argentine Civil Code, Art 1138.

⁷² Gomez, O.H., "Causa y Consideration" (1958) 15 *Universitas* 169.

⁷³ See Alterini (n 42 above), p 173. In civil law this distinction is relevant for other reasons. For example, the following phenomena, among some others, are only present in bilateral contracts and do not occur in unilateral ones: (1) double copies, ie a contract in writing must be made in two equally authentic copies, reciprocal breach (*mora*) – one of the parties to a contract is not in breach if the other party does not fulfil his obligations; (2) breach defence (*exceptio non adimpleti contractus*) one of the parties is entitled to refuse to carry on his promise until the other party carries on his own, except if he himself is obliged to perform first; (3) acceleration – when the performance of the obligation of one party is to be fulfilled in the future, but that party is insolvent, his counterpart is entitled to invoke the acceleration of that obligation, which becomes immediately enforceable; (4) suspension of own performance when the other party is temporarily unable to perform his own obligation or is foreseeable that he will not; (5) resolutive clause; (6) impossibility of payment, when the obligation is extinguished on account of impossibility of payment for one, each must return what he received; (7) lesion theory may be invoked in the cases of exploitation of one party and inequality of promises.

or to deposit it gratuitously for safekeeping (*depositum*), or to pledge it (*pignus*) were enforceable when the object concerned was actually delivered.⁷⁴

Contracts are also classified as commutative, such as contracts for the sale of real property, lease of dwelling, or transportation contracts, and aleatory, such as contracts for gambling, lotteries, raffles, contingency fees, and broker's fees. A commutative contract takes place when each of the parties binds itself to give or to do a thing which is regarded as the equivalent for that which is given to it, or for that which is done for it. When the equivalent thing consists of the chance of gain or loss for each of the parties, ie an uncertain event, the contract is deemed to be aleatory.⁷⁵

Today these classifications have little theoretical and practical value. Even if there are some rules which apply to one category of contracts and not the other, in practice these classifications do not imply any relevant consequences and are not part and parcel of the civil law lawyer's every day practice.⁷⁶ However, when civil law authors engage in the analysis of a new contract they tend to do so in comparison to an existing category and resort to these classifications to elucidate the legal nature of the new contractual figure.

Common law jurisprudence is less inclined to labour on definitions and to extract the legal consequences from this definition. With respect to contract theory, common law contract is more concerned with the kinds of promises that are enforceable and thus it places considerable effort in determining which promises may trigger binding legal consequences. A promise is generally regarded in common law contract theory, as a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made.⁷⁷ In general, in the US and other common law jurisdictions, a promise is enforceable if it is made as a bargained exchange for some legally sufficient consideration, which involves an offer and an acceptance. While this is the most usual and traditional promise which the legal system empowers and protects, other kinds of promises have also been considered enforceable. These include a promise that reasonably induced another person to change position in reliance of that promise, known as promissory estoppel,⁷⁸ new promises to perform previously existing (unenforceable) obligations, promises that may be enforced because of statutory enactments by legislative bodies and quasi-contracts also known as restitution, whose origin derives from the civil law concept of quasi-contract which has

⁷⁴ Other contracts were enforceable only when a formality was completed. Large gifts required a formality called *insinuatio*. By the 16th century, this formality could be performed by registering with a court a document describing the gift. Like in early common law, other contracts, such as informal agreements to barter, were enforceable only after one party had performed. See Gordley (n 54 above), p 547. Modern civil codes have preserved the distinction between gifts of money or property, which require a formality, and other gratuitous transactions that do not. Today, in some continental European countries the parties complete the formality by subscribing to a document before an official called a notary. Questions of formality are considered to be questions of positive law, which depend upon the provisions of each code and vary from country to country.

⁷⁵ French Civil Code, Art 1104.

⁷⁶ See Le Pera (n 66 above), p 1.

⁷⁷ Restat 2d of Contracts, § 2.

⁷⁸ Here the change in reliance of the promise acts as a substitute for the bargained exchange.

existed for centuries in Continental Europe but has only recently been incorporated in the common law.⁷⁹

The opposition between freely made promises and non-promissory principles as the core of contract law has been the object of much debate in common law academic circles.⁸⁰ A third position, which seems to emerge as the prevailing one, considers contract law as rooted in part on promissory principles but also tempered by non-promissory principles, which focus on fairness and the interdependence of parties rather than on parties' actual agreements and promises.⁸¹

The concept of enforceable promises is not unknown in civil law just as the notions of definitions and characterisations are definitely not unknown in common law. However, scholars and judges in civil law do not seem to assign much importance to the kinds of promises that the law chooses to enforce, and concentrate rather on the characteristics of certain elements which must be present for a contract to exist. Similarly, their common law counterparts do not elevate definitions to a sacrosanct pedestal and many working concepts of contracts abound. In this respect, for example, the Restatement defines contracts as "a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognises as a duty". US authors have defined contracts as "a commutative agreement when one of the parties undertakes to do or to give anything which is regarded by both as the inducement, or motive, for the giving or doing some other thing by the other party".⁸² From these conceptualisations, it is clear that the law of contracts in common law jurisdictions gravitates towards the ideas of exchange and enforceability of the promises and not on the regulation of rights derived from the existence of a contract.⁸³ However, borrowing from civil law sources, nineteenth-century common law jurists, such as Comyn, Newland, Chitty, Kent, Story, Dodd, Carey, Parsons and Leake, all defined contracts as agreements or assent – even when courts did not do so. This entailed both a borrowing – the mere notion of a definition and the consent – and a departure from civil law sources: consent was not regarded as binding because of liberality and commutative justice ideas as in civil law thought.⁸⁴

Formation of Contracts

In common law, a valid contract is succinctly formed where there is an offer, namely a manifestation to enter into a valid contract by one party, and an acceptance of that offer by the other party, which indicates a commitment to be bound. In addition to a valid offer and acceptance, there must be adequate consideration or a bargained-for legal detriment, or as is the case in certain jurisdictions, such as New York, a bargained-for legal benefit.

⁷⁹ Since our focus is commercial space launch services agreements which generally embody the exchange of a promise, we will concentrate on the analysis of promises made as a bargained exchange for some legally sufficient consideration.

⁸⁰ Gilmore, G., *The Death of Contracts* (Columbus: Ohio State University Press, 1974), p 1.

⁸¹ Hillman, R. A., *The Richness of Contract Law* (Dordrecht: Kluwer Academic Publishers, 1997), p 7.

⁸² Verplanck, G. C., *An Essay on the Doctrine of Contracts: Being an Inquiry how Contracts are Affected in Law and Morals, by Concealment, Error, or Inadequate Price* (New York: G & C Carvill, 1825), p 224.

⁸³ Chirelstein, M. A., *Concepts and Case Analysis in the Law of Contracts* (Foundation Press: Westbury, 1993), p 1.

⁸⁴ See Gordley (n 3 above), p 135.

Additionally, there must be no defences to formation that would invalidate an otherwise valid contract entered into by the parties.

Since a contract is formed when the offer is accepted, common law developed a series of important rules dealing with when, how and by whom an offer may be accepted. These rules indicate that an acceptance is effective for bilateral contracts when the acceptance is sent in accordance with the forms prescribed by the offeror. This shows that the offeror is the master of his offer, ie the offeror may prescribe the method by which the offer may be accepted. If not sent by an authorised medium, acceptance is effective when it is actually received by the offeror. If the offeror does not prescribe a form for the acceptance, the acceptance may be given by any reasonable method. For unilateral contracts, acceptance is effective when the offeree has begun to perform.⁸⁵

Consideration constitutes another element of contract in common law. As a general rule, a contract will not be enforceable unless it is supported by consideration. Consideration is a mere formality, which is being used to validate a promise or make it enforceable. Traditionally, in English law, there was no remedy for the non-performance of purely executory agreements, ie those where no performance on either side had taken place. Gradually, courts came to enforce promises in executory agreements when it could identify the consideration which was given for the promise. In Kent's words, "in order for consideration to be present, there must be something given in exchange, something that is mutual or something which is the inducement to the contract".⁸⁶ Based on Kent's ideas, Holmes developed the theory of bargained-for consideration and held that:

"the root of the whole matter is the relation of reciprocal conventional inducement, each for the other, between consideration and promise ... and that it is hard to see the propriety of erecting any detriment which an instrument may disclose or provide for, into a consideration, unless the parties have dealt with it on that footing."⁸⁷

According to Cardozo J, a promise is supported by consideration if there is a detriment, ie the promisee gives up something of value, or circumscribes his liberty in some way, and an exchange, ie the detriment induced the promise, and the promise in turn induced the detriment.⁸⁸ In other words, the promise is given as part of a bargain, where the promisor makes his promise in exchange for the promisee's giving of value or circumscription of liberty.⁸⁹

The traditional bargain theory, which is premised on the wrong assumption that there is a complete risk allocation at the time of contract formation, is unable to account for the reality of contract formation where there is a multitude of promises not necessarily exchanged and negotiated by the parties and where the allocation of all risks is not always present at the contract formation stage. A discontent with the artificial requirements for the presence of consideration led the modern courts in the United States and England to recognise the enforceability of promises even in cases where there is no

⁸⁵ In those cases where acceptance may be given either by promise or performance, either medium is considered acceptable.

⁸⁶ Kent, J., *Commentaries on American Law* (New York: William Kent, 1848), p 463.

⁸⁷ See Holmes (n 41 above), p 292.

⁸⁸ *Allegheny College v National Chautauqua County Bank of Jamestown*, (1927) 246 NY 369, 159, NE 173.

⁸⁹ See Holmes (n 41 above), p 292.

bargained for consideration. Therefore, as discussed above, promissory estoppel and restitution doctrines, among others also constitute a basis for the enforceability of promises.⁹⁰

Civil law contract theory is based upon will doctrines, where, in principle, all that should matter in contract formation is the will of the parties. The general principles governing formation of contracts reflect the pre-eminence of autonomy of the will. The formation of contracts is based on an agreement by the parties, expressed either directly or implied through behaviour, which must extend to all essential terms of the contract. Thus, in the formation of contracts, the parties are bound to their obligations because their agreement to contract is deemed to result from the exercise of free will.⁹¹ Thus, there is no need to analyse contract formation in terms of a formal offer and acceptance. Rather the analysis focuses on the presence of certain elements for a contract to be considered as such. In general, these elements are the consent of the parties, their capacity to contract, the existence of a certain object forming the matter of the contract, and a lawful cause.⁹² The analysis of the consent in civil law is a negative one, ie consent is considered to exist when it has been given in absence of mistake, violence and fraud.⁹³ However, in certain states, such as in Argentina⁹⁴ or Louisiana,⁹⁵ the civil code expressly determines that the consent must be given in the form of offers or proposals from one party to the other, which must be accepted by the other, and regulates the offer and acceptance in a way that resembles US common law contract theory. For example, in Argentina the rules dealing with the offer prescribe that offers may be revoked as long as they have not been accepted, except that the offeror has waived his right to revoke them, or he has obliged to make them or to maintain them for a certain period of time.⁹⁶ Also, for the acceptance of the offer, Argentine law follows the Mailbox Rule, whereby the contract is formed once acceptance of the offer is sent by the offeree. However, unlike

⁹⁰ Teeven, K., "The Advent of Recovery on Market Transactions in the Absence of a Bargain" (2002) 39 *Am Bus LJ* 376. Teeven affirmed that "Increasingly, courts created exceptions to the bargain test for transactions which had long been deemed worthy of enforcement; judges abandoned fictions and doctrinal manipulation to openly acknowledge that, in addition to the reciprocity of bargain, other good reasons supported the granting of relief, including fairness, reliance, unjust enrichment and consent. This recognition of binding unbargained-for obligations partially returned transactional liability to the time before the advent of the proclaimed bargain consideration doctrine when a variety of acceptable reasons, in addition to bargain, justified enforcing transactional obligations. Indeed, most of the forms of recovery on unbargained-for obligations enforced today once were granted either in chancery or at law under earlier, more malleable meanings of consideration".

⁹¹ Potter, P. B., "Doctrinal Norms and Popular Attitudes Concerning Civil Law Relationships in Taiwan" (1995) 13 *UCLA PAC BASIN LJ* 265. Contract law borrows from the theories of free will and private autonomy and espouses the primacy of freedom of contract as the basis for creation and enforcement of private obligation. The principles of freedom of contract are rooted in notions of free will and autonomy.

⁹² French Civil Code, Art 1108; Chilean Civil Code, Art 1445; Uruguayan Civil Code, Art 1261. Spanish Civil Code considers only the consent, object and cause as elements of a contract and capacity is only a general requisite of all legal acts, Spanish Civil Code, Art 1261. For the Italian Civil Code, consent, cause, object and form. The Argentine Civil Code does not enumerate the terms of the contract and the Paraguayan Code regards the consent, object and form as the sole contract terms.

⁹³ French Civil Code, Art 1109.

⁹⁴ Argentine Civil Code, Art 1144.

⁹⁵ Louisiana Civil Code, Art 1927. "A contract is formed by the consent of the parties established through offer and acceptance."

⁹⁶ Argentine Civil Code, Art 1150.

US law the offeree may revoke his acceptance before it is received by the offeror even if the acceptance has already been dispatched. In US contract law, if the acceptance is sent before the revocation of the acceptance, the contract is formed and the revocation of the acceptance has no legal effect.⁹⁷

With respect to the capacity to contract, any person who has not been declared by the law incapable of doing so may enter into a valid contract.⁹⁸ Persons considered to be incapable of contracting are minors, interdicted persons, and all those who the law has forbidden to enter into certain contracts. The minor and the interdicted person cannot, under pretext of incapacity, impeach their own engagements, except in the cases provided for by the law.⁹⁹

In civil law, the object of a contract constitutes the thing or performance (*prestation*)¹⁰⁰ over which the will of the parties is given and is generally considered to be another constitutive element of the contract.¹⁰¹ The theory of object of contracts is inspired by a tendency toward an abstract logic which constitutes one of the characteristic traits of civil law.¹⁰² For a contract to be valid its object must meet certain requisites. These include the existence of the thing or feasibility of the performance at the contract formation stage, certain qualities of the object, ie it must be in commerce, it must be appropriate to law and society, it must be in existence, and the performance must be legally possible, certain or ascertainable.¹⁰³ It is also necessary that the object of the contract be at least determinate as regards its kind.¹⁰⁴ The quantity of the thing may be uncertain, provided it is capable of being determined.

The theory of object serves to invalidate contracts which do not have a legal object because of the presence of a defect in the performance. Thus, the lack of one of these required characteristics renders invalid a myriad of contracts which would not be necessarily so in common law. For example, in civil law the obligation to mortgage an automobile would be considered to have a legally impossible object, for automobiles may only be pledged, and thus the contract would be invalid.¹⁰⁵ In a common law jurisdiction this contract would probably be considered as a pledge on the automobile. These requirements must be analysed at the time of contract formation. Otherwise, they may trigger a defence to a valid contract.¹⁰⁶ Additionally, the legality requirement, eg if a party agrees to a contract that contravenes a rule of criminal law in exchange for money, would prevent the formation of a contract whereas in common law the contract would be valid but may be subject to a defence based on public policy which would ultimately result in the unenforceability of the contract.

⁹⁷ Restat 2d of Contracts, § 63.

⁹⁸ French Civil Code, Art 1123.

⁹⁹ French Civil Code, Art 1124.

¹⁰⁰ Quebec Civil Code, Art 1371. It is of the essence of an obligation that there be persons between whom it exists, a prestation which forms its object, and, in the case of an obligation arising out of a juridical act, a cause which justifies its existence.

¹⁰¹ See Gorla (n 65 above), p 444.

¹⁰² *Ibid.*, p 451.

¹⁰³ French Civil Code, Art 1128.

¹⁰⁴ French Civil Code, Art 1129; Argentine Civil Code, Art 1170.

¹⁰⁵ See Alterini (n 42 above), p 218.

¹⁰⁶ *Ibid.*

The theory of object has been criticised because of its lack of utility both from a practical and academic viewpoint.¹⁰⁷ It has even been proposed to be eliminated as an element of contract formation and is non-existent in modern civil codes, such as the German code, where the whole theory of contract does not rest upon the notion of contract prevailing in most civil law jurisdictions. Furthermore, in many instances following the object theory according to its intended logical character would lead to contradictory or absurd solutions.¹⁰⁸

The cause in civil law constitutes the determinative reason or motive of the contract and is considered a necessary element for the existence of a contract in most jurisdictions.¹⁰⁹ The notion of cause in civil law theory does not denote a causal connection but rather the purpose which the parties have in mind when they enter into the contract.¹¹⁰ This purpose, however, is not the personal, and probably unique, motive which each party may have to pursue a certain specific transaction, but rather it is the general objective and standardised motive which any party has for each contractual type. Thus, in any purchase of real property the cause for the purchaser is the seller's delivery of title in the real estate in question.¹¹¹ The Civil Code of Louisiana, which represents a synthesis between the civil law and common law,¹¹² has adopted the cause theory for the existence of contracts and not the consideration.¹¹³ Cause is characterised in Article 1967 as "the reason whereby a party obligates himself".¹¹⁴

It has been argued that consideration and cause present some analogies, as consideration could loosely be equated with cause in the sense that both may be considered the reason that justifies the assumed obligation.¹¹⁵ Much of the debate around cause and consideration originated in the fact that Blackstone, and several nineteenth-century common law authors, borrowed directly from civil law explanations of cause to define and explicate the notion of consideration.¹¹⁶ However, cause and consideration may not be deemed identical, for they are not governed by the same principles and they do not even act similarly. Furthermore, in certain aspects they generate different solutions, sometimes even contradictory ones.¹¹⁷ The differences are manifold. First, for example, cause and consideration were crafted for different purposes. The doctrine of cause had theoretical rather than practical significance, as it aims at reflecting Aristotle's

¹⁰⁷ See Gorla (n 65 above), p 444.

¹⁰⁸ *Ibid.*

¹⁰⁹ An obligation without a cause, or upon a false cause, or upon an unlawful cause, can have no effect. French Civil Code, Art 1131. The agreement is not less valid, although the cause be not expressed therein. French Civil Code, Art 1132. The cause is unlawful when it is prohibited by the law, when it is contrary to good morals or to public order. French Civil Code, Art 1133.

¹¹⁰ Cueto Rua, Julio Cesar, *El Common Law. Su estructura normativa. Su enseñanza* (Buenos Aires: Abeledo-Perrot, 1997), 318.

¹¹¹ *Ibid.*

¹¹² See Tetley (n 28 above), p 677.

¹¹³ Civil Code of Louisiana, Art 1966. "An obligation cannot exist without a lawful cause."

¹¹⁴ Civil Code of Louisiana, Art 1967. The Louisiana Civil Code further provides that "a party may be obligated by a promise when he knew or should have known that the promise would induce the other party to rely on it to his detriment and the other party was reasonable in so relying".

¹¹⁵ Lorenzen "Causa and Consideration in the Law of Contracts" (1919) 28 *Yale L. J.* 621; Capitan, "De la cause des obligations" (1927), p 1.

¹¹⁶ See Gordley (n 3 above), p 137.

¹¹⁷ Villanueva, Adolfo, "La Consideration y los contratos en el Common Law" (1954) 78 *Rev de ciencias Juridicas y Sociales* 63.

distinction between liberality and commutative justice. The doctrine of consideration developed in exactly the opposite way. Common law judges were merely concerned about limiting in practice the promises that could be enforced.¹¹⁸ Additionally, cause operates in all kinds of legal acts whereas consideration is relevant only for bilateral contracts. In common law, the promisor / plaintiff must prove that there is consideration for the enforcement of the promise, whereas in civil law the existence of cause is always presumed and the debtor / defendant must prove its non-existence.¹¹⁹ In this case, it is possible to invalidate an obligation by showing the lack of cause. This would not apply to unilateral contracts as there are a myriad of promises that do not require consideration, such as promissory estoppel, new promises to perform previously existing unenforceable obligations, promises where enforcement is mandated by statutory enactment of legislative bodies and quasi-contracts. In those cases where consideration is required, its function is similar to cause of bilateral and onerous contracts and their effect is the same when both are lawful.¹²⁰ However, consideration does not require equivalence and need not be adequate.

Contract Interpretation

Rules for the interpretation of common law contracts are not inflexible and the purpose of interpretation is closely connected to the purposes of contract law itself.¹²¹ One of the major tenets of common law contract theory is the protection of the reasonable expectations of the parties, which is referred to as expectation interest. Another major pillar of United States contract theory is to provide compensation to people for damages resulting from reasonable reliance upon the promise of another (reliance interest).¹²² Thus, the whole set of interpretation rules in United States contract theory revolves around these major purposes of contract law. Therefore, for example, plain meaning of the words must prevail and later expressions control over inconsistent earlier expressions. Another rule states that language added by the parties control over printed materials in a standard form. Additionally, language is to be interpreted in light of custom and usage in the trade or community and in accordance with any prior course of dealing between the parties.¹²³

The courts must read a contract as the average person would read it and should not give a contract a bootstrap interpretation.¹²⁴ Two methods of interpretation coexist in common law contract theory. The objective theory of interpretation of contracts focuses on what a reasonable person, standing in the shoes of the addressee, would have thought

¹¹⁸ See Gordley (n 3 above), p 135.

¹¹⁹ Argentine Civil Code, Art 500; French Civil Code, Art 1132.

¹²⁰ Galli, E. and Salas, A.E., "Causa y Consideration. Estudio comparativo de ambos institutos en América" (1952) 68 *Folletos* 18.

¹²¹ Eclavea, R.P., "Contracts. Construction and Effect" (2003) 17 *Am Jur* 2d Contracts § 336.

¹²² Fuller, L.L. and Perdue, W. Jr., "The Reliance Interest in Contract Damages" (1936) 46 *Yale L J* 52.

¹²³ See Eclavea (n 121 above), p 335.

¹²⁴ The construction of words and of other manifestations of intention forming an agreement is the process of determining from such manifestations what must be done by the respective parties in order to conform to the terms of the agreement. Additionally, a contract should be viewed prospectively as the parties viewed it at the time of its execution, and not from a retrospective point of view. See Eclavea (n 121 above), p 336.

from the outward manifestations of the other party to mean.¹²⁵ Therefore, whether a person's words and acts, judged by a reasonable standard, a certain manifested intent, it is immaterial what may be the real but unexpressed state of that person's mind. In *Lucy v Zehmer*,¹²⁶ the defendant claimed that he had been drunk and joking when he made the contract. However, the Court held that whether the contract was the result of a serious offer or only a serious offer by Lucy and an acceptance in secret joke by the defendants it nonetheless constituted a binding contract between the parties.

In contrast, the subjective theory of interpretation of contracts seeks to determine what the parties subjectively intended. Under the United States' law, when both parties had the same subjective intent that becomes the proper interpretation. However, where one party knew of the subjective intent of the other and the latter did not know of the subjective intent of the former, then the latter's subjective meaning would control.¹²⁷

An interpretation phenomenon of common law contracts is the parol evidence rule. Usually, the parol evidence rule is called into play where a contract has been reduced to writing after oral or written negotiations, during which the parties have given assurances, made promises, or reached understandings. In the event of litigation, a party may seek to introduce evidence of the negotiations in order to establish that the terms of the contract are other than as shown in the writing. When writing is a partial integration, no evidence of prior or contemporaneous agreements or negotiations (oral or written) may be admitted if this evidence would contradict a term of the writing. However, when a document is a total integration, no evidence of prior or contemporaneous agreements or negotiations may be admitted which would either contradict or even add to the writing.¹²⁸

Contract interpretation in civil law consists of a search for the mutual intent of the parties, even if their intention is contrary to the literal meaning of terms.¹²⁹ Contract interpretation in civil law consists of scrutinising what the parties understood or could reasonably understand. This reflects the autonomy of will philosophy which contract law is built upon in civil law. Thus, contract interpretation is mainly subjective. Like common law, civil law has also developed a series of construction rules. For example, in order to accurately interpret a contract it is necessary to search into the mutual intention of the contracting parties, rather than to stop at the literal sense of terms.¹³⁰ Similarly, when an expression is susceptible of two meanings that which agrees best with the matter of the contract must be preferred.¹³¹ Unlike common law there is no parol evidence rule and

¹²⁵ The common law objective contract theory dictates that contractual promises be interpreted according to the reasonable expectation of the promisee (an objective standard).

¹²⁶ *Lucy v Zehmer* (1954) 196 Va. 493, 84 S.E.2d 516. Mental assent is not essential for the formation of a contract; if the words and acts of a party, reasonably interpreted, manifest an intention to agree, his contrary but unexpressed state of mind is immaterial.

¹²⁷ Eisenberg, M.A., "Expression Rules in Contract Law and Problems of Offer and Acceptance" (1994) 82 *Calif L Rev* 1127.

¹²⁸ Linzer, P., "A Tribute to Professor Joseph M. Perillo – The Comfort of Certainty: Plain Meaning and the Parol Evidence Rule" (2002) 71 *Fordham L Rev* 799; Hadjiyannakis, Helen, "The Parol Evidence Rule And Implied Terms: The Sounds of Silence" (1985) 54 *Fordham L Rev* 35.

¹²⁹ Louisiana Civil Code, Art 2045. "Interpretation of a contract is the determination of the common intent of the parties."

¹³⁰ Argentine Supreme Court of Justice, Fallos 311: 1556.

¹³¹ French Civil Code, Art 1158. Also, when a clause is susceptible of two meanings, it must be understood in the sense in which it may have some effects rather than in a sense in which it cannot produce any.

clauses which are usual in a certain contract must be supplied even if the parties have not expressly included them.¹³²

Defences Affecting Assent

In common law a contract may be invalidated because certain circumstances affect the assent given to form it or because of policy considerations. Defences affecting the assent require a subjective analysis. These deal with the capacity to contract, undue influence, duress, mistake, and misrepresentation. People are generally assumed to have capacity, ie the legal power to form contracts unless they are either: (1) under guardianship; (2) an infant; (3) mentally ill or defective; or (4) intoxicated. If evidence is offered to refute this assumption based on the fact the other person qualifies in one of these circumstances, it may establish a total incapacity in which case any manifestation of intent to enter a bargain is a nullity and the resulting agreement is void. In case of partial incapacity, the result can be a contract that is voidable at the option of the impaired party.

Undue influence is another defence which triggers off when a person entered an unfair transaction induced by improper persuasion. The victim was prevented from exercising free choice in the transaction due to a weakened mental state. Additionally, an apparent manifestation of assent may be defeated and the resulting contract avoided if assent was obtained by coercion which constitutes duress. Duress is a condition of the mind produced by an improper external pressure or influence that practically destroys the free agency of a party and causes him to do an act or make a contract not of his own volition.¹³³ It requires an improper threat of sufficient gravity to induce the other party to manifest assent to an agreement. A contract obtained under duress or undue influence is voidable and continues in operative effect until the injured party acts in opposition to the contract.¹³⁴

Additionally, mistake can also be a contract defence if there is a mistake as to parties or one of the essential terms of the contract, provided the court cannot resolve the mistaken situation. If the mistake is only of one party as to a basic assumption on which he made the contract then the contract is voidable by him if he does not bear the risk of the mistake, provided that the mistake has a material effect on the agreed exchange of performances that is adverse to him and or the other party had reason to know of the mistake or he caused the mistake.¹³⁵ A party bears the risk of a mistake when the risk is allocated to him by agreement of the parties, or he is aware that he has only limited knowledge with respect to which the mistake relates but treats his limited knowledge as

¹³² French Civil Code, Art 1157. All the clauses of agreements are interpreted by each other, giving to each the sense derived from the entire act. In case of doubt, the agreement is interpreted against him who has stipulated, and in favour of him who has contracted the obligation. However general the terms may be in which an agreement is couched, it only comprehends things respecting against him who has of him who has contracted the obligation, which it appears that the parties intended to contract. When a case has been put in a contract for the purpose of explaining the obligation, it is not to be inferred to have been designed to restrict the extent to which the engagement goes of right as regards cases not expressed. French Civil Code, Arts 1160 to 1164.

¹³³ *Miami v Kory* (Fla App D3) 394 So 2d 494, petition den (Fla) 407 So 2d 1104.

¹³⁴ *Loizos v Mutual of Omaha Ins Co* 229 Pa Super 552, 326 A2d 515.

¹³⁵ Restatement of the Law, Second, Contracts § 153.

sufficient or the courts allocates the risk to him on the ground that it is reasonable in the circumstance to do so.¹³⁶

Misrepresentation is an assertion which is not in accord with the facts. A party seeking to avoid a contract on this basis must show that the misrepresentation was (1) either (a) material to the bargain or (b) was fraudulent, and (2) that the victim was induced to enter the contract as the result of reasonable or justifiable reliance upon that misrepresentation.¹³⁷ According to the rule held in *Kannavos v Annino*,¹³⁸ where one party to a contract of sale goes beyond “bare non-disclosure” and knowingly misrepresents facts by telling “half-truths” the other party may rescind the contract even though he could have ascertained the whole truth by checking public records.

Apart from the defences for circumstances affecting the assent, common law now also recognises a defence focused on the fairness and effect of the terms of the contract. The common law doctrines of consideration, offer and acceptance were developed in the nineteenth and early twentieth centuries at a time when courts and scholars were reluctant to admit that the enforceability of a contract should depend on its fairness. However, the courts gradually developed a defence to deny enforcement of unfair promises.¹³⁹ Thus, the unconscionability defence was adopted to prevent oppression and unfair surprise. It does not, however, relieve a party from a simple unfair bargain. This defence requires that there be a fault or unfairness both in the bargaining process (procedural unconscionability) and in the bargaining outcome (substantive unconscionability) at the time the contract was formed and not as of the time of the performance of the contract.¹⁴⁰ Procedural unconscionability occurs when one party to the contract, usually the party who wrote the contract, is at a superior bargaining position than the other party and uses that power to his or her advantage by engaging in unfair pressuring or bargaining practices to force the other party to sign. Substantive unconscionability takes place where the contract contains terms that are obviously unfair and one-sided in favour of the party with the superior bargaining power.¹⁴¹

Finally, illegality or violation of public policy also constitutes a defence. This includes contracts requiring a performance that violates criminal law, which is a tort, a restraint of trade, which contravenes public morals, that impairs family relations, or interferes with the administration of justice, among other circumstances.¹⁴² For the prevention of enforcement of the contract, the courts must consider the closeness of the connection between the misconduct and the contract terms. If there is a direct connection the contract itself violates public policy.

¹³⁶ *Ibid.*, § 154.

¹³⁷ According to the Restatement of Contracts: (1) a misrepresentation is fraudulent if the maker intends his assertion to induce a party to manifest his assent and the maker, (a) knows or believes that the assertion is not in accord with the facts, or (b) does not have the confidence that he states or implies in the truth of the assertion, or (c) knows that he does not have the basis that he states or implies for the assertion; (2) a misrepresentation is material if it would be likely to induce a reasonable person to manifest his assent, or if the maker knows that it would be likely to induce the recipient to do so. Restatement of the Law, Second, Contracts, § 162.

¹³⁸ *Kannavos v Annino* (1969) 356 Mass 42, 247 NE 2d 708; cf *Kraft v Lowe* 77 A 2d 554 (DC App 1950).

¹³⁹ *Earl of Chesterfield v Janssen* (1750) 2 Ves Sr 125, 28 Eng Reprint 82.

¹⁴⁰ *Marin Storage & Trucking, Inc v Benco Contracting and Engineering, Inc* 89 Cal App 4th 1042, 107 Cal Rptr 2d 645 (1st Dist 2001).

¹⁴¹ Leff, A., “Unconscionability and the Code – The Emperor’s New Clause” (1967) 115 *U PA L Rev* 485.

¹⁴² Shell, G.R., “Contracts in the Modern Supreme Court” (1993) 81 *Calif L Rev* 431.

Civil law doctrine and codes treat the phenomena affecting the assent as vices that vitiate the contract will, which is required for the formation of the contract. Like in common law, these vices may be invoked only as a defence, generally referred to as an exception, by the party to the contract which has suffered them.¹⁴³ The vices recognised by legislation vary somewhat from jurisdiction to jurisdiction. But generally they include error, fraud, violence and lesion.¹⁴⁴

The error in civil law implies an error or mistake in the knowledge of a fact (factual mistake) or about the applicable law (legal mistake).¹⁴⁵ The legal error may not invalidate the contract, except in those specific cases which are contemplated in the law.¹⁴⁶ The factual error may be invoked to void the contract only if it is considered essential, ie if the error involves a contractual term which is considered fundamental.¹⁴⁷

Fraud, also referred to as *dolus*, entails any false representation or omission or simulation of the truth or any manoeuvre used for that end.¹⁴⁸ Fraud affects the contractual will when it provokes an error of the other contractual party and triggers off the avoidance of the contract, provided it has been determinative to obtain the other party's will to enter into the contract. If the other party would have nonetheless contracted the contract is valid but it would entitle the affected party to seek damages.

Violence, which resembles the common law duress defence, also invalidates a contract in similar terms as in common law. A contract can also be invalidated if the will to contract resulted from the actual exercise of force.¹⁴⁹ The threat or use of force may be directed to the contracting party or even to his or her spouse, ascendant, or descendant. In Louisiana, for example, if the threatened injury is directed against other persons, the granting of relief is left to the discretion of the court.¹⁵⁰

Civil law also recognises a defence called "lesion", which is relatively similar to the common law unconscionability defence.¹⁵¹ This defence traces its origin to the Roman law doctrine of *laesio enormis* where enforcement was refused for contracts where the disparity of value was objectively considerable.¹⁵² This defence may be invoked when a party, exploiting the need or inexperience of the other, obtains

¹⁴³ Civil law has developed a considerably vast set of general principles dealing with capacity. These principles are deemed to apply to all legal acts and not only to contracts thus usually included in the general part of the civil codes, which is applicable to all legal acts.

¹⁴⁴ In Quebec, consent may be vitiated by error, fear or lesion. Civil Code of Quebec, 1399.

¹⁴⁵ Louisiana Civil Code, Art 1949. Error vitiates consent only when it concerns a cause without which the obligation would not have been incurred and that cause was known or should have been known to the other party.

¹⁴⁶ Mosset I.J., *Contratos* (Santa Fe: Rubinzal-Culzoni, 1995), p 170.

¹⁴⁷ *Ibid.*, p 170.

¹⁴⁸ Louisiana Civil Code, Art 1953. Fraud is a misrepresentation or a suppression of the truth made with the intention either to obtain an unjust advantage for one party or to cause a loss or inconvenience to the other. Fraud may also result from silence or inaction.

¹⁴⁹ The Civil Code of Quebec includes fear instead of violence or duress and it considers that fear of serious injury to the person or property of one of the parties vitiates consent given by that party where the fear is induced by violence or threats exerted or made by or known to the other party. Civil Code of Quebec, Art 1402.

¹⁵⁰ Louisiana Civil Code, Art 1960.

¹⁵¹ For the Civil Code of Quebec, lesion results from the exploitation of one of the parties by the other, which creates a serious disproportion between the prestations of the parties; the fact that there is a serious disproportion creates a presumption of exploitation. Civil Code of Quebec, Art 1406.

¹⁵² von Mehren, A.T., *The Civil Law System* (Englewood: Prentice Hall, 1957), p 529.

disproportionately advantageous terms.¹⁵³ Its acceptance as a fundamental principle of contract law in the vast majority of civil law countries was due to certain ethical ideas taken to require a fair exchange of values in a stratified social structure.¹⁵⁴ Instead of talking about procedural and substantive unconscionability, civil law codes speak of objective (the disproportionate terms) and subjective (the disproportionate bargaining power). Additionally, in both civil law and common law the court must analyse this phenomenon at the moment of the formation of the contract and not during the course of performance. Despite the differences in the denomination, both legal institutions are very similar and pursue the same objectives.

Remedies

In common law, any failure to perform one's obligations according to the terms and specifications of a contract is a breach of contract. A breach of contract generally triggers off the compensation of the damages it causes. Historically, specific performance was available only in equity and even today it is granted as a limited and rather exceptional remedy.¹⁵⁵ There are three distinct kinds of interest recognised by the law for compensation purposes: expectation, reliance and restitution. The expectation interest is the general rule.¹⁵⁶ The non-breaching party seeks protection for the benefit of her bargain, including any profits she would have made from the contract. In other words, expectation damages compensate the injured party for that amount of money necessary to place it, as nearly as possible, in the position that the victim would have occupied had the contract been performed. In other words, Fuller and Perdue justify the primary nature of the expectation interest on the grounds that expectation of future values become for purposes of trade present values, so the expectancy created by an enforceable promise should be required as a kind of property where the breach of that promise entails a reduction of the promisee's assets.¹⁵⁷ Thus, compensation equals the value benefits, which are calculated at the time of learning of the breach, less any savings that plaintiff was reasonably able to make by virtue of not having performed.

Damages may be recovered only if they are proven with a relatively high degree of certainty. Once the existence of some damage is proven the precise amount of damages can be calculated in a reasonable fashion even though some estimation or approximation is required. Recovery of contract damages is also limited by the concept of foreseeability. General damages, ie damages that are a natural and probable result of a breach of this type of contract where the breaching party could contemplate being liable for such damages at the time the contract was made irrespective of any special circumstances,¹⁵⁸ may be recoverable without any further concerns of foreseeability. Consequential (or special) damages, ie those that occur because of special facts and circumstances relating to the specific transaction, may be recovered only if it is

¹⁵³ Chilean Civil Code, Art 1888.

¹⁵⁴ See von Mehren (n 152 above), p 529.

¹⁵⁵ Posner, R.A., *Economic Analysis of Law* (Boston: Little, Brown, 1992), p 130. In Real Estate law it has become the rule.

¹⁵⁶ See Fuller and Perdue (n 122 above), p 52.

¹⁵⁷ *Ibid.* Fuller's view asserts the primacy of law over economics as he sees law not as the creature but as the creator of social institutions.

¹⁵⁸ Leake, S.M., *Principles of the Law of Contracts* (London: Stevenson and Son, Ltd, 1906), p 739.

established that they were foreseeable to the breaching party at the time the contract was made.¹⁵⁹

A unique common law institution is the duty to mitigate¹⁶⁰ which does not allow the recovery of damages that could have been avoided with reasonable effort and without undue risk. Under the duty of mitigation doctrine, a defendant who breaches a contract is “entitled to a credit against liability for any consequential damages the plaintiff could have avoided or minimised by reasonable effort and expense, whether or not the plaintiff actually avoided or minimised such damages”.¹⁶¹ In other words, a breaching party cannot be held liable for consequences that the claimant could have avoided through reasonable conduct.¹⁶²

If expectation damages cannot be proven, the non-breaching party may recover reliance damages. Reliance damages are measured by the amount of money necessary to compensate the innocent party for expenses or loss incurred in reasonable reliance upon the contract that was breached. Reliance damages are designed to place the victim in the position he was in before the contract was made.¹⁶³

Finally, common law courts have come to protect the plaintiff’s restitution interest, which compels the defendant to disgorge the money value of the benefit that he received from partial or full performance of the contract. The restitution interest – known in civil law as the principle of unjust enrichment – has long been recognised in civil law countries around the world. Restitution is measured by the value of the benefit conferred upon the defendant and not the damages sustained by plaintiff. In a restitution action there is ordinarily no legally enforceable contract in existence at the time the lawsuit is brought.¹⁶⁴

Contractual responsibility in civil law is governed by the general principles of civil responsibility, which requires evidence of the presence of four elements (1) illegality, (2) imputability, (3) damage, and (4) causal connection. The illegality is originated in the breach of the contractual obligation where the breach infringes the subjective, vested, right of the non-breaching party. There is a breach when a party to the contract contravenes its obligation, provided there is no justification – excuse in common law terminology – for the breach. In bilateral contracts this would occur, for example, in

¹⁵⁹ However, if the performance is incomplete rather than defective, the loss in value will ordinarily be measured by the cost to complete. If it is defective, damages are measured by the cost to correct unless this is economically wasteful.

¹⁶⁰ The mitigation principle that today is universally applied in the American workplace was the common law creation of a nineteenth century judiciary that, in the context of ostensibly determining damages for workers who had been wrongfully fired, condemned worker idleness as economically wasteful and even immoral. These courts insisted that those who had been wrongfully discharged could not remain jobless while they litigated their claims. Accordingly, the courts embraced a principle that was of very considerable benefit to errant employers and of no benefit to innocent grievants. Egli, H.C., “Damages Mitigation Doctrine in the Statutory Anti-Discrimination Context: Mitigating its Negative Impact” (2000) 69 *U Cin L Rev* 9.

¹⁶¹ Dobbs, D.B., *Law of Remedies Damages, Equity, Restitution* (St. Paul: West Pub Co, 1993), p 3.

¹⁶² Farnsworth, A.E., *Contracts* (New York: Aspen Law & Business, 1990), p 897.

¹⁶³ See Fuller and Perdue (n 122 above), p 52.

¹⁶⁴ At the time the contract is formed the parties may agree to a fixed sum of money or a formula for ascertaining a sum of money that will be due in the event of a breach of a certain nature. Liquidated damages may only be compensatory and not punitive. They must reflect an honest effort by the parties to anticipate the probable damage that would result from the breach.

the case of the *exceptio non adimpleti contractus* where the non-performance by one party is admissible when the other party has not performed.¹⁶⁵ The illegality, ie the breach must be attributable to the breaching party. This imputability is based on a subjective basis, where the breaching party must have either willingly or negligently breached his obligation. With respect to the third element, there is damage when one causes harm to another, whether caused to a person, thing or right. Absent damage, even if there is a breach of the contract, there is no obligation to compensate in civil law.

In principle, the breach of a contract entails the possibility of requesting a court to order specific performance or performance by a third party. Unlike common law, where specific performance is the exception, in civil law the first remedy a court ought to provide is specific performance. However, despite this general rule, in practice, like in common law, the vast majority of cases are compensated by monetary awards. Specific performance is relatively recent in common law since it has traditionally been unavailable. In civil law, if specific performance is unfeasible or inadmissible, the breaching party must compensate damages. Additionally, a contract breach allows the non-breaching party to resolve the contract or to request the court to declare the resolution.

Finally, there must be a causal connection between the illegal conduct and the damage. This connection is analysed retrospectively under an objective test to determine whether the conduct in question probably caused the damage.¹⁶⁶ This connection may either be wilful or negligent.

The scope of remedies in civil law is generally limited to the immediate and necessary, or direct, consequences of the breach. Immediate consequences are those which normally occur according to the natural and ordinary course of events.¹⁶⁷ This implies that there is no interference between the fact and the result which such fact produced. Despite its name, this concept does not allude to a temporal notion, but rather it refers to an adequate causation test.¹⁶⁸ However, in many civil law jurisdictions, it is not sufficient that contractual damages are the immediate and direct consequence of the non-performance – they must have been foreseen or foreseeable at the time that the obligation was contracted unless there is intentional or gross fault.¹⁶⁹ This strict line between immediate and non-immediate consequences has sometimes been blurred in judicial decisions – in a fashion not unlike that used by common law courts – which have followed a more flexible approach with the view toward circumventing this unfair legal limitation.¹⁷⁰ For wilful breaches of a contract with the intention to cause damage, the scope of the compensation includes the recovery of non-immediate consequences.¹⁷¹

¹⁶⁵ Argentine Civil Code, Art 1201.

¹⁶⁶ Agoglia, M.M., *et al*, *Responsabilidad por Incumplimiento Contractual* (Buenos Aires: Hammurabi, 1993), p 284.

¹⁶⁷ Argentine Civil Code, Art 901.

¹⁶⁸ *See* Agoglia (n 166 above), p 284.

¹⁶⁹ In contractual matters, the debtor is liable only for damages that were foreseen or foreseeable at the time the obligation was contracted, where the failure to perform the obligation does not proceed from intentional or gross fault on his part; even then, the damages include only what is an immediate and direct consequence of the non-performance. Civil Code of Quebec, Art 1613.

¹⁷⁰ *See* Alterini (n 42 above), p 1186.

¹⁷¹ Trigo Represas, Felix, “Extensión de la responsabilidad por incumplimiento contractual” (1998) 17 *Rev. de Derecho Privado y Comunitario* 22.

With respect to the types of compensable damages,¹⁷² civil law gives an action for recovery of a wide array of damages. These include both patrimonial, ie emergent damages derived from the breach and loss profits,¹⁷³ and extra-patrimonial damages.¹⁷⁴ Unlike common law, civil law has been more liberal with the recovery of moral damages. Moral damages can be equated to compensation of the harm of mental shock and anguish in common law. Thus, moral damage is also recognised in common law countries – albeit with different denominations. However, the compensation of moral damages differs between civil law and common law jurisdictions. For example, in Belgium and France a woman can claim compensation for the loss of her husband, and in the United States loss of consortium is compensable.¹⁷⁵

Commercial Launch Services Contracts in Common Law and Civil Law Jurisdictions

Private-sector commercial endeavours in outer space have been increasing exponentially and have experienced a significant quantitative growth over the last years.¹⁷⁶ Along with satellite communications and remote sensing, the space launch market has been growing steadily and constantly over the last few decades.¹⁷⁷ Apart from the traditional space powers – the United States and the former Soviet Union – there are several other countries today which offer commercial launch services. These including France, along with the European Space Agency, China, Japan, and to a lesser extent India. Other countries, such as Argentina, Brazil and Israel, are currently developing space transport capabilities and will join the space launch market in the near future.¹⁷⁸

The most distinctive note about space launch agreements is the high degree of uniformity in their structure, wording and organisation which they present both in the United States and France, as well as in other common law and civil law jurisdictions.¹⁷⁹ Furthermore, as will be analysed below, the doctrinal analyses about these agreements are remarkably similar and civil law authors freely base their analysis and doctrinal

¹⁷² Civil law gives an action that permits the recovery of present damages and those certain future damages and thus excludes the possibility of compensating uncertain or hypothetical future damages. *See* Alterini (n 42 above), p 554.

¹⁷³ Besides those damages arising naturally from the breach, consequential damages include such damage as “may reasonably supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it”. If there are special circumstances, they must be communicated and thus known to both parties. *See* Tetley (n 28 above), p 713.

¹⁷⁴ *See* Alterini (n 42 above), p 554.

¹⁷⁵ Christol, C.Q., “International Liability for Damage Caused by Space Objects” (1980) 74 *AJIL* 346.

¹⁷⁶ *See* Hermida (n 31 above), p 1.

¹⁷⁷ The space launch market is expected to experience steady and constant growth and is estimated to generate approximately US\$10 billion annually in revenues. The 2002 State of the Space Industry, International Space Business Council, Feb 2002, <http://www.spacebusiness.com> (visited 18 Jul 2002) and Satellite Industry Association / Futron Satellite Industry Indicators Survey 2000/2001, Jun 2001 <http://www.sia.org/satelliteinfo.htm> (visited 18 Jul 2002).

¹⁷⁸ Goldman, N.C., *American Space Law International and Domestic* (Ames: Iowa State University Press, 1988), p 24.

¹⁷⁹ Hermida, J., *Legal Aspects of Space Risk Management: The Allocation of Risks and Assignment of Liability in Commercial Launch Services*, (LLM Thesis on file at McGill University, Montreal), p 52.

comments on United States and other common law works¹⁸⁰ and United States authors highly rely on civil law works,¹⁸¹ especially since judicial decisions are marginal due to the existence of mandated waivers of liability and the special characteristics of the space industry.¹⁸²

Both United States and civil law authors¹⁸³ characterise the launch services agreement as an understanding between the carrier and the user whereby the carrier, in exchange for a price, undertakes to render several services and to make its best efforts to place the user's payload in an orbit in outer space by means of a manned or unmanned launch vehicle.¹⁸⁴ Under French law,¹⁸⁵ Arianespace launch services agreements have been categorised within the scope of section 1779 of the French Civil Code,¹⁸⁶ which governs industry and services leases, thus stressing the *obligations de moyen* as one of its central features.¹⁸⁷ In French law, the *obligations de moyen* entail a duty to do one's best as opposed to the *obligations de resultat* which require a duty to achieve a particular outcome.

In the United States, the central element of these contracts is the best efforts principle, whereby the launch services provider limits its obligations to make its best efforts instead of warranting the actual placing of the satellite in orbit.¹⁸⁸ This best efforts

¹⁸⁰ Masson, T.L., "The Martin Marietta Case or How to Safeguard Private Commercial Space Activities" (1992) 35 *IISL* 239. In effect, launch carriers around the world have adopted the agreements used by NASA in the early 1980s when it offered launches on a commercial basis practically without competition. This uniformity transcends any legal and political regime. Thus, these agreements have proved to be efficient not only in civil and common law jurisdictions, but also in the socialist system.

¹⁸¹ Bender, R., *Space Transport Liability: National and International Aspects* (The Hague: Martinus Nijhoff, 1995), p 7.

¹⁸² Kayser, V., *Launching Space Objects: Issues of Liability and Future Prospects* (Dordrecht: Kluwer Academic Publishers, 2001), p 150.

¹⁸³ See Hermida (n 179 above), p 53.

¹⁸⁴ Hermida, J., *Commercial Space Law: International, National and Contractual Aspects* (Buenos Aires: Ediciones Depalma, 1997), p 17. A space launch consists of a series of activities directed toward placing satellites into orbit or otherwise into outer space by means of a manned or unmanned space vehicle.

¹⁸⁵ Peyrefitte, L., *Droit de l'Espace* (Paris: Précis Dalloz, 1993), p 104.

¹⁸⁶ French Civil Code, Art 1779. It read as follows "there are three principal species of hiring of labour and industry: (1) the hiring of workmen who engage themselves in the service of any one; (2) that of carriers, as well by land as by water, who are charged with the conveyance of person, or commodities; (3) that of persons who undertake work by estimate or by contract."

¹⁸⁷ Couston, M., *Droit Spatial Economique* (Paris: SIDES, 1994) p 245. Unlike the air transport contract where the carrier assures the result of the obligations, ie the transport of persons or goods to an agreed upon destination, the promise of the space carrier lies merely in the use of its best efforts to place the payload in the agreed upon orbit, which implies that in case of failure of the launch, Arianespace may not be held liable unless the customer proves Arianespace's fault.

¹⁸⁸ Schmidt-Tedd, B., "Best Efforts Principle and Terms of Contract in Space Business" (1988) 31 *IISL* 330. As pointed out by Schmidt-Tedd, it has to be emphasised that the meaning of the best efforts principle is not limited to the exclusion of claims for non-performance, or improper performance of contractual obligations. This principle is formed by two elements: the effort and the quality of best. The former implies the attempt to perform an objective and the latter determines that such effort must be made according to the highest standard of quality. It may thus be concluded that this principle implies an enhanced promise of performance. This requires that the parties behave with the greatest commitment and with the highest quality standards when fulfilling their respective contractual obligations. Otherwise, the limitation of liability would lack the intended legal effect, and any damage should have to be fully compensated. In keeping with this line, the best efforts principle appears as an effective legal instrument to prevent disputes in an industry which requires permanent venture capital to exist.

principle is defined in space launch agreements generally as “diligently working in a good and workman-like manner, as a reasonable, prudent manufacturer of launch vehicles and provider of launch services”.¹⁸⁹ By means of the best efforts principle, the parties refrain from promising the accomplishment of their respective obligations, committing themselves only to making their best efforts to achieve success,¹⁹⁰ which coincides with the *obligations de moyen* nature which these agreements have in French law.¹⁹¹

French authors, such as Léopold Peyrefitte,¹⁹² Valérie Kayser¹⁹³ and Mireille Couston¹⁹⁴ also emphasise the centrality of the *obligations de moyen* and that therefore the object of the contract is not the carriage of the payload from one site to a certain orbit but rather the efforts to place it in orbit. For this reason, French authors, as well as some Argentine commentators,¹⁹⁵ coincide that the nature of the agreement does not fall within the traditional category of transportation agreements in a strict sense. In the United States, there are very few judicial decisions dealing with these contracts and due to the characteristics of the industry it has been predicted that there will not be many in the future.¹⁹⁶ Therefore, some authors have delved into the analysis of these contracts in a style which is reminiscent of the civilian approach. United States authors have concluded that these contracts constitute services for which fulfilment the carrier makes its best efforts.¹⁹⁷ As can be seen from the foregoing discussion, in both civil law and common law jurisdictions authors characterise and treat these contracts in a similar fashion.

Another common characteristic of these contracts is the participation of government in many ways. Even if strictly speaking only the launch services provider / carrier and the user are parties to the contract, this agreement forms part of a complex series of transactions where several entities are involved. These include the manufacturer of the payload, the contractors and subcontractors of both the launch services provider and the user and the government.¹⁹⁸ In space launch services provided by US companies, where the launch is made from United States sites, it is set forth that the launch is to abide by the United States Government launch policy, which implies that a payload of the Government has priority over any other commercial space object. Similarly, in services

¹⁸⁹ Launch Services Agreement between Martin Marietta Corporation and INTELSAT, No MMC-CTS-87-001 INTEL-629. See Masson (n 180 above), p 247.

¹⁹⁰ See Hermida (n 184 above), p 17. This principle is associated with both a reduction and a waiver of liability and is one of the techniques used for the contractual allocation of risks among the participants in a commercial space transaction.

¹⁹¹ In French law, as pointed out by Kayser, in order to show contractual liability the injured party must only prove fault of the defaulting party. This fault standard is the failure of the obligee to act in accordance with the standard of conduct appropriate to achieve the obligation at stake. See Kayser (n 182 above), p 97.

¹⁹² See Peyrefitte (n 185 above), p 102.

¹⁹³ See Kayser (n 182 above), p 150.

¹⁹⁴ See Couston (n 187 above), p 241. Couston considers that the nature of these agreements is cooperational and promotional although she sees that they present some distinctive features.

¹⁹⁵ Mutti, A.H., “Contrato de Transporte Espacial” (1986) 6 *Rev del Instituto Nacional de Derecho Aeronáutico y Espacial* 73.

¹⁹⁶ Kayser asserts, “the space community is not litigating much, due to the fact that there are not many actors involved, they have often strong ties among themselves and are bound by inter-participant waiver of liability clauses which have the effect of blocking litigation”. See Kayser (n 182 above), p 150.

¹⁹⁷ D’Angelo, G., *Aerospace Business Law* (Westport, Conn: Quorum Books, 1994), p 125.

¹⁹⁸ In the case of launches provided by Arianespace, the European Space Agency and its member states are also involved.

provided by the French carrier, European payloads have priority over non-European ones according to the commitments undertaken between France and the European Space Agency.¹⁹⁹ These similar contractual provisions imply that even if the parties to the launch services agreement have already fixed a date or a period of time for the launch, this launch can be relegated in the event that the United States Government or a European firm, respectively, needs to launch a satellite.

Structure of Space Launch Services Agreements

The launch services agreements usually have a standard contractual structure.²⁰⁰ The structure, as well as the wording, of these contracts follows the organisation, structure and language of the contracts generally used in common law practice,²⁰¹ which typically includes the following provisions: (1) recitals; (2) definitions; (3) services to be provided; (4) termination of launch services; (5) program of launches; (6) delays; (7) adjustments to the launch program; (8) priority; (9) price; (10) price adjustment; (11) method of payment; (12) replacement launch; (13) reimbursement option; (14) representations and warranties; (15) reciprocal waivers of liability; (16) third party insurance; (17) limitations of liability; (18) *force majeure*; (19) disclaimer of liability for representations and warranties; (20) proprietary data treatment; (21) industrial and intellectual property, including patents; (22) compliance with governmental authorisations; (23) compliance with export permits; (24) post launching actions; (25) termination; (26) arbitration; (27) applicable law; (28) assignment; (29) notifications; (30) language; (31) entire agreement; (32) entry into force; and (33) confidentiality.

In contracts governed by civil law and common law jurisdictions, the most important clauses are certainly the ones embodying the risk management system. This is achieved by a complex system of reciprocal waivers of liability, indemnification granted by the states, commitments to obtain insurance, limitations of liability, sole contractual remedies in the event of default, exclusion of liability clauses, and the inclusion of the best efforts principle or the *obligations de moyens*, among other contractual clauses. These risk management systems included in the contracts derive from the prescriptions of the law and thus the parties to the launch services agreement have little margin for negotiation and to depart from these mandatory schemes. In US law, the risk management regime of these contracts is mandated by the Commercial Space Launch Act. In France, the risk management system derives from a complex mosaic of administrative regulations and bilateral and multilateral agreements made at the agency and national levels.²⁰²

In the United States launch services agreements first party risks, ie risk of damage to the parties' space objects – the space vehicle in case of the launch company or the

¹⁹⁹ See Hermida (n 31 above), p 31.

²⁰⁰ Generally, these contracts consist of three main parts. The first one, which is the most important one, contains the provisions applicable to the launch itself. The second one, which may not be present in all agreements, governs the rights and obligations relating to each party in case of a replacement launch. Finally, the last part of the contract contains the general rules applicable to both types of launches. Contracts used by other launch providers contain only one part and the provisions regarding the replacement launch are incorporated in the contract.

²⁰¹ See Kayser (n 182 above), p 244.

²⁰² Hermida, J., "Risk Management in Arianespace space launch agreements" (2000) XXV *Ann Air & Sp L* 143.

payload in case of the customer, and to their personnel – resulting from the launch activity, are allocated through a system of mandatory reciprocal waivers of liability²⁰³ whereby each party agrees to be responsible for any damage or loss resulting from activities carried out under the use of a space license. These waivers of liability represent legislatively mandated contractual indemnification obligations of each private participant, and its contractors and subcontractors, vis-à-vis the other private participants,²⁰⁴ as well as its contractors and subcontractors.²⁰⁵

Second party risks, ie risks to certain related entities – generally the government – which, although they do not participate directly in the space activity, are all the same exposed to some risks, are distributed in a two-layered basis, where the private launch operator assumes the risk of losses through a system of insurance or self-insurance up to the amount of the maximum probable loss, ie US\$100,000,000 or the highest amount of liability insurance available, at a reasonable cost, on the world market in case the same is lower than US\$100,000,000, and the government absorbs the risks from that limit upwards through the so called waivers of liability.²⁰⁶

Third party risks, ie risks of damage caused to persons and property thoroughly unrelated to the launch, are allocated between the private launch provider and the government on a horizontal basis, consisting of three layers. In the first layer, risks are

²⁰³ Reciprocal waivers of liability constitute the milestone of this system. By means of these waivers of liability (wrongly called inter-party since they involve other participants unrelated to the contract between the carrier and the customer), each party agrees to be responsible for any damage which it sustains as a result of damage to its own property and employees, whether the damage is caused by the carrier, the customer or other customers involved in the space transport operations. Usually, this is complemented by the obligation imposed on all parties to the contract to include similar waivers of liability in their agreements with their contractors and subcontractors, so that each will assume its risks and will not sue the other participants.

²⁰⁴ Commercial Space Launch Act Amendment of 1988, Report of the Senate Committee on Commerce, Science and Transportation on HR 4399, SR 100-593, 7 Oct 1988, US Government Printing Office, Washington, 1988, 14.

²⁰⁵ According to the text of the 1988 Amendments, the purpose of this provision is (1) to limit the total universe of claims that might arise from a launch, and (2) to eliminate the necessity for all the parties to obtain property and casualty insurance to protect against such claims. With respect to the first of the objectives sought by the 1988 legislator, as the reciprocal waivers promulgate the assumption of risks by each participant they act as a deterrent of claims. Indeed, by virtue of this legal prescription each participant is precluded from its right to sue the entity causing the damage. The scope of this provision does not encompass all events which may originate damage arising from a space launch. Moreover, even within the covered events not all claims are precluded. However, the waivers have proved to act as an effective hindrance of lawsuits. As regards the second of the objectives sought by the legislator, the waivers of liability foster the obtainment of insurance – or another form of risk management – by the users to protect against their own first party risks, for they may not afford to lose their payload without recouping at least part of their investment. However, since neither the launch carrier nor the customer is liable for damage it may cause to each other, the obtainment of insurance to protect against foreign first party risks becomes thoroughly unnecessary. Therefore, the actual objective of the reciprocal waivers of liability consists of providing the launch industry with a system that permits it to convey risks to the customers. *See Hermida* (n 31 above), p 105.

²⁰⁶ Thus, the Commercial Space Launch Act obliges launch operators to obtain liability insurance or to demonstrate financial responsibility in an amount sufficient to compensate the maximum probable loss from claims against any person filed by the United States for loss of or damage to property of the United States resulting from activities carried out under the license in connection with any particular launch. Cassidy, Daniel E., “Allocation of Liabilities Between Government and Private Sector and Implications on Insurance for Space Commercialisation” (1990) 33 *IISL* 28.

absorbed by the private space launch provider through insurance or demonstration of financial responsibility in an amount sufficient to compensate the maximum probable loss, which has been capped at US\$500,000,000, or the maximum liability insurance available on the world insurance market at a reasonable cost. Risks in the second layer are assumed entirely by government indemnification up to the amount of US\$1,500,000,000. The third layer includes all claims above the upper limit of the indemnification and is the exclusive responsibility of the launch provider. This risk allocation system permits the United States Government to redistribute the liability which the international space law instruments²⁰⁷ have attached to it to the different space players in accordance to its objectives of promoting the strength of its private sector space launch industry while safeguarding the public safety interests of the United States population in general.²⁰⁸

In Arianespace agreements, first party risks are assumed by Arianespace and its customers, by means of reciprocal waivers of liability.²⁰⁹ These waivers of liability²¹⁰ consist of (1) a general assumption of risks by each party, (2) the assumption of the consequences of those risks, (3) a consequent waiver of rights to make a claim for liability, (4) a waiver for the consequences of the losses suffered, and (5) an

²⁰⁷ *Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies*, 27 Jan 1967, 610 UNTS 205, 18 UST 2410, TIAS No 6347, 6 ILM 386 and *Convention on the International Liability for Damage Caused by Space Objects*, 29 Mar 1972, 961 UNTS 187, 24 UST 2389, TIAS No 7762.

²⁰⁸ Furthermore, in the cases of damage not expressly foreseen in the agreements, the carrier's liability, or the liability of the launching state in the event the carrier is a governmental entity, towards the customer and vice versa will be limited to direct damages and will not include any loss of revenue, profits or other indirect or consequential damages.

²⁰⁹ They are generally drafted as follows: "Each Party shall bear any and all loss of or damage to property and any bodily harm (including death) and all consequences, whether direct or indirect, of such loss, damage or bodily harm, (including death), and / or of a Launch Mission failure and / or of a Satellite Mission Failure, which it or its Associates may sustain that arises in any way in connection with this Agreement, or the performance of this Agreement. Each Party irrevocably agrees to a no-fault, no subrogation, inter-party waiver of liability, and waives the right to make any claims or to initiate any proceedings whether judicial, arbitral, administrative on this account against the other Party or that other Party's Associates for any reason whatsoever. Each Party agrees to bear the financial and any other consequence of such loss, damage or bodily harm (including death), and / or of a Launch Mission failure and / or of a Satellite Mission Failure, which it or its Associates may sustain, without recourse against the other Party or the other Party's Associates. In the event that one or more Associates of a Party shall proceed against the other Party and / or that Party's Associates as a result of such loss, damage or bodily harm (including death), and / or of a Launch Mission failure and / or of a Satellite Mission Failure, the first Party shall indemnify, hold harmless, dispose of any claim, and defend, when not contrary to the governing rules of procedure, any liability and expense, including attorneys' fees, on account of such loss, damage or bodily harm (including death), and / or of a Launch Mission failure and / or of a Satellite Mission Failure and shall pay all expenses and satisfy all judgments and awards which may be incurred or rendered against that other Party and / or its Associates".

²¹⁰ The scope of reciprocal waivers of liability is quite broad, for they include: (1) damage to property; (2) bodily harm; (3) death; (4) all their consequences; (5) Launch Mission failure; and (6) Satellite Mission Failure. Unlike in the US regime, the waivers of liability used in Arianespace launch services agreements also cover contractual losses. In effect, they include Launch Mission failure, ie the impossibility of placing the satellite in the agreed upon orbit due to problems caused by the space vehicle or the launch itself, and Satellite Mission Failure, ie risks of causing damage to the satellite which may impede it to attain the intended orbit or operate successfully in it.

indemnification or hold harmless provision in case of actions filed despite the waiver.²¹¹ As in the US system, the objectives sought by the reciprocal waivers of liability are basically to limit the claims that might arise from a launch, and to eliminate, or at least reduce, the necessity to obtain property and casualty insurance to protect against claims which may otherwise derive from the launch.²¹² This liability-waiver scheme is further complemented by obliging each party to the agreement to make its contractors and subcontractors execute reciprocal waivers of liability so that they will also be banned from filing claims in the event of an accident.²¹³

Second party international liability²¹⁴ risks involve Arianespace, the European Space Agency, its member states and the French Government. They refer to the possibility of these governmental and supra-governmental entities' being considered launching states and therefore liable pursuant to the Liability Convention.²¹⁵ These risks are distributed on a two-layered basis, where Arianespace assumes liability up to approximately 61,000,000 Euros (formerly 400,000,000 French francs) through insurance and the French Government bears all liability claims above that level by means of governmental indemnification. With respect to the first layer, participants in the Production Declaration requested Arianespace to undertake to reimburse the French Government within a ceiling of approximately 61 million Euros per launch,²¹⁶ the amount of any compensation it may be required to pay in case of damage caused by Ariane launches to third parties.²¹⁷ This assumption of liability by Arianespace is implemented

²¹¹ The indemnification provision for claims filed despite restriction of waivers of liability stems from the fact that clauses whose object is the exoneration of responsibility in cases of bodily injury are prohibited under French Law. Therefore, in the event that, for example, employees of the customer suffer physical damages or even death they or their heirs could file a claim before the French courts, which would be admitted despite the waiver of liability contained in the launch services agreement. In such a case, the launch carrier could be condemned to pay damages to that employee or their heirs. If so, the carrier could, in turn, recover damages so paid from its customer by invoking the indemnification and hold harmless provision of the agreement. Loquin, E., "La gestion contractuelle des risques de l'exploitation commerciale de l'espace" in Kahn, P., (ed) *L'Exploitation Commerciale de l'Espace: Droit Positif, Droit Prospectif* (Dijon: Litec Credimi, 1992), p 173.

²¹² Also as in the US system, the reciprocal waivers of liability act as a mechanism for the transfer of first party risks to the customers, thus exempting the launch provider from damage it causes. This is so because it is more frequent for a carrier to cause damage to its customer rather than the reverse. This acts as an exclusion of liability, which constitutes an exception to the fault principle of the French civil law. *See* Couston (n 187 above), p 245.

²¹³ This is generally drafted in Arianespace launch services agreement as follows: "Each Party obligates itself to take all necessary and reasonable steps to foreclose claims for loss, damage or bodily harm (including death) by any participant in the launch activity. Each Party shall require its Associates to agree to a no-fault, no subrogation, inter-party waiver of liability and indemnity for loss, damage or bodily harm (including death) its Associates sustain identical to the Parties' undertaking under this Article ... of the Agreement".

²¹⁴ *See* Hermida (n 179 above), p 6.

²¹⁵ "Liability Convention," Art 1.

²¹⁶ The cap on the reimbursement has been set on a per launch basis. Thus, even if, for example, Ariane carries two payloads in a single launch which causes damages to third parties, Arianespace will still have to reimburse up to approximately 61 million Euros.

²¹⁷ Declaration by Certain European Governments Relating to the Ariane Launcher Production Phase signed by states participating in the Ariane production phase, VOL.II-BIS / G02V [hereinafter the "Production Declaration"], Art 3.8. This Declaration, engineered by the French Government, entered into force in 14 Apr 1980 and was signed by states participating in the Ariane production phase. According to the Declaration, the participants decided to entrust an industrial structure, Arianespace, with the execution

through a reimbursement of costs to the French Government for compensation it may have paid in the event of damage caused by Arianespace to third parties if the French Government, the ESA or its member states were considered launching states and thus held liable for these damages. In this case, Arianespace does not have to pay directly to the victims but has to refund the French Government any compensation actually paid by it to third parties or to the ESA or its member states if the Agency or its members paid a compensation to the victims of the accident. Therefore, Arianespace assumes liability for what is considered maximum probable loss, ie approximately 61 million Euros, and the Government assumes the potential but extremely unlikely maximum possible loss.²¹⁸

Third party risks are distributed in Arianespace launch services agreements on a two-layered basis. In the first level, Arianespace requires the customer to assume the risks up to the amount of approximately 61 million Euros through insurance taken by Arianespace and paid for by the customer.²¹⁹ In the second level, the French Government provides full indemnification to Arianespace above approximately 61 million Euros.²²⁰

As can be seen from the above analysis of the risk management clauses, in contracts used in the civil law and common law worlds the structure and the elements of the risk distribution regimes present general common features. They both distribute first and third party risks by means of a combination of reciprocal waivers of liability and insurance, or self-insurance, requirements and they both have a system of insurance and government indemnification for the distribution of second party risks. However, their

of the Ariane launcher production phase. The objective of this production phase was to meet the launch requirements of the world market subject only to the following conditions: (1) that it should be carried out for peaceful purposes in conformity with the ESA Convention and the Outer Space Treaty; and (2) that ESA and the participant states should have priority over third party customers. Arianespace was thus assigned the manufacture, marketing and launch of the Ariane launchers.

²¹⁸ The French Government assumes the liability of ESA's member states, ESA itself and Arianespace. In order to distribute this category of second party risks, the ESA and Arianespace signed a Convention on 15 May 1981 – extended on 24 Sept 1992 – which aimed at putting into practice the principles of the Production Declaration. Convention between ESA and Arianespace signed 15 May 1981, ESA/C(81)11.

²¹⁹ This clause generally reads as follows “Arianespace shall, for the Launch, take out an occurrence basis type insurance policy at Customer's cost to protect itself and Customer against liability for property and bodily harm which Third Parties may sustain and which are caused by the Combined Space Vehicle or part thereof. In said insurance policy the natural and corporate bodies hereinafter shall be named as assured: 1. The Government of France. 2. The Centre National d'Études Spatiales 'CNES' and any launching state as per Convention of 29 Mar 1972 related to the international liability damage caused by spacecraft. 3. The auxiliaries of any kind, whom Arianespace and / or the CNES would call for in view of the preparation and execution of the launching operations. 4. The European Space Agency 'ESA', but only in its capacity as owner of certain facility and / or outfits located in the Centre Spatial Guyanais in Kourou and made available to Arianespace and / or CNES for the purpose of the preparation and the execution of the launches. 5. The firms, who have participated in the design and / or in the execution and / or who have provided the components of the Launch Vehicle, of its support equipment including propellants and other products either liquid or gaseous necessary for the functioning of the said Launch Vehicle, their contractors, subcontractors and suppliers. 6. Customer and Third Party Customer(s) of Arianespace on whose behalf Arianespace executes the launch services as well as their co-contractors and subcontractors. 7. When they act in the scope of their activities, the Officers and Directors, the legal representatives, the Managing Director, the employees, agents, as well as the interim staff employed by Arianespace or by the Assured mentioned in here above Paragraph 1 to 6 (included)”.

²²⁰ Governmental indemnification constitutes a fundamental risk-sharing instrument aimed at protecting Arianespace's customers for claims above the level of insurance. Through this indemnification the customer is relieved from the risks of having to face claims above approximately 61 million Euros.

actual content differs substantially, as the objectives of these systems are a response to the objectives of the general space policy of each country.²²¹ Thus, the Arianespace system pursues the maintenance of the French (European) leadership in space, and therefore the French Government assumes a higher degree of risk than the United States Government. In turn, the United States regime tends to provide its private sector launch industry with a set of norms that permit it to transfer a significantly high degree of risk to its customers and, to a lesser extent, to the government.²²²

In contracts used in the civil law and common law worlds virtually all other substantive clauses also read quite the same. Thus, for example, the contracts tend to describe the provision of the launch services in almost exact terms and to word the representations and warranties, the determination of the launch date and the payment clauses in practically the same way.²²³

The reason for the similarity in treatment, structure, and analysis between space launch services agreements in civil law and common law jurisdictions is twofold. First, as has been analysed above, common law and civil law present common features and a highly compatible nature derived from their common Western philosophy and secular objectives, as well as from a history which has been moving toward convergence, particularly in the commercial realm. Second, the characteristics of the outer space environment, which entails high risks to persons and property both part and foreign to the commercial space ventures, require similar or even uniform legal solutions, for which purpose the international treaties and conventions dealing with outer space have acted, in practice, as general harmonizing guidelines and principles for the development of national law and even for contractual practice.²²⁴

Conclusions

Common law and civil law have been traditionally seen as distinctive and fairly diverse. Each belongs to a tradition that has been regarded as quite different. However, in several areas common law and civil law have been increasingly marching toward natural convergence. This process toward convergence does not mean that civil law and common law are one and the same. On the contrary, as has been shown, there are still important differences in virtually every area of law in these two systems. However, these differences deal with a different order of priority in sources, a different style of judicial decisions and doctrinal analysis and a slightly different interpretation method.

Civil law tends to proclaim sets of principles of general and more abstract applicability to govern most areas of contract law, which derive mainly from the codes and to a lesser extent from other statutory norms that have been widely analysed by the doctrine. In contrast, in common law there is a tendency to articulate rules of more precise and specific applicability through the works of the courts in their adjudication

²²¹ See Hermida (n 31 above), p 1.

²²² See Hermida (n 179 above), p 52.

²²³ See Masson (n 180 above), p 239.

²²⁴ In these contracts there is no resort to civil sources in the civil law jurisdictions and in common law there is no resort to case law precedents not because there is a search for a minimum common denominator between civil law and common law but because these rector principles dealing with contractual practice, eg formation, interpretation, etc, are not diametrically opposed and work well in both systems.

function. However, civil law also contains rules to govern some areas of contracts, such as the rules governing the communication of offers and acceptance, which are not altogether dissimilar from their common law counterparts.

At the present stage of development toward convergence in the contract field, despite these differences in style, methodology and terminology common law and civil law have arrived at practically analogous solutions for the vast majority of contract problems. For example, the requirements for contract formation in civil law are more in number and more complex than in common law, such as the object requirements. However, some of these requirements – or at least similar ones based on the same underlying policy – are also present in common law, albeit in a different aspect of and with a different role in contract law, with slightly similar consequences, such as the civil law lesion exception and the common law unconscionability defence.

The reason for the similarity in treatment, structure, and analysis between civil law and common law contract theory and practice is twofold. First, common law and civil law present common features and a highly compatible nature derived from their common Western philosophy and secular objectives, as well as from a history which has been moving toward convergence, particularly in the commercial realm.

In the case of commercial space launch agreements the convergence phenomenon between civil law and common law is remarkably greater. The structure, as well as the wording of the clauses, resembles the structure, organisation and language of these agreements followed in most common law contracts. However, the doctrinal analysis of these agreements both in common law and civil law jurisdictions follows the traditional civilian style of identifying the functions of the contract and explaining the effects in terms of rights and obligations of the parties.