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Legal Remedies Provided in the Estonian Draft Law of Obligations Act for Breach of Contractual Obligations

Under § 13 of the Constitution of the Republic of Estonia, everyone has the right to the protection of the state and of the law. Under § 19 everyone has the right to free self-realisation. Everyone shall honour and consider the rights and freedoms of others, and shall observe the law, in exercising his or her rights and freedoms and in fulfilling his or her duties. Section 31 of the Constitution vests everyone with the right to engage in enterprise. The provision of the appropriate legal environment by the state is an important condition for conducting business. Nonconformity of the applicable civil law in its law of obligations part to the interests of free enterprise has become evident. The drafting of the new Law of Obligations Act was based on the approach that law of obligations and, in particular, contract law are fields the unification of which is requisite in the development of an actually functioning single European market. In the situation of today's competition economy, competition has also appeared between national legislations.¹ In choosing the law applicable to a contract, preference is inevitably given to a legislation that is efficient, comprehensible and provides adequate negative mandatory capacity, etc. The grounds for applying remedies (grounds of civil liability), the remedy categories, procedure and legal consequences of their use and the negative mandatory capacity are the questions of interest to any contracting party who must make the choice of national law applicable to the contrac-

tual relationship in the event of dispute. The drafters of the new Estonian Law of Obligations Act have sought to find such solutions and methods of regulation that would be as competitive as possible in comparison with the civil law of other European countries.²

Parties conclude contracts with a view to certain objectives that they wish to attain: the income that they hope to receive or the prevention of certain consequences or conduct. At the initial stage of a contractual relationship, both parties are, presumptively, interested in performing the assumed duties. As in other European countries, the *pacta sunt servanda* principle is also the cornerstone of Estonian contract law. Although contracts can be prepared with high thoroughness and expertise, the performance of a contract may still fail owing to the fault of the party in breach, the aggrieved party or a third party or to circumstances independent of the contracting parties. It is also said that a contract is exactly as good as the parties thereto. In order to ensure legal certainty and actually implement the freedom of enterprise guaranteed under the Constitution, the remedies available for breach and the procedure of their use must be as simple as possible and undistinguishing between persons breaching contractual obligations.

Protection must be afforded to any right, and anyone vested with the right is entitled to protection by means of remedies provided in the law. The right to claim judicial protection of violated rights is a part of personal rights

under civil law. The scope and extent of protection of rights depend on many circumstances relating to the nature of the protected rights and the circumstances of violation. Such circumstances include, in particular, the field of the violated right. Hence, for example, remedies provided for violation of real rights are inapplicable if relationship under law of obligations is determined as existent between the parties. In addition, the application of remedies may be limited by or related to proper performance by the creditor. The extent of a party's liability may also depend on that party's status or the counterparty's need for protection. For example, the extent of liability may vary according to whether the contract has been concluded within the bounds of professional or economic activity or not. In the latter event, for example, the liability for breach may be more stringent, remedy categories may be different from those allowed to other subjects and the properness of performance is often regulated by laws or other legislation.

The protection of parties' rights in the event of breach of contractual obligation means, first of all, the opportunity to use remedies provided in the law or stipulated in the contract. The doctrine of civil law has been entrusted with the task to work out the criteria for optimum and equitable protection of the aggrieved party's rights in the event of breach. This enables to ensure the stability and legal certainty of contractual relationships and the rationality of commerce.

The application of remedies may be aimed at removing or anticipating a breach, removal of harmful consequences, restoration of the former situation or compensation for damage caused by the breach. Some of the remedies are universal and available for any breach. Others are provided only for violations of certain categories of civil-law rights. While some remedies are applied only by the courts, certain others can be applied upon the expression of will by one party. The latter category of remedies serve their protective function extrajudicially.

In Estonian law, judicial intervention is usually needed to apply remedies. In certain civil-law relationships, the application of remedies should remain in the competence of the court because one of the parties to the relationship is apparently in a weaker position and, therefore, needs more protection and public control over the dynamics of the contractual relationship. At the same time, a situation in which but very few remedies are available for extrajudicial use is out of accordance with modern requirements and needs. The fundamental principle of legal regulation in the new Law of Obligations Act is to ensure opportunities for extrajudicial application of remedies. Use of remedies by the court is allowed where this is justified by the need to protect the weaker party. Hence, for example, in a residential lease the lessor may generally not use remedies extrajudicially.

Concept and Categories of Breach

In drafting the Principles of European Contract Law (PECL), the question of how to regulate nonperformance and its legal consequences was among the most difficult problems in the situation in which large differences exist between the member states as regards the treatment of breaches, the system of remedies and the procedure of their application. The choice of a system for regulating breaches and remedies was one of the most problematic areas also in the preparation of the new Estonian Law of Obligations Act. In Estonia, like the PECL, the question was decided in favour of the common concept of breach. The decision was induced in particular by the need to harmonise Estonian national contract law with European contract law. In addition, it was certainly influenced by foreign experts' recommendations and law amendment proposals in the model countries (Germany and Switzerland).

In the PECL, nonperformance denotes any nonperformance, delayed performance, defective performance (including the absence of rights in the thing transferred) as well as the breach of collateral duties such as those concerning invoicing or confidentiality.³ Performance by a contracting party is regarded as proper if that party performs its duties in accordance with the express and implied terms of the contract. Thus, under the PECL, any failure to meet contractual obligations or any nonperformance is deemed a breach. Although German law has, to a very large extent, served as a drafting model for a number of Estonian Acts, the choice of regulation for breach of obligations was made in favour of the harmonised law, supported by the fact that unlike German law⁴, Estonian law applies the common conception of breach. Under § 222(1) of the Civil Code, which dates back to 1965, breach is any nonperformance or improper performance of duties.⁵ Hence the adoption of the new Law of Obligations Act will not bring about substantial changes regarding the conception of breach. According to the draft Law of Obligations Act⁶, breach means any nonperformance or improper performance, including any delay in the performance, of a duty arising out of an obligation. A breach of obligation may be excusable or inexcusable.⁷

Grounds for Application of Remedies

Remedies are applied on the basis of the breaching party's liability for failure to perform or nonperformance. In Estonian civil-law theory, the elements of liability are damage, wrongful act by the party in breach, the causal relationship between the damage and the wrongful act, and culpability (fault) of the party in breach. This conception, largely built upon the Soviet civil-law theory, has become obsolete in many aspects and no longer meets the actual

needs of the legal practice.⁸ In the aspect of wrongful act, the presently applicable conception does not substantially diverge from those known in the civil-law theories of developed countries. However, the difference presented by the element of culpability as a basis of liability is much more considerable. In so far as legal regulation in the Estonian draft Law of Obligations Act is also founded on the categorisation of breaches as excusable or inexcusable, the question of culpability is interesting from the very aspect whether the absence of culpability will release the party in breach from liability and whether culpability is of any importance at all in the application of liability.

In the Soviet civil-law theory, the theoretical conception of culpability was based on the criminal-law conception of guilt. In accordance with § 227 of the Civil Code, the categories of culpability are intent and incautiousness. Intent, as the person's subjective attitude to his or her act and its consequences, is a normally uniformly understandable basis of liability. In civil-law textbooks compiled by Estonian jurists⁹, culpability has been defined as the person's mental attitude towards his or her wrongful act, as the relationship between the person's consciousness and the consequence of the act. Culpability was primarily the question of whether the person had wanted the consequence or not, whether the person had foreseen or must have foreseen the consequence. In order that the liability could be applied, the person who had breached an obligation must have known that such act was prejudicial to the interests of the society or a member thereof, and that the person had wanted this to happen (intent) or had neither wanted nor foreseen although that person could and must have foreseen had he or she exercised the necessary caution and care (incautiousness).¹⁰ The Civil Code also refers to degrees of incaution, i.e. the slighter and the greater degree of incaution. Thus we know the incaution degrees of *culpa levis* — a situation in which the person abides by the general rules but not higher requirements — and *culpa lata* — a situation in which the person fails to abide by even the general rules. Differently from the new Law of Obligations Act, even incaution was considered a subjective form of culpability, in which the person's subjective attitude was important, rather than objective adherence to care. For the sake of clarity, drafters of the Law of Obligations Act decided to define the concepts and degrees of intent and negligence. According to the draft, intent means wishing a wrongful consequence upon the inception, performance or termination of an obligation. Negligence, on the other hand, means the failure to exercise the necessary degree of care in commerce. Negligence is divided into material negligence, which is a material failure to exercise the necessary degree of care in commerce, and negligence, in which the person fails to exercise even such care as that person usually adheres to in his or her affairs. In the author's opinion, the definition of the forms and degrees of fault in the Law of

Obligations Act is justified by the need to emphasise changes in the conception that has hitherto existed. Obviously, the Act will also fulfil an educational function in this regard.

In drafting the PECL, a choice had to be made concerning the general rule of liability — whether the party in breach will be liable only if fault exists or regardless of fault.¹¹ In common law, a uniform conception of breach exists, whereunder breach of contract is constituted by such nonperformance that creates the right to use a remedy and that is not excusable.¹² In order to regard nonperformance as a breach, the fault of the party in breach need not be determined. The duty to compensate for damage may be created independently of the fault. Thus, in most cases, the party who has breached the contract is also liable for the breach. However, in the very event of a circumstance which frustrates the contract, the parties' duties are extinguished without the parties having to express their will to that effect.¹³ The conception in French law is similar. In certain cases, fault of the party in breach is necessary for creating liability, but in other cases, the party is released from liability only upon a circumstance interpretable as *force majeure*. Whenever a circumstance beyond the will of the parties (*force majeure*) exists, contractual duties are extinguished under French law without the parties' expression of will.

In the law of the Nordic countries, the system of breaches is different from that described above. There breach is constituted by nonperformance that creates the right to use a remedy. A breach owing to *force majeure* does not result in the automatic termination of the contract. The party who wishes to terminate the contract must express its will for that purpose.¹⁴ The CISG and the U.S. Restatement of Contracts, 2nd, have taken the same position.¹⁵

The Law of Obligations Act also provides for release from liability in the event of fault, as a derogation that needs to be provided in the law or stipulated in the contract. The party in breach is released from liability only in the event of such circumstances for which it is not responsible (*force majeure*). The Act provides for events when a breach of obligation results in the breaching party's liability only if fault exists. Hence, for example, the doctor-patient relationship created upon examination as well as during the treatment that follows is regarded as a service contract under the draft Law of Obligations Act. The doctor is liable to the patient only in the event of fault.

In Estonian civil law, under the first sentence of § 227 of the Civil Code, the party in breach of contract is responsible only upon the existence of culpability (intent or incautiousness), except in the cases provided by the law or stipulated in the contract. Under the second sentence of § 227, the absence of culpability must be proved by the person in breach of the obligation. Even a person who has caused damage extracontractually must, in order to be

released from liability, prove that the damage was caused not by his or her fault. Thus the presumption of fault of the person who has caused the damage is presently applied in Estonian law both to the cases of causing damage contractually and extracontractually.

In accordance with the draft Law of Obligations Act, a debtor is released from liability for breaching a duty when the debtor proves that it breached the duty because of a circumstance that was beyond its control and it could not, under the principle of reasonableness, have been expected to take that circumstance into account at the time of the conclusion of the contract, or to have avoided or overcome the impeding circumstance or its consequences. Hence the definition of *force majeure* is accordant with that provided in Article 8.108 (1) of the PECL.¹⁶ Article 7.1.7 of the PICC also defines *force majeure* as a circumstance releasing from liability and contains wording identical to the formulation in the PECL. It is also important that the PECL and the PICC, as well as the new Estonian draft Law of Obligations Act, regard *force majeure* as a circumstance which releases from liability but at the same time does not prevent the application of certain remedies. Under Article 7.1.7 (4) of the PICC, the aggrieved party may terminate the contract or withhold performance or request interest on money due.¹⁷ According to Article 8.101 of the PECL, the aggrieved party may, despite the existence of circumstances releasing from liability, still resort to remedies, except claiming performance and damages. The Estonian draft Law of Obligations Act also provides for the aggrieved party's right to apply remedies if the breach was excusable. That includes the rights to claim interest, withhold the performance, terminate the contract or reduce the price.

Under § 240 of the Civil Code, an obligation is terminated by the impossibility of its performance if that results from a circumstance beyond the responsibility of the debtor. Thus, in the event of *force majeure*, no expression of will by the parties is needed under Estonian law to terminate a contractual relationship. The contractual obligation terminates and the aggrieved party cannot use any remedies against the party in breach. As the obligation terminates, the other party's counterduties are also extinguished. The *force majeure* circumstances must be proved by the party in breach.

Force majeure circumstances may also be only temporary. The applicable Estonian law does not regulate temporary impossibility of performance. Nevertheless, in practice, this is a contractual stipulation of extensive use. The respective provision in the Estonian Law of Obligations Act is formulated identically to the wording of Article 8.108 (2) of the PECL, which provides that "where the impediment is only temporary the excuse has effect for the period during which the impediment exists."

The performance of the notification duty, which arises out of the law, is a very important condition in the applica-

tion of remedies. By the adoption of the new Law of Obligations Act, the notification procedure concerning breaches, which at present is extremely inexplicit and unsystematic, and the consequences of nonperformance of that duty will be put into order in Estonian law.

Thus, under the draft Law of Obligations Act, a debtor in breach of a duty must notify the creditor about the circumstance impeding the performance of the duty immediately after the debtor has or should have become aware of the impeding circumstance. Failing the notification, the debtor must indemnify the creditor for the damage caused.

Estonian civil law contains no general norm imposing the duty to give immediate notice of breach. The provisions regulating different categories of contracts nevertheless contain the aggrieved party's duty to give immediate (as a rule, within six months after the conclusion of the contract or the transfer of a thing) notice of a deficiency. If the aggrieved party fails to fulfil the notification duty, it is usually deprived of the right to rely on the breach. In the event of certain contracts, non-notification has no influence on the later right to claim. For example, under § 366(1) of the Civil Code, a thing transferred under a contractor's agreement must be immediately inspected by the purchaser, who must give notice of evident deficiencies discovered therein. If the purchaser fails to immediately give notice of deficiencies, it will be deprived of any later rights to claim based on deficiencies. As far as evident deficiencies are concerned, a purchaser may file a claim within six months after the day of receiving the work; as to latent deficiencies, claims may be made immediately after the discovery of such deficiencies within one year. In purchasing something, the purchaser is under no obligation to inspect the purchase. Nevertheless, the purchaser must notify the seller about any deficiencies immediately after discovering them. Failing to give notice of the deficiencies immediately after discovery, the purchaser may still file a claim concerning nonconformity of the purchase with the court within six months after the six months provided for presenting deficiencies have lapsed. Thus the Civil Code recognises the duty to give notice of deficiencies and the duty to inspect the thing as preconditions for entering claims against the party in breach. The new Law of Obligations Act also relates the right to use remedies to the inspection and notification duties. In accordance with the Law of Obligations Act, the creditor must notify the debtor about improper performance within reasonable time after the creditor has discovered or must have discovered the breach.

In the application of remedies, the question of their cumulativeness is also an important one.¹⁸ The Estonian Civil Code presently provides for the right to performance even upon the existence of the right to claim penalties, interest and damages. The availability of several remedies concurrently is also provided for individual contract cate-

gories. Naturally, claims for damages are, as a rule, cumulative with other remedies. The new Law of Obligations Act entitles the creditor to avail itself, upon breach of obligation, of all lawful or contractual remedies, severally or in combination, that can be used concurrently unless otherwise provided by the law or stipulated in the contract. In particular, the resort to a remedy for breach of obligation does not deprive the creditor of the right to claim compensation for damage caused by the breach. When a remedy is unavailable under the law or contract, the aggrieved party may use other remedies. The same principle is contained in Article 8.102 of the PECL, which implies that compensation for damage does not deprive a party of the right to use other cumulative remedies.

Remedy Categories

Civil-law remedies can be classified on different bases. The legal regulation of remedies is primarily aimed at ensuring the maximum protection of the aggrieved party's interests. In selecting a remedy for breach of contractual obligation, the aggrieved party has a view to certain objectives that it wishes to attain by making the claim, although in general, breached obligations can never be fully cured. However, in each specific case, it is possible to find a remedy that provides the highest possible satisfaction to the aggrieved party by, for example, allowing it to receive the agreed performance just a little later, to replace it with money, to repair the damaged thing, etc. On the basis of the objective of application, one group of remedies can be classified¹⁹ as those aimed principally at the acknowledgement of rights or the extinguishment or alteration of duties (e.g. acknowledgement of a right; specific performance of a duty; termination or alteration of a legal relationship). Secondly, reference can be made to remedies aimed at anticipating a breach or directed towards termination (claims for ending the conduct that violates somebody's rights or that apparently can violate somebody's future rights; abatement of nuisance; claims for interest). In that event, the remedy is aimed at forcing a party to stop or anticipate the breach. The third group comprises remedies used mainly for the restoration of and indemnification for violated rights (restoration of the pre-breach situation, claims for annulment, determination of voidness, indemnification for damages, penalties).

In drafting the PECL, one of the debated issues was the choice of approach to the regulation of remedies. Namely, remedies can be regulated on the basis of breach categories by providing the remedies and methods of their application for each individual breach category respectively (the "cause approach"). The second possible approach was regulation on the basis of remedy categories (the "remedy approach"). It should be noted that remedies, by designation, include a range of very different lawful facilities for the protection of rights.²⁰ Regulation on the basis of

breach category is common to many national legal systems and also, partly, to the CISG. The same can be said about Estonian law, which regulates both the use of different remedies and the legal consequences of breaches of different categories. Hence, for example, delays in contractual performance are regulated as a category of breach, and respective provisions indicate the allowed remedies. At the same time, the consequences of nonperformance of a duty to perform certain works are also regulated as a category of breach by § 226 of the Civil Code.

A law system regulating remedies on the basis of breach categories has many positive qualities, including in particular the simplicity and intelligibility for those participating in contractual relationships. When a contract is not performed in due time, the aggrieved party will look up the law section describing delays in performance, and find there information on the available remedies. On the other hand, such regulation inevitably results in repetitions, as the same remedies are applicable to a number of breaches. The drafters of the Law of Obligations Act judged the repetitions resulting from the regulation based on breach categories to be unacceptable and therefore, that method was abandoned.

In order to describe which changes will be brought about by the new draft Law of Obligations Act in comparison with the applicable law, I deem it necessary to give a brief overview of the corresponding regulation in the Estonian Civil Code. First of all, no uniform system of remedies was established in drafting the Code. Instead, remedies are scattered throughout the general as well as specific provisions and the specific Acts of the law of obligations. As a rule, there are no general provisions on different remedy categories. By analysing the judicial practice, it can be asserted that such situation, in which no uniform conception of remedies exists with regard to their categories as well as their application, results in uncertainty of commerce and hence materially weakens the principles of legal certainty and freedom of contract. The courts are uncertain about to which extent and on which grounds agreements are permitted with regard to application of those remedies which are not provided for at all in the civil legislation. Moreover, minds differ on how remedies should be applied between the contracting parties themselves. In addition, reference should be made to uncertainty in the application of such important remedy as the right to terminate the contract. Even the formulation in the Civil Code fails to allow a uniform definition of cases in which the right to terminate is created, how the right to terminate contractual relationship is realised and whether the expression of will concerning the termination of a contract must be received or personally received by the party in breach.

The committee on preparation of the draft Law of Obligations Act considered it appropriate to transpose the PECL system, whereunder breaches of contract are regu-

lated on the basis of remedy categories. According to the PECL regulation, the risk of nonperformance is borne by the obliged party. The same principle underlies the regulation of contractual liability in the CISG. The new Estonian law of obligations also provides for the principle whereunder the creditor may not rely on the breach of duty by the debtor nor use any remedies arising out thereof if that breach results from the creditor's own act or a circumstance or event which was caused by the creditor and the risk of which was incumbent on the creditor.²¹

Together with the Law of Obligations Act, the preparation of a new General Principles of the Civil Code Act also got underway in order to replace the present General Principles of the Civil Code Act applicable from 1 September 1994. The present General Principles of the Civil Code Act, completed and passed in 1994, contains a substantial amount of provisions originating from the Soviet civil law. The choices then made are understandable, as the principles of preparation and the general principles of the law of obligations were lacking full definition at that time. However, when the new Law of Obligations Act passes into force, provisions of the applicable General Principles of the Civil Code Act would not conform to the principles underlying the Law of Obligations Act. In drafting the new General Principles of the Civil Code Act, full account has already been taken of the new Law of Obligations Act, the amendments made in other fields of law since 1994 and, anticipatorily, the need to amend legislation.

The application of remedies and their actual functioning in the regulation of contractual relationships under the principle of private autonomy depends largely on the legal regulation of expressions of will. The Estonian General Principles of the Civil Code Act, like the General Part of the German BGB, is based on the theory of expression of will and transaction, although legal relationships are regulated, differently from German law, through the concept of transaction rather than expression of will. During the preparation of the Act though, no attention was paid to regulating expressions of will so as to meet the needs of modern law of obligations and, in particular, contract law. The new draft General Principles of the Civil Code Act expressly provides that in order to be valid, an expression of will must have been expressed and it becomes valid as from receipt by the addressee. The regulation concerning the entry into validity of expressions of will is based on the objective receipt principle, i.e. an expression of will is considered received when it has reached the absent person's place of residence or location and can be examined by that person under reasonable circumstances. When an expression of will fails to reach, or timely reach, the addressee, it is still considered received if such situation results from circumstances for which the addressee is responsible. Thus the objective receipt principle, recognised in many European countries and also in Article 1.303 (3) of the

PECL, will become applicable in Estonian civil law.

Remedies are applied if the debtor breaches its duties assumed under contract. The new Estonian draft General Principles of the Civil Code Act, though, provides the principle, contained also in Article 1.303 (4) of the PECL, that an expression of will made with regard to breach becomes valid from its dispatch. Hence the draft states that "if one party gives notice to the other because of the other's nonperformance or because such nonperformance is reasonably anticipated by the first party and the notice is properly dispatched or given, a delay or inaccuracy in the transmission of the notice or its failure to arrive does not prevent it from having effect".

The draft Law of Obligations Act allows the aggrieved party to use the following remedies: right to performance, if the breach is inexcusable; right to withhold performance; right to damages, if the breach is inexcusable; dissolution or rescission of the contract; right to reduce price in reciprocal (synallagmatic) contracts; right to interest.²²

1. CURE

Cure, as a remedy available to the aggrieved party in the event of breach of contract, is not unfamiliar to Estonian law. Although respective regulation existed in general provisions of the Civil Code, provisions on specific contract categories substantially restricted the use of this remedy. In addition, attention must be paid to the different roles of cure in the applicable civil law and in the forthcoming law of obligations. The duty to cure and the corresponding right were formerly regarded as only the creditor's right to demand reparation, replacement or other cure of the deficiency. However, the new draft Law of Obligations Act, like Article 8.104 of the PECL, provides for cure as the debtor's right to improve its situation.²³ Under the Law of Obligations Act, the right to cure is available until the dissolution or rescission of the contract and indemnification for damage (if damages serve the purpose of compensation and are paid to the extent of the unreceived performance). The draft also lists the circumstances in which cure is allowed.

Cure is allowed when it is reasonable under the existing circumstances, when no unjustified inconveniences or expenses are thereby caused to the aggrieved party. The aggrieved party's refusal to accept cure must be justified. With regard to cure, the procedure of notice, the nature and the consequences of curing deficiencies caused by improper performance are important. At first, the party in breach must offer cure by expression of will, describing the method and time of cure. For refusing cure, the aggrieved party must have a legitimate interest, of which the offeror must be notified within reasonable time. Thus the option of cure primarily protects the breaching party's status and enables to alleviate, for that party, the consequences of application of remedies. The fact that from receiving the notice of cure until the completion or failure of cure, the

aggrieved party may not use any remedies which are non-cumulative with cure is important to the party in breach. The aggrieved party may claim compensation for damage caused by the cure and/or delay and request the payment of interest or agreed penalty. Unlike the PICC, in which cure includes both the aggrieved party's right to demand cure and the nonperforming party's right to offer it, the Estonian Law of Obligations Act provides for cure, as an independent remedy, only as a right of the party in breach. The creditor's right to demand cure — i.e. the reparation, replacement or other removal of impropriety — is regulated as an independent demand for performance.

2. RIGHT TO PERFORMANCE

The right to performance is characteristic of particularly the Continental European legal systems as the remedy first applicable. In modern days, the right to performance has been losing its topicality, since traders are interested in fast commerce mainly, and therefore, specific performance may turn out to be inefficacious and unprofitable in economic terms. Nevertheless, the *pacta sunt servanda* principle has remained one of the fundamental principles underlying the regulation of contractual relationships in Continental Europe even today.

Two important principles are provided in the new Estonian Law of Obligations Act on the basis of Articles 9.101 and 9.102.²⁴ Under the first principle, monetary obligations are always performable. According to the second principle, demands for specific performance are not always justified, in particular when the performance is of a personal nature.

The legal provision for grounds whereon performance may not be demanded is important for Estonian civil law also because of the decision to abandon the principle of "realness of contracts". Thus, under the new Law of Obligations Act, loan contracts, transportation contracts and gift contracts will not remain real contracts but will rather be treated as consensual contracts. When loan contracts, but also gift contracts and transportation contracts, are regarded as consensual, the law must provide for the cases in which the rightful party is nevertheless prevented from demanding performance under the contract. In accordance with the draft Law of Obligations Act, the creditor may demand performance only when the performance of the duty is not unlawful or impossible, unreasonably burdensome or expensive for the debtor, when the performance cannot be reasonably obtained from another source and when the performance does not consist in the provision of services or work of a personal character.

A demand for specific performance also means that the debtor must be ready to fulfil the duties assumed under contract.

In the new Law of Obligations Act, the situation of the aggrieved party is also improved by the principal requirement that performance may be demanded only within a

reasonable time after the aggrieved party has or ought to have become aware of the breach. The debtor also may propose a time-limit within which the creditor must decide whether it is still interested in specific performance or wants monetary compensation. The time-limit set by the debtor must be reasonable so as to allow the creditor to decide which claim would be more useful to the creditor. The time given to the creditor for presenting a claim is, regardless of the set time-limit, deemed to be extended to a reasonable time-limit.

If the breach of duty occurred during a delay in reception or if the breach was caused by the other party (the aggrieved party), the other party may still remain bound by the contractual obligation even when specific performance may not be demanded from the party in breach. However, in no event may the creditor demand performance when it has received damages as a compensation for damage or in lieu of performance.

3. RIGHT TO WITHHOLD PERFORMANCE

During the performance of contractual duties it may become clear that regardless of performance by one party, the other fails to or cannot fulfil its duties. In economic activity, it is of utmost importance to ensure to the parties the right to use the said remedy under the law. The right to withhold performance protects the party under obligation to perform against crediting the party in breach and, at the same time, forces the party in breach to fulfil its duty.²⁵ According to Article 9.201 of the PECL, the party who is to perform simultaneously with or after the other party may withhold performance until the other has tendered performance or has performed.²⁶ Performance may be withheld with regard to a part of or the entire performance. Like Article 9.201 of the PECL, the draft Estonian Law of Obligations Act regulates the right to withhold performance as a general norm, and the right to withhold performance in reciprocal contracts as a special norm.²⁷

Under Article 9.201 (2) of the PECL, a party may withhold performance for as long as it is clear that there will be a nonperformance by the other party when the other party's performance becomes due. The Estonian Law of Obligations Act provides for a party's right to withhold performance of its duties until the counterparty has fulfilled the first party's due claim, if the claim is not sufficiently secured. Under the PECL, the CISG as well as the Law of Obligations Act, the claim presented to withhold performance must be sufficiently connected with the debtor's duty. According to the Law of Obligations Act, connection between the claim and the duty is sufficient when reciprocal obligations arise from the same legal relationship or previous relationships between the persons or from other economic or temporal connections. In its character, the right to withhold performance is similar to the property-law right of retention, which exists in the event of insufficiently secured claims and which is regulated under

the provisions of the Law of Property Act.²⁸ Under the Law of Obligations Act, the provisions of the Law of Property Act also apply when withholding performance is concurrently accordant with the exercise of the right of retention provided in the Law of Property Act.

In parallel with the right to withhold performance with regard to insufficiently secured claims, the right to withhold performance in the event of reciprocal contracts is also regulated in the Law of Obligations Act. The provision, following the example of the PECL and the PICC, entitles the parties to withhold performance in the event of reciprocal contractual obligations until the counterparty has fulfilled its duties, tendered performance or furnished a sufficient security for performance or sufficiently guaranteed that it will perform the obligation. When an obligation must be performed to more than one person, the party under obligation may withhold performance with regard to all those persons until the entire obligation to that party is performed. The exercise of withholding performance must be reasonable and in accordance with the principle of good faith, taking into account all circumstances. Although the wording of the general provision contains no requirement that the other party's breach must be fundamental, the Act nevertheless provides for the principle whereunder no right to withhold performance can be assumed when the aggrieved party has fulfilled a substantial part of its duties or when the breach committed was not fundamental. Thus, the rather flexible formulation of that provision allows to assess the parties' right to withhold performance in each specific case.

In the realisation of the right to withhold performance, the sequence of performing duties must also be taken into consideration. Under Article 9.201 of the PECL, the right to withhold performance is available, first of all, to the party who is to perform simultaneously with or after the other party. In accordance with the draft Estonian Law of Obligations Act, performance may not be withheld by the party who must fulfil a duty before the other, except if circumstances that have become known after the conclusion of the contract constitute sufficient grounds to believe that the other party will not be able to perform its duties because of lacking monetary or other means for performance or nonperformance is caused by the other party's conduct in preparation or performance of the contract.²⁹ Under the Law of Obligations Act, in such event, the party entitled to withhold performance may demand simultaneous performance, set an additional time-limit for that or for the provision of a security, failing which the creditor becomes entitled to the dissolution of the contract. When, however, the creditor has sufficient grounds to believe that the debtor will be able to perform the duty in part or improperly, resort to withholding performance is justified only by the fundamentality of such breach. Thus the creditor must prove that the partial or improper performance of the con-

tract is of such fundamentality that entitles it to withhold performance.

The provision of the right to unilaterally withhold performance in the new Law of Obligations Act is an important change in comparison with the applicable law. Namely, § 174 of the Civil Code provides the right to unilaterally withhold performance for only such cases when that right is set out in the law. As no general provision exists to enable to withhold performance also in such cases that are not expressly provided in the law, the right to use the remedy in question is available to the creditor only in a very limited number of situations. For example, in accordance with § 230 of the Civil Code, the creditor may refuse to accept performance and claim damages if the debtor is in delay and, as a result, the creditor has lost its interest in performance. In addition, under § 248 of the Civil Code, a purchaser may decline to accept performance and refuse to perform when the seller fails to transfer the sold thing. Under § 249, the seller has the right to withhold performance if the purchaser, breaching the contract, refuses to take the purchased thing or to pay its determined price.

4. RIGHT TO REDUCE PRICE

The reduction of price as *actio quanti minoris* is regulated as a remedy under Article 50 of the CISG and in Article 9.401 of the PECL. The right to reduce price becomes available when a party accepts improper performance. In accordance with the Law of Obligations Act, the party who has accepted improper performance has the right to reduce the price by the amount to the extent of which the value of the inappropriate performance was less than the value of proper performance at the time of performance. In order to reduce the price, the party who has accepted performance must give to the other party a statement to that effect. The right to reduce price is available to the party already before claimability if it is apparent that the other party commits a fundamental breach of contract. The other party must be notified of the reduction of price, to allow it to cure the improper performance and thus alleviate its situation.

In Estonian law, the reduction of price may be used only in cases provided in the law. The reduction of price as a remedy is regulated as a right to claim, which is judicially actionable only when one of the parties disagrees with the other's claim to reduce price. Hence, expression of will is not sufficient to reduce price unless the other party agrees. The person who has wished the reduction of price must turn to the court for the recognition of its right to that effect. The Act contains no instructions on how and for how long a party can exercise its right to reduce price. In the judicial practice, disputes over the right to reduce price exercised in the event of improper performance have arisen primarily under contractors' agreements. As the Civil Code does not contain provisions which would allow reduction of the agreed price of work completed with

improper quality, the parties themselves usually agree, in the contract, on the right to use the remedy in question. Often even the parties themselves are unable to agree on the realisation of such right. And disputes do arise in a situation in which the purchaser has accepted improper performance, the contractor claims payment for work, and the purchaser, for its part, objects that it has offset the contractor's claim by reducing the price. But the purchaser has not presented a claim to reduce price nor an expression of will to that effect. In connection with the presentation of the draft Law of Obligations Act to judges and carrying out the appropriate training, the situation described by Hartkamp in the overview of the preparation of the Netherlands Civil Code during 1947-1992³⁰ has arisen in Estonia. Namely, Hartkamp stresses that the preparation of the draft also influenced the development of judge law in the Netherlands, as the courts construed the applicable law so as it would be in conformity with the principles provided in the draft and with the relevant scientific commentaries. By analysing Estonian judicial practice in civil actions and particularly in disputes over contracts, it can be noted that courts interpret provisions which regulate contractual relationships and originate yet from the Soviet era in accordance with the fundamental principles and solutions in the new draft Law of Obligations Act.

5. INTEREST

Interest as a remedy available in the event of delay in performance of monetary duties is treated in the applicable law as a security, as a subcategory of penalty. The new Law of Obligations Act will bring about a rather important change in this respect.

Under the applicable Civil Code, interest is a subcategory of penalty, fixed in the law or contract and must be paid by the debtor to the creditor in the event of delay. According to § 231 of the Civil Code, a debtor in delay in the performance of a monetary obligation must pay, for the period of delay, three per cent of the amount in delay per annum unless another rate has been fixed in the contract or in the law. The applicable Civil Code does not provide for payment of default interest for delays in performing other than monetary obligations.

The draft Law of Obligations Act provides the right to claim interest as a remedy for late performance. The draft sets out a uniform procedure for determining both usage interests and default interests. Namely, the Law of Obligations Act also provides that when interest must be paid on an obligation, the interest rate is determined as the arithmetical average of two rates: the average interest rate paid by credit institutions for fixed-time deposits in the place and at the time of performance of the obligation and calculated with regard to the currency of the place of performance, and the average commercial bank short-term lending rate to prime borrowers prevailing for the contractual currency of payment at the place where payment is

due. However, the interest may not be lower than 6% per annum, unless otherwise provided in the law or stipulated in the contract. The above-referred arithmetical average will be fixed and notified by the Bank of Estonia. In the event of arrearage with the payment of interest over one year, the arrears of interest will be added to the amount of debt.

The duty to pay interest is created only in the event of delay in performing the principal obligation, which means that no interest may be claimed for delay in the payment of interest. Interest may also be claimed upon delay in performing nonmonetary duties; in that event, the interest is calculated from the time when the obligation was breached. Differently from the applicable law, the payment of interest does not depend on the fault of the person in delay. On the other hand, delay in acceptance and withholding performance release the person in delay from the duty to pay interest in the event of late performance.

The debtor's right to demand reduction in interest is an important remedy in the event of delay. The applicable Civil Code also provides for the right to demand reduction in interest when it is excessively high in relation to the losses incurred by the creditor. Here the court must take into account the extent of the creditor's performance, the parties' financial status and any other significant interests of the creditor. The draft Law of Obligations Act provides for the court's right to reduce penalties at the debtor's request when the penalties are unreasonably high, considering the extent of debtor's performance, the financial status of the participants in the obligation and the creditor's rightful interests. The debtor will lose the referred right after it has paid the interest. When the right to reduce interest, provided in the applicable law, is compared to the regulation in the new draft Law of Obligations Act, it is apparent that no substantial changes are envisaged in the regulation of this institute. In so far as the meaning of the unreasonably high interest is not set out with greater precision in the new reviewed text, it is apparent that the courts will follow the principle provided in the Civil Code, whereunder the losses and the demanded interest must be compared with each other to determine whether the interest is unreasonably high or not. This is supported by the fact that Article 9.509 of the PECL also allows to reduce interest when it is grossly excessive in relation to the loss resulting from the nonperformance and the other circumstances.

6. NOTICE FIXING ADDITIONAL PERIOD FOR PERFORMANCE

In Estonian civil law, a debtor need not be notified to be in breach of contract (*Mahnung* in German law). The same principle will remain applicable in the new Law of Obligations Act. In the applicable law, the termination of a contract is in the competence of the court, as a rule, but in certain cases provided in the law, one of the parties may itself terminate the contract upon its expression of will. In the applicable law, the right to unilaterally terminate the

contract is not regulated with a general provision extending to all contractual relationships in the absence of respective special provisions. However, provisions concerning specific contract categories entitle the creditor to terminate the contract when the debtor is in material breach of the contract. Hence, for example, a purchaser may under § 365(2) of the Civil Code repudiate a contractor's agreement during the performance of works and claim damages when it is obvious that the works are not carried out in conformity with the requirements. Repudiation of contract is, though, permitted only on condition that the purchaser has set a time-limit for removal of the deficiencies and the debtor has not fulfilled the creditor's request after that time-limit has lapsed. Thus it cannot be asserted that the right to notice fixing an additional period for performance as a remedy is absolutely unfamiliar to Estonian law, as the legislator also had a view to such remedy in regulating special contract categories. Here it must be noted that disputes arise in Estonian legal practice also over the application of this remedy since it is often considered unnecessary and parties resort to the right to terminate the contract without fixing an additional time-limit for removal of deficiencies.

The draft Law of Obligations Act provides the right to give the debtor an additional time-limit for performance of its duties. The set time-limit must be reasonable. In demanding performance it is assumed that a reasonable time-limit was fixed for that purpose and in the event of setting such time-limit that is not reasonable, taking into consideration all circumstances, it will extend to the time-limit which is deemed reasonable by the court.³¹

Regardless of fixing an additional time-limit, the creditor may demand compensation for its losses, demand interest and withhold performance of its duties. Under the draft Estonian Law of Obligations Act, the creditor, regardless of having set an additional time-limit, may still demand specific performance after that time-limit has lapsed without result. The creditor may not demand specific performance after it has been compensated for the unreceived performance by the debtor. In addition, the creditor may avail itself of other remedies, such as rescission or dissolution of the contract and the right to damages. Thus, differently from situations in which the debtor itself presents the creditor with a time-limit during which the creditor may demand specific performance and after which the creditor loses its right to demand performance, specific performance may be demanded from the debtor even upon the fixing of an additional time-limit by the creditor. Hence the regulation contained in the draft differs from the German law institute of *Nachfrist*, which was characterised by the extinguishment of the right to demand performance by fixing an additional time-limit. Rather, it is similar to the common-law principles, whereunder giving an additional time-limit did not extinguish the right to demand performance. A similar principle is provided in Articles 47,

49 (1)(b), 63 and 64 (1)(b) of the CISG, and a similar regulation can be found in Article 8.106 of the PECL.

The introduction of the institute of fixing additional time-limits also requires the provision of safeguards for the debtor under the law. Thus the creditor may not dissolve the contract without fixing an additional time-limit if the counterparty would thereby suffer unreasonably extensive losses in relation to the expenses it has incurred for the performance and the preparation of performance of the obligation. The setting of an additional time-limit may be subject to the stipulation that if that time-limit lapses without result, the contract will automatically terminate when the unperformed duty forms a substantial part of the entire contract. Thus the debtor's situation will become steadier — it knows that after the time-limit has passed without result, the creditor will not demand specific performance any more and therefore, the debtor need not be ready for performance.

7. RIGHT TO DAMAGES

The aggrieved party may claim damages for losses caused to it by breach of contract. Damages may be claimed with specific performance or in lieu thereof; in addition, the right to damages is usually also created with the right to use other remedies. No right to damages is created when the debtor is not responsible for the breach or the losses need not be compensated for under the law. Unlike other remedies, claims for damages need not be fulfilled in the events of excusable breach of contract. The right to damages is a remedy cumulative with virtually all other remedies. Damages may also be claimed without fixing an additional time-limit when it is obvious that even an additional time-limit will not give the desired result. In the event of partial performance, the creditor may nevertheless claim damages to the full extent if everything received is mutually restituted in accordance with the provisions concerning the dissolution of the contract. All benefits or claims for benefit must be subtracted from the compensable losses.

In the new Estonian Law of Obligations Act, all provisions regulating damages are contained in one Chapter. Those provisions are also applicable to damages payable for extracontractual losses. The draft Law of Obligations has abandoned the prohibition of competing actions, which underlies the Civil Code 1965. More substantial changes in comparison with the applicable regulation include the more precise regulation of damages and the provision of modern principles in the law. As in Article 9.502 of the PECL, the compensation for damage is aimed at putting the aggrieved person as nearly as possible into a situation in which that person would have been if the contractual obligation had not been breached. In the event of breach of contractual obligations, compensation for damages is restricted by the foreseeability principle, which is formulated in the draft like Article 9.503 of the PECL. Thus the

nonperforming party is liable only for loss which it foresaw or could reasonably have foreseen at the time of conclusion of the contract as a likely result of his nonperformance, unless the nonperformance was intentional or materially negligent. Damages do not cover losses caused or increased by circumstances independent of the party — in particular, force majeure or third-party act or a risk incumbent on a third party — unless otherwise provided or implied by the law.

The draft Law of Obligations Act provides the principle whereunder both material and moral damage must be compensated for. The applicable Civil Code does not provide the obligation to compensate for moral damage. However, under § 25 of the Estonian Constitution, everyone has the right to compensation for moral and material damage caused by the unlawful action of any person. As the Constitution was passed later than the Civil Code, the courts apply the Constitution as a legal basis for awarding moral damages. It is true that special Acts passed later also provide for the right to claim moral damages. Hence, for example, under clause 6) of § 4 of the Consumer Protection Act, a consumer may claim from the seller compensation for material and moral damage caused. The draft leaves the concept of moral damage undefined but indicates that moral damage includes, *inter alia*, physical and mental pain and suffering. Moral damages for breach of a contractual duty may be claimed if the duty was directed towards a moral interest and, depending on the circumstances of the conclusion or breach of the contract, the debtor understood or must have understood that the breach of duty could cause such damage, also in other cases when it committed a breach intentionally. In addition, the draft sets out the opportunity of compensation for future damage when such damage can be reasonably expected. The court may partly or fully postpone the determination of the extent of future damage or it may determine the extent of future damage by assessing the circumstances. Analogously to Article 9.506 of the PECL, the difference between the transaction concluded upon dissolution of the contract (coverage transaction) and the contract price may be claimed as damages if the cover transaction is concluded within a reasonable time after the dissolution and in a reasonable manner.

The applicable law does not provide for the right to claim compensation for future damage. The compensation obligation covers only the damage that has actually occurred. The provisions of the draft Law of Obligations Act allow to assess claims for compensable damages and the extent of their satisfaction much more flexibly. In addition, this enables courts to adopt more equitable adjudications, which will ensure legal certainty in such situation as compensation for damage.

The draft Law of Obligations Act also provides for the right to limit compensation by reducing the amount of damages. In reducing compensation, account must be

taken of the character of liability, relationships between the persons, the economic situation and the principles of equitableness and reasonableness. Under the applicable law, the amount of compensable damage may be reduced only when the damage has been caused also by the aggrieved party's fault, by connecting the application of the debtor's remedy with the question of fault of the parties.

8. DISSOLUTION OF CONTRACT

As a rule, the right to dissolve the contract is a remedy available in the event of material breach of contract. Estonian civil legislation has been extremely inconsistent in regulating dissolutions of contract. Namely, the wording in the law fails to define unambiguously whether unilateral termination is an *ex parte* transaction or the counterparty's consent is needed in order that the dissolution be valid. The draft Law of Obligations regards the right of dissolution as a transaction exercisable upon a unilateral expression of will, which, in order to be valid, must have been received by the counterparty.

The Civil Code refers to the aggrieved party's right to terminate the contractual relationship as the right to rescind the contract (§ 364 of the Civil Code — purchaser's right to rescind the contractor's agreement during the performance of works; § 399(2) of the Civil Code — mandatary's right to rescind the contract of mandate at any time) as well as the right to terminate the contract (§ 422(2) — depositor's right to terminate the contract of deposit at any time). However, in certain contracts, the aggrieved party may only demand termination of the contract, which means that remedies can be applied only by the court. Hence, for example, the Commercial Lease Act (1980) provides for the lessor's right to demand early termination of the lease when the lessee has committed a breach referred to in § 18 of the Commercial Lease Act. The same right is enjoyed by residential lessors under the residential lease contract. In such event, the lessor cannot terminate the residential lease contract, either, without a court order. Also, in the event of selling a thing the quality of which does not conform to the appropriate requirements, the purchaser is entitled to only demand termination of the contract but not to terminate the contract. In the applicable law, the right to dissolve the contract is created usually when the counterparty commits a material breach of its duty. In applying the provision, the court must determine whether the breach was material or not.

The definition of material breach provided in the draft Law of Obligations Act conforms, in its main part, to Article 8.103 of the PECL. Material breach is a situation in which strict compliance with the obligation is of the essence of the contract, or the nonperformance substantially deprives the aggrieved party of what it was entitled to expect under the contract, unless the other party did not foresee and could not reasonably have foreseen that result or the nonperformance is intentional and gives the aggrieved party reason to believe that it cannot rely on the

other party's future performance, and the obligation is not performed within an additional time-limit. Consequences of material breach with regard to some obligations or parts thereof are also regulated similarly to Article 9.302 of the PECL.³²

The right to dissolve the contract may be created even before the obligation becomes claimable. The respective regulation in the draft Estonian Law of Obligations Act is partly based on Article 8.105 of the PECL. Thus, one party may terminate the contract even before the contractual obligation is breached if it is evident that the other party will commit a material breach. A similar right becomes available to the aggrieved party when the breach concerns only one part of the performance. The exercise of the right of dissolution may not cause unreasonable and excessive expenses to the counterparty and, therefore, the respective provision sets out that an intention to dissolve the contract is subject to prior notification. The statement of dissolution must be made within a reasonable time after the party has become or must have become aware of the breach, after the additional time-limit has lapsed or after the debtor's notice that it will not perform its duty. The aggrieved party becomes entitled to dissolve the contract if the contract has not been confirmed or secured within a reasonable time. A party is released from the duty to notify about dissolution upon the breaching party's notice that it will not perform its duty or upon other circumstances in which it is not reasonable to expect a prior dissolution notice. The flexibility of the duty to notify makes the situation more uncertain, on the one hand, because in case of dispute, the assessment of circumstances is left to the court. On the other hand, this allows checking of the parties' conduct under specific circumstances, assessing it objectively under the principle of reasonableness.³³

The right to dissolve the contract may arise out of a breach of contract or an agreement between the parties. The Law of Obligations Act also provides for the opportunity to agree on paid rights of dissolution.

The harmonisation of remedies between European national legislations is one of the most important areas which enable the removal of barriers to trade between different countries.³⁴ It is important for market players to know their rights with regard to their contract partners under the laws applicable in specific legal systems. The drafters of the new draft Estonian Law of Obligations Act aimed at creating a law that would be in accordance with modern requirements and protect contracting parties' rights in a manner that would ensure equitableness and good manners in contractual relationships.

Notes:

¹ Q.v.: Jürgen Basedow. *A Common Contract Law for the Common Market*. — F. Ferrari (ed.). *The Unification of International Commercial Law*. 1998, pp. 51-52.

² In drafting the Law of Obligations Act, German law (mainly the proposed amendments to BGB), Swiss Civil Code, the United Nations Convention on Contracts for the International Sale of Goods (CISG), signed in Vienna on 11 April 1980, the UNIDROIT Principles of International Commercial Contracts (1994) and the Principles of European Contract Law were used as models.

³ O. Lando. *Principles of European Contract Law: An Alternative to or a Precursor of European Legislation*. — *The American Journal of Comparative Law*. A Quarterly. Vol. 40, 1992, p. 581.

⁴ K. Zweigert, H. Kötz. *An Introduction to Comparative Law*. Vol. II: *The Institutions of Private Law*. — North-Holland Publishing Company, Amsterdam - New York - Oxford, 1977, p. 179.

⁵ *The Civil Code of the Estonian Soviet Socialist Republic*. Adopted on 12 June 1964. Tallinn, 1971. Of that Code only the law of obligations part is applicable, as other parts (general principles of the Civil Code, law of property, law of succession and family law) have been replaced by respective Acts passed during the independence. The Civil Code itself was drafted upon the grounds of the Soviet Union civil legislation.

⁶ For the text of the draft Law of Obligations Act in the Estonian language, q.v. <http://www.just.ee/volaigusseadus.html>

⁷ O. Lando. *Performance and Remedies in the Law of Contracts*. — *Towards a European Civil Code*. Ed. A. S. Hartkamp, M. W. Hesselink, E.H. Hondius, C. E. du Perron, J. B. Vranken. 1994, p. 215.

⁸ Hence, for example, there is no uniform and satisfactory conception of the causal relationship. Neither is there any developed and generally accepted conception regarding the interrelationship between elements of liability.

⁹ Y. Ananyeva, P. Kask, V. Kelder, L. Lill, E. Ploom. *Nõukogude tsiviilõigus (The Soviet Civil Law)*. Tallinn, 1971, p. 421; textbook 1975, p. 339.

¹⁰ Y. Ananyeva, P. Kask, V. Kelder, L. Lill, E. Ploom. *Nõukogude tsiviilõigus (The Soviet Civil Law)*. Tallinn, 1971, pp. 421, 422.

¹¹ O. Lando, 1994, pp. 212-215.

¹² M. P. Furmston. *Breach of Contract*. *The American Journal of Comparative Law*. A Quarterly. Vol. 40, 1992, p. 671.

¹³ O. Lando, 1992, p. 582.

¹⁴ O. Lando, 1992, p. 583.

¹⁵ Art. 79 of the CISG does not regulate the termination of a contractual obligation but such conclusion is implied in the provisions of that Article.

¹⁶ Art. 8.108 (1) of the PECL: A party's non-performance is excused if he proves that it is due an impediment beyond his control and that he could not reasonably have been expected to take the impediment into account at the time of the conclusion of the contract, or to have avoided or overcome the impediment or its consequences.

¹⁷ Q.v.: UNIDROIT: *Principles of International Commercial Contracts (International Institute for the Unification of Private Law, Rome, 1994)*.

¹⁸ The cumulativeness of remedies is primarily based on their concurrent applicability. This is a field creating difficulties in the practical aspect as well as in the aspect of the harmonisation of laws. Q.v.: M. P. Furmston, 1992, pp. 673-674.

¹⁹ Q.v.: M. I. Braginski, V. V. Vitryanski. *Dogovornoye pravo (Contract Law)*. 1998, pp. 634-635.

²⁰ K. Zweigert, H. Kötz, 1977, p. 194.

²¹ Under Art. 8.101 (3) of the PECL, "a party may not resort to any of the remedies set out in Chapter 9 to the extent that his own act caused the other party's non-performance".

²² The new Estonian law of obligations did not transpose the punitive penalty called *astreinte*, which is unfamiliar to our national legal system, although known to the CISG as well as the PICC, and which means the imposition of a punitive duty on a party. The described remedy does not appear in the PECL either.

²³ A. S. Hartkamp. The UNIDROIT Principles for International Commercial Contracts and the Principles of European Contract Law. — European Review of Private Law 2, Netherlands, 1994, p. 350.

²⁴ A. S. Hartkamp. The UNIDROIT Principles for International Commercial Contracts and the Principles of European Contract Law. — European Review of Private Law 2, Netherlands, 1994, p. 352.

²⁵ O. Lando, H. Beale. The Principles of European Contract Law. Part I: Performance, Non-Performance and Remedies. 1995, p. 166.

²⁶ A. S. Hartkamp. The UNIDROIT Principles for International Commercial Contracts and the Principles of European Contract Law. — European Review of Private Law 2, Netherlands, 1994, p. 350.

²⁷ Q.v.: Art. 58 (1) and Art. 71 (1) of the CISG.

²⁸ Q.v.: § 320 of the Law of Property Act (passed on 9 September 1993), whereunder, if a claim is not sufficiently secured by a real right and the due date for its performance has arrived, the creditor has the right to retain movables and securities of the debtor which have legally come into possession of the creditor until the claim is satisfied if the claim is connected to the retained object. Q.v. also: P. Pärna, V. Kõve. Asjaõigusseadus. Kommenteeritud väljaanne. (Law of Property Act. Commented edition.) Tallinn, 1996.

²⁹ This provision corresponds to Art. 71 (1) of the CISG.

³⁰ A. S. Hartkamp. Civil Code Revision in the Netherlands 1947-1992. New Netherlands Civil Code. Patrimonial Law (Property, Obligations and Special Contracts). Nieuw Nederlands Burgerlijk Wetboek Het Vermogensrecht (Zakenrecht, Verbintenissenrecht en Bijzondere Overeenkomsten). Transl. P. P. C. Haanappel. Kluwer Law and Taxation Publishers. Deventer. Boston, 1990.

³¹ A. S. Hartkamp. The UNIDROIT Principles for International Commercial Contracts and the Principles of European Contract Law. — European Review of Private Law 2, Netherlands, 1994, p. 353.

³² A. S. Hartkamp. The UNIDROIT Principles for International Commercial Contracts and the Principles of European Contract Law. — European Review of Private Law 2, Netherlands, 1994, p. 353.

³³ According to the draft Estonian Law of Obligations Act, reasonable in an obligation is what persons acting in the same situation in good faith would usually consider reasonable. In assessing reasonableness, account is taken of the nature of the obligation and the objective of the transaction and the traditions and practice in the field or profession concerned, as well as other circumstances.

³⁴ Q.v.: A. S. Hartkamp. The UNIDROIT Principles for International Commercial Contracts and the Principles of European Contract Law. — European Review of Private Law 2, Netherlands, 1994.