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## **On Contractual Fairness and the Bindingness of the Contractual Bond: An Analysis in Light of the Legal Protection of the Weaker Contracting Party**

### **Sobre la equidad contractual y la obligatoriedad del vínculo: Una mirada a la luz de la protección jurídica del contratante débil**

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#### **Abstract**

Contractual fairness and the will's role on the bindingness of contracts can be regarded as essential elements for the task of juridically argument that it is possible to find enough tools within the law of obligations to protect the contracting party that is in a weak position with respect to the other. In this sense, it is not necessary to have the status of a consumer to be entitled to the aforementioned protection, since such regime can be articulated from particular notions integrated to our legal system. In this framework, the modern interpretation of legitimate trust and contractual equilibrium are stressed. These notions can be inspired by the *favor debilis* criterion rather than the notion of good faith. This criterion is fundamental to define the directive line of this work.

**Key words:** *Free will; contract law; bindingness; fairness; weaker contracting party; favor debilis.*

#### **Resumen**

La equidad contractual y el rol de la voluntad en la obligatoriedad del acuerdo obligacional, permiten ser considerados como elementos esenciales en el cometido de argumentar jurídicamente, que en el derecho civil de las obligaciones, es posible detectar herramientas suficientes en el sentido de proteger al contratante que se sitúa en una posición de debilidad frente al otro. En este entender, no resulta indispensable estar revestido de la calidad de consumidor para aspirar a la mencionada tutela; toda vez que aquella puede desprenderse de particulares nociones que nuestro ordenamiento jurídico permite integrar. En este ejercicio destacan las modernas lecturas de la confianza legítima y del equilibrio contractual, las cuales bajo una corporeidad diversa a la buena fe, son susceptibles de ser inspiradas en el criterio del *favor debilis*, el cual para nosotros resulta fundamental en la definición de la línea directriz del presente trabajo.

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**Palabras clave:** *Autonomía de la voluntad; ley de contrato; obligatoriedad; equidad; contratante débil; favor debilis.*

## I. PRELIMINARY NOTES

What we intend to highlight in this work relates to the fact that the law of obligations can be an effective tool in protecting the weaker contracting party in contractual relations that are not governed by consumer law. The underlying idea is that it is not necessary to have the status of consumer in order to be protected by the law, so that a non-consumer may also be protected, although by rules other than consumer law. Strictly speaking, as Momberg points out, “the notion of consumers as the weaker party that is to be protected in market relations has been superseded by the finding that there are other categories of individuals who are in situations similar to that of consumers and therefore deserve equal (or greater) protection”.<sup>1</sup>

The exercise is not whimsical, as a similar interest can be perceived in much discussed *soft law* instruments, which in our opinion can capture the main features of modern contract law from global perspectives.<sup>2</sup> In summary, the recognition that rightly has been attributed to consumer law as a system that corrects asymmetries<sup>3</sup> should make civil law invisible regarding the same purpose, especially if, in Maume’s words, a “mutation of the contractual atmosphere” is perceived,<sup>4</sup> one capable of holding in its orbit an acknowledgement of new notions— that of the weaker party among them.

In order to attribute reality to the so-called weaker party we do not necessarily have to entertain far-fetched hypotheses, since, for example, we can think of smaller companies, and in particular micro- and small-sized businesses (seen through the prism of Law No. 20.416 of 2010), which enter into relations with large companies as suppliers, having to accept the –sometimes disproportionate– conditions that the latter impose on them. An abuse of bargaining power, then, is a fairly concrete image of the purpose of these pages.

Thus, in Carbonnier’s words “law goes beyond a legal rule”,<sup>5</sup> and as such, not only those who have in their favor a more or less systematic framework of protective rules (such as the one in Law No. 19.496 of 1997) may be subject to legal protection. To claim otherwise, as Mazeaud teaches, “would mean satisfying a selective and discriminatory protection, since the same causes would not yield the same effects.”<sup>6</sup> In summary, we believe that the individual that should be protected is the weaker one under the law, independently of their status, a purpose that Momberg considers should be achieved through “a general regulation that goes

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<sup>1</sup> MOMBERG (2015), p. 749.

<sup>2</sup> As noted by LÓPEZ (2019b).

<sup>3</sup> Cf. MORALES & MENDOZA (2019); ISLER (2019b).

<sup>4</sup> MAUME (2015), p. 8.

<sup>5</sup> CARBONNIER (2001), p. 21.

<sup>6</sup> MAZEAUD (1998), p. 95.

beyond occasional reactions through the enactment of specific rules”.<sup>7</sup> Moreover, the protection we are talking about does not necessarily owe its accent to the penalties that can be imposed on those who violate the interests of the weaker party, since –following López– the focus should point towards the “protection of those who deserve protection [...] weighing the interests in conflict and reaching a fairer solution”.<sup>8</sup>

## II. THE PLAN

Therefore, it is worth questioning whether it is necessary that this modern –inclusive of the weaker party, that is– civil law framework be organically defined through legal regulations included into law by means of amendments to the Civil Code [as countries which belong to the tradition of codified law such as France, which has been the protagonist of a process<sup>9</sup> of formally including the duty to inform (art. 1112-1),<sup>10</sup> adhesion contracts (art. 1110),<sup>11</sup> abusive clauses between non-consumers (art. 1171)],<sup>12</sup> or whether it can be derived from the same norms that our code already contains [this could explain, for example, Chilean case law extending the duty to inform beyond the precontractual domain on the basis of a just interpretation of article 1546,<sup>13</sup> although it has been reluctant to favorably sanction unforeseeability].<sup>14</sup>

Although the systematizing exercise involved in legal reform is useful, we understand that it is not essential to establish the aforementioned protection. Thus, contractual fairness deriving from the *favor debilis* principle can be understood as an effective protective tool. In turn, even if it is claimed that the principle of the autonomy of the will could be infringed upon by appealing to contractual fairness in order to protect the weaker party, we believe that it is sometimes necessary to revise the ideological parameters that have underpinned

<sup>7</sup> MOMBERG (2015), p. 749.

<sup>8</sup> LÓPEZ (2019a), p. 158.

<sup>9</sup> Ordonnance N° 2016-131 of 2016, ratified by Loi N° 2018-287 of 2018.

<sup>10</sup> Article 1112-1: *Celle des parties qui connaît une information dont l'importance est déterminante pour le consentement de l'autre doit l'en informer dès lors que, légitimement, cette dernière ignore cette information ou fait confiance à son cocontractant.*

*Néanmoins, ce devoir d'information ne porte pas sur l'estimation de la valeur de la prestation.*

*Ont une importance déterminante les informations qui ont un lien direct et nécessaire avec le contenu du contrat ou la qualité des parties.*

*Il incombe à celui qui prétend qu'une information lui était due de prouver que l'autre partie la lui devait, à charge pour cette autre partie de prouver qu'elle l'a fournie.*

*Les parties ne peuvent ni limiter, ni exclure ce devoir.*

*Outre la responsabilité de celui qui en était tenu, le manquement à ce devoir d'information peut entraîner l'annulation du contrat dans les conditions prévues aux articles 1130 et suivants.*

<sup>11</sup> Article 1110: *Le contrat de gré à gré est celui dont les stipulations sont négociables entre les parties.*

*Le contrat d'adhésion est celui qui comporte un ensemble de clauses non négociables, déterminées à l'avance par l'une des parties.*

<sup>12</sup> Article 1171: *Dans un contrat d'adhésion, toute clause non négociable, déterminée à l'avance par l'une des parties, qui crée un déséquilibre significatif entre les droits et obligations des parties au contrat est réputée non écrite.*

*L'appréciation du déséquilibre significatif ne porte ni sur l'objet principal du contrat ni sur l'adéquation du prix à la prestation.*

<sup>13</sup> Cf. *Medina Guajardo Elizabeth v. Hospital Clínico Fusat* (2009); *Cristóbal Tienken Fernández v. Clínica Las Condes S.A.* (2015).

<sup>14</sup> See DE LA MAZA (2011); MOMBERG (2010).

traditional contractual interpretations. What we say is reinforced by the weakening of the principle of the autonomy of the will, a phenomenon that places the bindingness of the contractual bond on good faith, reasonable trust or contractual balance.

From the above, it is possible to derive the two pillars of our contribution, in the first part we will discuss the Protection of the weaker contracting party from the perspective of contractual fairness; and in the second, we will present our position on the Protection of the vulnerable from the perspective of the bindingness of the contractual bond.

### III. PROTECTION OF THE WEAKER CONTRACTING PARTY AND CONTRACTUAL FAIRNESS

At the foundations of the aforementioned protection one principle takes on special relevance: *favor debitoris*.<sup>15</sup> Explaining it, Castán indicates that “it’s a response to the desire to soften, in unclear cases, the situation of the debtor.”<sup>16</sup> As proof of that, it is significant that in some legal systems, such as ours, certain issues are settled in their favor, either due to a legal requirement, or as the result of a suppletory exercise, when the parties have not addressed in a clear and balanced manner the clash of bargaining efforts within the bond. The debtor’s contractual interest is ultimately protected and is therefore allowed to “free himself from performing the obligation and to not see his position within the bond worsened as a result of non-performance”, in López’s words.<sup>17</sup>

Among the areas in which the Chilean Civil Code shows favor toward the debtor, there are several that stand out. On the one hand, the general rule on the *burden of proof regarding the existence of the obligation*, insofar as article 1698 provides that it be borne by the creditor, and some classifications of obligations, such as alternative obligations, thus article 1500 states that the choice belongs to the debtor, in the absence of express stipulation; optional [*facultativas*] obligations, since article 1505 allows the debtor to choose between paying with the thing due or with one that is specified; or, as article 1507 when it provides that in case of doubt regarding the classification of the obligation it will be considered to be

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<sup>15</sup> For an analysis of *favor debitoris* from a historical perspective, cf. ISLER (2019a). The author refers to the dimension comprised by the obligation in Rome, which, while identified with elements of a pecuniary and non-pecuniary or inalienable nature, would subsequently have evolved and settled towards a purely objective conception. However, AEDO (2013), p. 98, has expressed doubts about this way of understanding the institution. In fact, he states that “there is no marked transit from the personal bond to a pecuniary [*patrimonial*] one. In the executory process characteristic of the formulary procedure, the personal nature of the bond remains dormant: the possibility selling the debtor’s whole patrimony and *infamia* are just examples”. In our day, the bond is also not identified by a purely objective or exclusively pecuniary [*patrimonial*] exercise, but also incorporates elements of a personal nature linked, for example, to the prestige of the debtor or his social reproach, think of credit reports, or internal registers prepared by financial institutions.

<sup>16</sup> CASTÁN (1961), p. 835.

<sup>17</sup> LÓPEZ (2012), p. 38.

alternative; and, of course, in the prohibition of obligations *in solido* that are not expressly stipulated, under article 1511, paragraph 2.

The same can be seen in relation to specific manners of extinguishing obligations. As regards payment, article 1574 states that the debtor is not obliged to reimburse in the event of a payment made against his will; article 1588 makes, in the absence of stipulation, the debtor's domicile the place for the payment to be made in the case of a certain and determinate thing; article 1597 gives the debtor the power to impute the payment to the debt of his choice when there is no difference between debts regarding their being due or not (the same criterion flows from article 1596); article 1595 presumes interests to be paid, if no mention on the matter is made in the letter of payment; further, payment by consignment is designed precisely to allow the debtor to be discharged, as follows from article 1598. Regarding remission, article 1654 allows for a tacit form of this manner of extinguishing obligations to operate, stating as well that, although the creditor can claim that "it was not made with the intention of remitting the debt", this needs to be proven; otherwise "it will be understood that there was an intention to remit it." Regarding the loss of the thing due, article 1680 releases the debtor from liability when the thing due has been destroyed in their possession "after it has been tendered to the creditor, and during the latter's delay in receiving it", unless the debtor's gross negligence or malice is proven.

While other expressions can be identified within the domain of contract law, both with respect to contractual interpretation—in this regard, article 1566 contains a supplementary rule in favor of the debtor, when ambiguous clauses are not the result of lack of explanation from the obligor himself—, as well as regarding specific rules related to certain contracts, as we will see in the following paragraphs.

Such is the case of the rules on sale, since article 1820 releases the debtor—the seller—from the risk of the thing at the moment of tendering the thing due; that rule is also a specification for the case of the contract of sale of article 1550, studied under the so-called theory of risks; article 1826, paragraph 3, grants special protection to the debtor who is under an obligation to deliver in circumstances when "after the contract the buyer's fortune may have considerably diminished so that the seller is in imminent danger of losing the price"; article 1874, according to which the clause of non-transferability of ownership, or of reservation of ownership, does not prevent the buyer—the debtor obliged to pay the price—from acquiring it, since "it will not produce any other effect than the alternative demand stated in the preceding article". On the other hand, in the matter of the *pacto comisorio calificado* for non-payment of the price, Bello allowed for the buyer—debtor of the obligation to pay—to cause the contract to subsist by paying it, "at the latest, in the twenty-four hours following the judicial notification of the suit", which entails an exception to the relative effect of stipulations, as stated in article 1879. The same criterion can be seen in the paragraph relating to the vendor's power of redemption [*pacto de retroventa*], thus paragraph 2 of article 1885 states that the buyer—debtor of the obligation to return the thing—has the right to be notified by the vendor of the exercise of said power, also establishing a period of time for restitution if the thing is fruitful.

We notice the same in the context of the mandate, specifically by attentively reading article 2137, regarding the delegation to the mandatary that has been expressly authorized,

the person of the delegate being designated by the principal. Strictly speaking, although the mandatary may carry out the assignment, he may also delegate it to said person, which is an alternative obligation, and the choice is his; if delegation is chosen “a new mandate is constituted between the principal and the delegate that can only be revoked by the principal, and is not extinguished by the death or other accident that may befall the previous agent”; or article 2158, paragraph 2 which sets forth a guarantee in favor of the agent –debtor as regards the fulfillment of the assignment– by virtue of which, only proof of negligence allows the principal to “dispense with these obligations, alleging that the business entrusted to the agent has not been successful, or that it could have been performed at lesser cost”. Finally, the mandatary is empowered to make use of a legal right to retain, which applies to “the effects that have been delivered to him on behalf of the principal for the security of the performance to which he is obligated on his part”, as article 2162 of the Civil Code states.

Considering the rules on pledge, paragraph 2 of article 2369 can be singled out as in favor of the pledgor, which states that he “will be heard” in the event that he may “ask to be allowed to replace the thing pledged with another without prejudice to the creditor”, which constitutes another exception to the relative effect of contracts. This protection can similarly be seen in article 2393, which refers to the right of the debtor to retain the thing given as pledge, when it has come into his power for any reason, as long as the debtor “pays the entire debt for the security of which it was constituted”. The creditor cannot reclaim it even though he could well invoke new credits “even if they meet the requirements listed in article 2401”.

It should not be understood that the debtor must necessarily in every case be considered the weaker party in the contractual bond, since sometimes he is definitely the stronger part in it. In fact, in Rogel’s words,

the debtor who –incidentally and in synallagmatic relations of obligation, which are the most numerous– is so because he was previously a creditor and saw his credit entirely satisfied. The debtor, by virtue of a contract, is not always, far from it, the weakest party to it. As creditor, he may have imposed his conditions in it, he may have established that the performance to which he is entitled –the house sold, printed books– be delivered immediately, becoming debtor of an obligation that he has not yet performed and is not in a hurry to comply, even being able to do so.<sup>18</sup>

In fact, Chilean legal doctrine has been considerably concerned with the situation of the creditor when he is exposed to total or partial non-performance, studying the actions or remedies that the law provides, between which a right to choose is recognized in favor of the creditor.<sup>19</sup>

However, some specific expressions concerning protection of the creditor may also be extracted from Bello’s Code. As an example, this can be seen in the regulation of mortgage, since article 2427 states the rights that the creditor can enforce in the event that “the tenement is lost or deteriorates to the point of not being sufficient for the security of the debt”; in the

<sup>18</sup> ROGEL (2010), p. 128.

<sup>19</sup> Cf. ELGUETA (1981), p. 110; PIZARRO (2006), pp. 247 ff.; VIDAL (2007), p. 59; PIZARRO (2008), p. 397; ABELIUK (2010), pp. 529 ff.; CORRAL (2010), pp. 231 ff.; LÓPEZ (2012), pp. 16 ff.

guarantee that is entailed by agreeing to generic obligations, since the wording of article 1508 displays an application of the Latin maxim *genera non pereunt*; and also in the loss of the thing due as a manner of extinguishing obligations, since article 1677 orders that even when the thing perishes through no fault of the debtor, thus extinguishing the obligation, the creditor “may demand that the rights or actions that the debtor has against those for whose act or fault the thing has perished be transferred to the creditor”.

We do not take the provisions presented above as exceptional rules, but rather as formal expressions of contractual fairness in various passages of the Civil Code, by making the debtor the holder of special protection, considering him as the weaker party in the contractual bond, which does not in any case exclude the possibility that the vulnerable party may be the creditor. Hence, the *favor debitoris* principle, under a broad reading, can be conceived, in the words of Castán, firstly, as “an adage founded on considerations of fairness”;<sup>20</sup> that, secondly, requires going beyond its semantically reductive borders, in order to conceive the *favor debilis* principle that for us acquires the character of a *second-order principle* [*supraprincipio*] (later we will explain the reason for this category) aimed toward intervening in modern contract law, with the purpose of protecting those who meet unfair contractual conditions, whatever their position in the contractual bond.

What has been pointed out seems relevant because, as we have stated, it is not necessary to resort to legal reforms in order to incorporate this *second-order principle*. The protection, again following Momberg, “should be understood as applicable to all cases and for all parties that may require it, whether or not there is a specific rule that so declares it”.<sup>21</sup> The same view can be identified in the defense that a certain well-regarded legal doctrine formulates, by proposing a series of alternatives available to the weaker contracting party to defend himself from the originally fair, but superveningly unfair obligations,<sup>22</sup> for which compliance is demanded; thus it is possible to resort to absolute and relative nullity, compensation for damages,<sup>23</sup> in addition to the possibility of proposing adjustments to the contract.<sup>24</sup>

#### **IV. PROTECTION OF THE WEAK CONTRACTING PARTY AND THE BINDINGNESS OF THE CONTRACT**

The panorama presented in the first part, acquires greater force from the perspective of the lack of a real justification of the principle of the autonomy of the will as ground for the bindingness of agreements, which, in our view, should rather be limited to the goal of justice

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<sup>20</sup> CASTÁN (1961), p. 848.

<sup>21</sup> MOMBERG (2015), p. 753.

<sup>22</sup> We include in the analysis the distinction between original and superseding imbalance, as proposed by LÓPEZ (2015a), p. 132.

<sup>23</sup> LÓPEZ (2019b).

<sup>24</sup> LÓPEZ (2018).

that contracts must show, since not always “he who says contractual, says fair”,<sup>25</sup> as well as the fact that the magnitude of the obligations is not always irrelevant. What has been said is expressed in the conviction that contractual fairness, soul of the *favor debilis* principle, should not ignore its most intimate purpose: the pursuit of contractual justice,<sup>26</sup> which López claims is achieved “by guaranteeing the parties an egalitarian relationship that translates into the proportionality of their obligations”.<sup>27</sup>

Because of what has been said, even if a traditional position maintains the opposite,<sup>28</sup> it seems questionable that the autonomy of the will is the principle that allows, by itself and in itself, an explanation of the binding nature of contracts, in other words, the claim that the will is self-sufficient;<sup>29</sup> in fact, Pizarro argues that “the will of the parties constitutes a fundamental element for the formation of the contract, but it lacks explanatory force of its bindingness. The will of the parties determines, in principle, the content of the bond, that is, the obligations that the contracting parties must perform, but cannot explain the obligatory character of the contract”.<sup>30</sup> Similarly, Corral states: “An ideological absolutization of the principle of contractual inalterability, which would lead to excluding *a priori* all kinds of intervention of the content of a contractual agreement, would run a serious risk of turning the contract into an instrument of exploitation and domination rather than of expression of personal freedom”;<sup>31</sup> and Pereira, who, in turn, argues:

The dimensions that identify the contemporary contractual environment are associated with a decrease in the influence of the autonomous will of the parties, as a justification criterion for the binding effect of the contract and, consequently, an increase in the heteronomous intervention of the legislator in the formation or configuration of contractual bonds”. Thus, the autonomy of the will may be hindered if it is intended to affirm it as the normative justification of the binding force of the contract. It can be thought that the will is no longer the prism under which the contractual norm rests, as well as it can be claimed that if it nonetheless were, it cannot be recognized as *the* unrestricted foundation according to which it was admitted in modern contract theory.<sup>32</sup>

What has been argued is in line with what professor Gómez has argued in Spain, who, referring to obligatoriness in the performance of contracts, without ignoring the role of contractual freedom as a driver of the bond,<sup>33</sup> points out that it is not unthinkable that, in the

<sup>25</sup> Cf. commenting Fouillée's statement, cf. ROLLAND (2006), p. 769.

<sup>26</sup> Cf. DE LA MAZA (2007), pp. 571 ff.; PIZARRO (2011), pp. 7 ff.

<sup>27</sup> LÓPEZ (2015a), p. 126.

<sup>28</sup> Cf. SOMARRIVA (1934), pp. 17 ff.; CORRAL (2018), pp. 495 ff.

<sup>29</sup> Cf. LÓPEZ & ELORRIAGA (2017), p. 247.

<sup>30</sup> PIZARRO (2004), p. 236.

<sup>31</sup> CORRAL (2010), p. 292.

<sup>32</sup> PEREIRA (2016), p. 74.

<sup>33</sup>And even before him; the issue has been analyzed by Chilean legal doctrine in relation to the performance of the duty to inform in the precontractual sphere, thereby confirming the broad interpretation that should be given to article 1546 of the Civil Code. Cf. BOETSCH (2011), pp. 140 ff.; DE LA MAZA (2010a), p. 28 (the author develops the application of the principle from the perspective of imperfect rationality); CAORSI (2016), p. 24;



end, it may be imbalanced and consequently not obligatory.<sup>34</sup> The author's argument seeks to question an orthodox reading of the principles of contractual freedom and the observance of agreements, which in turn causes judges to lack the power to check the outcome of contracts, being able exclusively to focus on the formation of the contract. The previous, from the postulate that "[C]ontractual freedom would guarantee the internal justice of the contract."<sup>35</sup> In essence, it is criticized that the law of contracts cannot deal with substantive injustices, and must exclusively deal with aspects that relate, rather, to procedural injustices or the formation of the agreement, which in other words means applying the rules on defective consent.

So, the circumstances of the formation of a contract will not always allow the weaker party to be subject to protection by such rules –on defective consent–, which constitutes the crux of the matter. Gómez on this point, teaches that:

what happens in the cases that are of interest here is that the position of weakness of one of the contracting parties affects their contractual freedom, so that they consent to a contract that is substantively unjust, or is forced onto them by the circumstances (due to their own state of need or dependence, or the position of power of the other party, which leaves them no choice), or without being fully aware of the commitment entered into (due to limitations of their capacities, lack of knowledge or experience, or their position of trust with respect to the other party). The lack of freedom or lack of awareness places us in a scenario similar to that of classic defects of consent such as fraud, violence or intimidation. And, although in the hypotheses of abuse that we are dealing with now, there does not have to be an openly illicit behavior by the one who exploits the vulnerability of others, it is possible to cast serious reproach from the moment that such exploitation is conscious and translates into obtaining an unfair or disproportionate advantage.<sup>36</sup>

In our understanding, the foregoing reveals the dimension of the legal problem that is the object of the current analysis. There are technically no defects of consent, but rather circumstances that caused substantive inequality, even if not formal.

An example in this area can be identified in the Supreme Court's ruling on *Ingenierías y movimientos de tierras Tranex Ltda. v. Anglo American Sur S.A.*<sup>37</sup> In the case, a contractual earthmoving agreement was signed between the parties, including an agreement on a convenience clause, by virtue of which, Anglo American S.A. reserves for itself the power to end the contract "without indication of cause". It happened that, citing loss of confidence in the other party as cause, the contractual relationship was effectively ended. As can be read in the ruling, the decision of the company that required the services,

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DE LA MAZA (2008), pp. 43-72; DE LA MAZA (2009), p. 48; DE LA MAZA (2010b), p. 79; DOMÍNGUEZ (2012), p. 56; MUNTA (2019).

<sup>34</sup> GÓMEZ (2018), pp. 19 y ff.

<sup>35</sup> GÓMEZ (2018), p. 23.

<sup>36</sup> GÓMEZ (2018), p. 23.

<sup>37</sup> *Ingenierías y movimientos de tierras Tranex Ltda. v. Anglo American Sur S.A* (2019).

relied on the principle of *pacta sunt servanda* to argue that the early termination of the contract was in accordance with the law since the power it exercised originates in a valid, clearly worded agreement, subjecting its decision strictly to the requirements established in that clause, the exercise of which does not give the right to damages or compensation of any kind, without prejudice to the payment of the services actually provided until the date of the early termination (par. 13).

Ultimately, the Supreme Court rejected the appeal for annulment [*recurso de casación en el fondo*], affirming the ruling of the lower Court, which ordered the compensation of Tranex. In its reasoning, the Court recalls that article 1546 of the Civil Code must be interpreted as an imperative of loyalty that puts on the “contracting parties the duty to behave correctly and loyally in their mutual relations, from the beginning of the preliminary dealing up to and beyond the conclusion of the contract”,<sup>38</sup> according to López and Elorriaga, and which, being the heart of objective good faith<sup>39</sup> “should be seen as an unifying element of contracts and, so conceived, serves as a basis for the duty of guarantee assumed by the contracting parties” (par. 27).

In fact, a contractual agreement should not be construed rigidly, where recourse to the convenience clause constitutes an infringement of the principle of good faith. The Court cites a ruling of the Court of Appeals of Pedro Aguirre Cerda (March 4, 1988, R.D.J., T. 85, secc. 2, p. 9) to substantiate the above; the ruling reads: “None of the contracting parties must rely on a rigid literal reading in order to give less or to demand more, arbitrarily, under the influence of petty self-interest; rather, the contract should be allowed to express its content broadly. Nor should elements beyond the text, that could be based on the nature of the pact, on custom or the law be left unconsidered” (par. 27).

For these reasons, the agreement, even without defects of consent, on a unilateral termination clause must not be invoked arbitrarily or baselessly. Good faith also permeates the outcome of contractual bonds, an issue which is diametrically opposed to the capricious application of clauses such as the one discussed. In summary, “the good faith which should guide the defendant’s acts during the performance of the contract required her to justify the reasons for the early termination of that contract” (par. 28), which was not shown to be the case. That position seems correct to us.

On the other hand, good faith, we believe, should not be confused with the principle of legitimate expectations that could be invoked to protect the vulnerable as an instance of the *favor debilis* principle. Technically speaking the principle of legitimate expectations, as López points out, is broader than that of good faith, since “it not only follows moral or subjective reasons, but also economic or utilitarian ones, which go beyond it and overflow it, finding its foundation, rather than in the obligation of the sender to act fairly and correctly, in the fact that his action has created reasonable expectations in the recipient that must be protected, because there was an appearance that caused the emergence of trust worthy of

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<sup>38</sup> LÓPEZ & ELORRIAGA (2017), p. 435.

<sup>39</sup>as well-regarded legal doctrine states, the objective view of the notion is the one to which “article 1546 of the Civil Code refers when it requires that contracts be performed in good faith, and that, consequently, contracts demand not only what is expressly stated in them” (LÓPEZ & ELORRIAGA (2017), p. 434).

protection”,<sup>40</sup> providing it with independent functionality, because it seeks to “protect the legitimate expectations of the diligent party, purposes that cannot be achieved by resorting to good faith”.<sup>41</sup>

The Court’s decision cited above also rules on the protection of the valid expectations of the weaker party; and while, from the point of view of terminology, it does so on grounds closer to good faith, substantively we understand that the argument must be considered as an expression of the principle of legitimate expectations, since the hypothesis –which we will review– can, in our view, only in a narrow or a confused manner, be read from the logic of the fulfillment of a duty of reciprocal collaboration, as the same ruling states (par. 30).

In the case, the ruling states: “Anglo [...] violated its duty to perform the contract in good faith because of its conduct which created an appearance that the relationship with Tranex remained within the margins of trust” (par. 29). The decision is understandable, since, as is apparent from the case, despite having reached the decision not to persevere in the contract, not only did Anglo not inform Tranex, but also created a scenario of normality which introduced a spirit of trust in the plaintiff, even proposing a contractual amendment one month before expressing its decision not to continue. In turn, it informed nothing about the surcharge in construction that resulted for the contractor from the non-implementation of a bimodal transport system, Anglo being obliged to do so. The second breach of Tranex’s legitimate expectations manifests itself when, as the ruling states: “faced with the demands for payments due to the surcharges which originated precisely because of that lack of implementation, it did not expressly reject them, as required by article 1546 of the Civil Code, but remained silent and, in the meantime, the services continued to be carried out” (par. 33). Hence, it was determined that the elements of judgment allowed the Supreme Court to deem the facts as a case of qualified silence (par. 33).

French law has also explored the stated principle which has been understood as an effective criterion in the determination of contractual obligations, as well as in their demarcation.

As regards determination, the basis of the vendor’s obligation to deliver the thing should not be understood to be bound to the debtor’s will, but rather to the trust that the performance of that obligation provokes in the buyer. Duzert explains the principle of legitimate expectations in light of the carrier’s obligation of security, which must be adhered to throughout the whole journey and which, being contractual in nature, has as its source the debtor’s promise.<sup>42</sup> We find this interesting, because as López says: “resorting to good faith as the foundation of a particular legal construct is vague and indeterminate, since its continuing expansion and use by legal doctrine has turned it into a “general clause” or “open-ended norm”, whose abstract content only takes on a concrete significance in each of the instances in which the duty of loyalty, rectitude and correctness that it evokes manifests

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<sup>40</sup> LÓPEZ (2019a), p. 157.

<sup>41</sup> LÓPEZ (2019a), p. 157.

<sup>42</sup> Cf. DUZERT (2017), p. 140.

itself”,<sup>43</sup> aspects that also affect, according to the Latin American Principles of Contract Law, their “broad and intangible” nature.<sup>44</sup>

As for demarcation, the principle is used with regard to the distinction between duties of best efforts and duties to achieve a specific result. In this sense, if the nature of the obligation makes it possible for the judge to assume that the result might not be achieved if, even when acting diligently, eventualities may intervene, the creditor could not then rely on legitimate expectations against non-performance of the obligation;<sup>45</sup> thus, for example, in the case of the doctor’s obligation to surgically intervene; on the contrary, the principle could be invoked regarding the lawyer’s obligation to appeal in a timely manner. However, it should not be overlooked that if the contract is binding it is precisely because it is fair and not exclusively because the parties have autonomously agreed to it. The principle of contractual balance is in accordance with that, principle which according to López is observed “when the presence of qualitatively reciprocal or commutative obligations can be ascertained and that are, at the same time, quantitatively equivalent or proportionate”,<sup>46</sup> which explains that according to the aforementioned Latin American Principles of Contract Law, a contract “does not warrant being binding, given the imbalance that it provides to a party the excessive advantage over the other”.<sup>47</sup>

## FINAL REMARKS

The protection of the weaker party is the primary purpose of this draft presentation we submit for review. That protection gets its legal justification from the *second-order principle* of *favor debilis*, which reflects the fairness that must animate contractual bonds. Recognizing that principle does not require specific legal reforms (even if that would be useful), as it may be derived from the reading of various passages of the Civil Code. On the other hand, the appeal to contractual fairness goes toward clarifying why contracts are binding, arriving at the conclusion that they are so insofar as they are fair. In this space, it is adequate to reflect on the principles that, born under the wings of the *favor debilis* principle (hence its being a *second-order principle*), permit a technical answer to the question of when a contract has such quality. Thus, it can be said that it is not fair when after non-performance there is good faith on the part of the breaching party (consider the case of unforeseeability), or that it is, either when the creditor’s expectation in the performance of the obligation is legitimate (consider the duty of security), or when the contractual bond is balanced (in which case a broad reading of the general recourse to lesion has been proposed). Finally, we consider that the above-mentioned alternatives are powerful judicial tools in the task of visualizing solutions to situations in which the interests of the disadvantaged party are affected.<sup>48</sup>

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<sup>43</sup> LÓPEZ (2015b), p. 117.

<sup>44</sup> DE LA MAZA *et al* (2017), p. 24.

<sup>45</sup> Cf. DUDEZERT (2017), p. 142.

<sup>46</sup> LÓPEZ (2015b), p. 127.

<sup>47</sup> DE LA MAZA *et al* (2017), p. 24.

<sup>48</sup> Cf. LÓPEZ (2015b).

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