



## The Struggle for the Soul of the Contract: From Contractual Literalism, through the Law of Remedies, to the Confrontation between Contractual Equity and the Economic Analysis of Law

**La lucha por el alma del contrato: Del literalismo contractual, pasando por el derecho de los remedios, y la confrontación entre la equidad contractual y el análisis económico del derecho**

RODRIGO BARCIA LEHMANN\*

JOSÉ MAXIMILIANO RIVERA RESTREPO\*\*

### Resumen

The Exegetical School of Law, which postulated the defense of legal literalism, meant that in matters of obligations, forced fulfilment or specific performance of obligations was central to the system of contractual remedies. Furthermore, contractual literalism prevents the judge from revising the contract, unless the requisites of existence and validity are affected. The objective theory of contracts would change this maxim, allowing the judge to intervene the contract and alter how its specific performance operates. The most significant expression of the objective paradigm –which allows for limited intervention of the contract by the judge– is the European law of remedies. The objective theory has been developed fundamentally through the principle of good faith. The present work highlights the theories that are based on contractual equity in order to contrast it with the economic analysis of contracts.

**Key words:** *Contractual Literalism; Law of remedies; Contractual Equity; Law & Economics.*

### Resumen

La Escuela de la Exégesis, cuyo postulado era la defensa del literalismo jurídico, significó que en materia de obligaciones el cumplimiento forzoso o cumplimiento específico de las obligaciones constituía un sistema central de los remedios contractuales. Además,

\* Universidad Autónoma de Chile, Santiago, Chile ([rodrigo.barcia@uautonoma.cl](mailto:rodrigo.barcia@uautonoma.cl)). ORCID: <https://orcid.org/0000-0003-1021-446X>. Article received on March 8th, 2022 and accepted for publication on June 14th, 2022.

\*\* Universidad San Sebastián, Santiago, Chile ([jose.rivera@uss.cl](mailto:jose.rivera@uss.cl)). ORCID: <https://orcid.org/0000-0003-0422-8494>.

How to cite this article:

BARCIA LEHAMANN, Rodrigo & RIVERA RESTREPO, José Maximiliano (2022). “The Struggle for the Soul of the Contract: From Contractual Literalism, through the Law of Remedies, to the Confrontation between Contractual Equity and the Economic Analysis of Law”, *Latin American Legal Studies*, Vol. 10 N° 2, pp. 280-339.

el literalismo contractual impide que el juez revise el contrato, a menos que se afecten los requisitos de existencia y de validez. Las tesis objetivas del contrato modificarían esta máxima, permitiendo al juez intervenir el contrato y alterar la forma en que opera el cumplimiento específico. La manifestación más relevante del paradigma objetivo -que permite una intervención limitada del contrato por parte del juez- es el derecho europeo de los remedios. Las tesis objetivas han sido desarrolladas fundamentalmente por medio del principio de la buena fe, y el presente trabajo destaca las tesis que se basan en la equidad contractual, para contrastarla con el análisis económico del contrato.

**Palabras clave:** *literalismo contractual; derecho de remedios; equidad contractual; análisis económico del derecho.*

## INTRODUCTION

The rise of the ideas of the Enlightenment as well as the codification of laws and modern constitutionalism brought about the emergence of the *École de l'exégèse*,<sup>1</sup> whose main bastion was the defense of the contractual literalism.<sup>2</sup> The idea of specific performance as a consequence of the autonomy of the will, although it can be traced to Roman law, is a consequence of the Enlightenment. Nevertheless, as will be seen, it meant that the *pacta sunt servanda* principle would result in contractual literalism. Contractual literalism will make specific performance prevail over other remedies, such as rescission or compensatory damages. This view has changed, especially since the Pandectists, after the enactment of the Code, but it still has some validity. This link between Enlightenment law and industrial and post-industrial law is reflected in the following words of Cardenal Fernández, who argues that:

[...] performance also entails the idea of satisfaction of the credit, the idea of realization of the creditor's interest: performance, therefore, is not only execution of the consideration (payment), *in solutio or liberatio*; it is also *satisfactio*".<sup>3</sup>

<sup>1</sup> See CARMONA TINOCO (1996), pp. 25 et seq.; MOISSET DE ESPANÉS (1992), pp. 78-85; PERELMAN (1988), pp. 37 et seq.; RUZ LÁRTIGA (2011), pp. 121 et seq.

<sup>2</sup> MARTÍNEZ MUÑOZ (2005), pp. 24 et seq.

<sup>3</sup> CARDENAL FERNÁNDEZ (1979), p. 61.

Views on contracts are intimately connected to their time. Naturally, the ideas of the Enlightenment do not serve to explain and give support to contracts today. This work proposes that postmodern law of contracts has abandoned the view of contract of the Codification era, presented as just its literal wording, which is to be applied in a more sophisticated way. In this respect there are different trends, but we believe that the way to understand the contract, at present, is by resorting to the principle of good faith. Thus, to explain this evolution we have divided this article into three parts. The first is “Rise and fall of literalism, or the so-called *pacta «sunt servanda»*”; the second is: “A postmodern view of the contract: the tension between good faith and the principle of free will”, and the third part: “Some notes on EAL and Good Faith as principles that supplement and correct contracts”. This section links two approaches that are relevant to contract theory, namely the objective theory of contracts and the Economic Analysis of Law (*EAL*). This particular understanding of good faith allows us to move forward toward a theory of the contract that has internal coherence and that allows us to resolve practical conflicts in contractual matters. But also, it seeks to build a theoretical framework that allows us to rearticulate contract theory.

## **I. RISE AND FALL OF LITERALISM, OR THE SO-CALLED “*PACTA SUNT SERVANDA*”**

### **I.1 Contractual literalism and the “*pacta sunt servanda*” principle as Enlightenment concepts**

As a consequence of the French Revolution, in continental law countries, the contract is not built upon the idea of the expectations of the parties (which appear later), but on the principle of *pacta sunt servanda*.<sup>4</sup> This explains the importance of specific performance.<sup>5</sup> On the other hand, the law of contracts would change its center of analysis since the end of the last century, focusing on the expectations of the parties. This objective theory of the contract has its origins in the post-Code

<sup>4</sup> See RIVERA RESTREPO (2017a), pp. 40-53; RIVERA RESTREPO (2017b), pp. 303-333; RIVERA RESTREPO (2017c), pp. 188-217; RIVERA RESTREPO (2017d), pp. 120-139; RIVERA RESTREPO (2017e), pp. 83-98; RIVERA RESTREPO (2016a), pp. 187-203; RIVERA RESTREPO (2016b), pp. 203-244; RIVERA RESTREPO (2016c), pp. 266-288; RIVERA RESTREPO (2016d), pp. 223-233; RIVERA RESTREPO (2016e), pp. 3-10; RIVERA RESTREPO (2016f), pp. 1-15; RIVERA RESTREPO (2016g), pp. 267-291; RIVERA RESTREPO (2015a), pp. 69-104; RIVERA RESTREPO (2015b), pp. 9-17; RIVERA RESTREPO & BARCIA LEHMAN (2019a), pp. 19-68; RIVERA RESTREPO & BARCIA LEHMAN (2019b), pp. 165-181.

<sup>5</sup> We have preferred this concept although legal scholarship uses different terms according to the legal system. See: BAHAMONDES OYARZÚN & PIZARRO WILSON (2018), pp. 29-51; SHAVELL (2006), pp. 831-876.

Pandectists, although it would then develop through international trade. Perhaps its most relevant milestone in this respect was the CISG. Thus, from this perspective, it confronts non-compliance through the law of remedies, or, from an economic point of view, a market function. Both concepts give a more restrictive conception of forced compliance (or specific performance). Prior to the Enlightenment, specific performance of contracts or their effects was not identified with the expectations of the parties. The literalist conception of contracts is contrary to the Roman origin of the effects of obligations. In Roman law, breach of contract gave rise to compensation for damages.<sup>6</sup> Moreover, Common Law countries also do not share the Enlightenment's position on specific performance, which was never given preferential status.<sup>7</sup> Anglo-Saxon countries did not adopt the Enlightenment view, which practically considered specific performance as a synonym of the effects of obligations.<sup>8</sup> This tradition of continental law breaks with post-classical Roman law, which, in the event of breach of contract, essentially awarded the creditor compensation for damages.<sup>9</sup>

### **I.2 Contract literalism or “*pacta sunt servanda*” in Chilean law**

In Chile (as in most civil law countries), specific performance was the creditor's primary right, while contract termination with damages was, for a long time, a secondary right. Furthermore, damages were supplementary to contract termination under Chilean law, at least regarding the obligations to give.<sup>10</sup> The literalist theses regarding specific performance came out of the general theory of

---

<sup>6</sup> ZIMMERMANN (2000), pp. 126-127.

<sup>7</sup> Although, truth be told, Sánchez Lorenzo explains that “...according to this version of literalism, typical of the rationalist culture, the agreement that reflects the intention of the parties at formation excludes applying it to the subsequent behaviour of the parties...”. SÁNCHEZ LORENZO (2011), p. 152.

<sup>8</sup> García Caracuel, following De Castro, claims that “If the grounds for the issue are viewed from a realistic comparison of the systems, one can see that the English and German law are disconnected from the Common Law, one with its formalities and literalism, a comfortable stage for trade; the other, by the big illusion of dogmatic purity as per Roman science...”. GARCÍA CARACUEL (2014), p. 273.

<sup>9</sup> CLEMENTE MEORO (2009), pp. 47 ff.

<sup>10</sup> LARRAÍN RÍOS (1994), pp. 83-84; MEZA BARROS (1990), pp. 255-256; RAMOS PAZOS (2004), p. 239 and FUEYO LANERI (1992), p. 339.

the contract and the effects of obligations.<sup>11</sup> The theory of contracts resorts to a literal interpretation of article 1545 of the Chilean Civil Code (“ChCC” in what follows) which is itself a reference to article 1134 of the French Code.<sup>12</sup> As for the obligations, it resorts to the distinction between the rights the creditor has concerning articles 1553, 1555 and 1489 of the ChCC. This view featured prominently a few years back. However, the ChCC never laid down rules on this situation directly but only applied the effects of obligations to do and not to do something (Articles 1553 and 1555 ChCC) respectively. Thus, Meza Barros pointed out that:

[...] in the case of the obligations to give, the creditor does not have the right to ask for alternative compensation or performance; it may only ask for compensation if performance is not possible.<sup>13</sup>

Naturally, a complete elaboration of the literalist thesis was put forward by Claro Solar, who pointed out that Article 1545 of the ChCC was inspired by two sources. This rule has its immediate antecedent in Article 1134 of the French Code, which equated contracts to the law in order to prevent the application of rules of equity to the contract by the judge; and a distant one in the Digest, which equated contracts to the law in order to make it clear that naked contracts bind the parties, leaving behind the position of classical Roman law.<sup>14</sup>

Nonetheless, this trend changed twelve years ago and now contractual literalism has been abandoned by most in Chilean legal scholarship. This is the view shared by Peñailillo Arévalo,<sup>15</sup> Pizarro Wilson,<sup>16</sup> Barcia Lehmann,<sup>17</sup> De La Maza

---

<sup>11</sup> See Supreme Court Judgment of March 29, 2021; Supreme Court Judgment of Julio 21, 2020; Supreme Court Judgment of December 6th, 2019; Supreme Court Judgment of September 27th, 2016; Supreme Court Judgment of April 25th, 2019; Supreme Court Judgment of March 13, 2019.

<sup>12</sup> CONTARDO GONZÁLEZ (2011), pp. 85-118.

<sup>13</sup> MEZA BARROS (1990), p. 255. In Meza Barros' quote there is a reference to *Revista de Derecho y Jurisprudencia*, v. XXX, sec. 1<sup>a</sup>, 465.

<sup>14</sup> CLARO SOLAR (1977), N° 1030, pp. 469-471.

<sup>15</sup> PEÑAILILLO ARÉVALO (2003), p. 429.

<sup>16</sup> PIZARRO WILSON & AGUAD DEIK (2009), pp. 239-245.

<sup>17</sup> BARCIA LEHMANN (2008), pp. 87-88.

Gazmuri,<sup>18</sup> López Díaz<sup>19</sup> and Oviedo-Albán,<sup>20</sup> who have solely followed foreign legal systems.

The arguments of literalism in favor of contract fulfilment as the primary right in Chilean law are as follows:

a) The fact that the creditor can choose between specific performance and termination means that the object of the contract would be an alternative obligation because the creditor would be entitled not only to performance but also to avoidance of the contract. Moreover, since alternative obligations are an exception, an express rule is required. As regards obligations to give, the legislator did not provide for such a possibility.

b) The creditor may opt for termination instead of specific performance in the event of failure to comply with an obligation to do under article 1553 of the ChCC. This implies an express authorisation by the legal system, which does not apply to obligations to give and not to do.

c) As in the previous case, as a general rule with regard to obligations, the creditor may only exceptionally choose between specific performance and the penal clause, following article 1537 ChCC. Thus, as the right of option is expressly established concerning the penal clause, it is not appropriate to apply it as a general rule, since this would have required express regulation.<sup>21</sup>

d) Lastly, as per article 1672.1° of the ChCC the creditor must demand “the price” if the thing due is destroyed due to the debtor’s fault, that would prove that specific performance is what should always be demanded.<sup>22</sup>

Moreover, some Chilean scholarship remains loyal to the thesis of literalism. Abeliuk Manasevich was one of the authors that categorically argued in favor of the classic doctrine claiming that:

From another point of view, the obligation to indemnify is subsidiary and contingent with regard to the agreed to and non-fulfilled obligation, the former precisely because it appears only with non-fulfilment, and because,

---

<sup>18</sup> DE LA MAZA GAZMURI (2009), pp. 455-469.

<sup>19</sup> LÓPEZ DÍAZ (2010), pp. 67-68, 85-109 and LÓPEZ DÍAZ (2014), pp. 158-198.

<sup>20</sup> The author discusses the separate nature of damage compensation in relation to the action for clearing of hidden defects in Chile and Colombia. OVIEDO-ALBÁN (2014), pp. 239-276.

<sup>21</sup> ALESSANDRI RODRÍGUEZ & SOMARRIVA UNDURRAGA (1941), pp. 179-180.

<sup>22</sup> MEZA BARROS (1990), p. 256.

as we will see, as a general rule it can only be resorted to by the debtor, if the non-fulfilment is no longer possible. It is contingent, then, since in order for it to be born, it is indispensable that a legal fact occurs: the aforementioned non-fulfilment, which suspends the birth of the obligation, but is essential for it to take place.<sup>23</sup>

In Comparative Law, important authors have leaned in favor of literalism. In this vein, it is possible to refer to Albaladejo and Atiyah. In the case of the former:

In the absence of spontaneous performance by the debtor, the creditor is not free to request either performance (which can later be carried out as voluntary or compulsory procedural enforcement or at the debtor's expense) or compensation for non-performance, but the former and, failing that, the latter. A direct demand for performance can only occur when the other is not possible (even if it is no longer useful to the creditor).<sup>24</sup>

According to Atiyah, the creditor should prefer compulsory performance because it represents the fulfilment of the pledged word.<sup>25</sup>

### **I.3 An overview of the thesis of contractual literalism**

Although it is not the point here to review the counterarguments against these positions, some of them will be elaborated. Larroumet points out that, under French law, the argument from alternative obligations does not make sense because:

[...] the notion of alternative performance does not include, at the time of the conclusion of the contract, the possibility for the creditor to choose between the specific performance of the obligation itself provided for in the contract and alternative performance. The latter applies only in the event of non-performance, which is not dependent on the creditor's will but on the conduct of the debtor, since the latter has not performed the obligation itself normally. It cannot be an alternative obligation chosen by the debtor [...] since the creditor has not consented to any choice in favor

<sup>23</sup> ABELIUK MANASEVICH (1983), p. 519.

<sup>24</sup> ALBALADEJO (1997), p. 196.

<sup>25</sup> ATIYAH (1986). This era --that we have allowed ourselves to call the literalist interpretation of the contract-- was strongly influenced by the Enlightenment and is supported by pre-Codification authors, such as Pothier, Domat, Planiol, and is developed through a post-Codification scholars, before to the seventies, such as Charles Aubry and Charles Rau, Baudry-Lacantinerie, Marcel Planiol, René Demogue, Capitan. See: JOSSERAND (2017), pp. 364 ff.

of the debtor as between the two kinds of performance.<sup>26</sup>

Similarly, Barros Bourie claims that damages should only meet an additional requirement in comparison to specific performance, namely, non-performance.<sup>27</sup> The strongest argument in favor of the right to choose and against literalism is based on the regulation of the implied resolutive condition [*condición resolutoria tácita*]. According to the new interpretations of article 1489 of the ChCC, this situation changed in favor of the *ius electionis*. Most authors argued that this clause was only applicable to obligations to give, which made the argument against specific performance as the right of the creditor even stronger.<sup>28</sup> Meza Barros was one of the first authors to argue against the order of priority between specific performance and termination by saying that: “Article 1489 still allows the creditor to demand termination of the contract with damages and makes it clear that it is not possible for him to claim damages directly”.<sup>29</sup>

The discussion around such rule extends to the rights that the civil legal system alternatively grants to the creditor in each particular contract. Thus, López Santa María broadens the discussion about the alternative rights of the creditor in sale, rental and other contracts.<sup>30</sup> Notwithstanding, within Economic Analysis of Law (EAL) scholarship the discussion continues, claiming that the solution depends on the transaction costs resulting from damages. In this regard, continuance of the contract and substitute performance, as a kind of *in natura* performance, is seen as an alternative to specific performance.

EAL also maintains this position, but with some nuances. Thus, Steven Shavell adds that:

[...] the conclusion that I reach is that parties would tend to prefer the remedy of damages for breach of contracts to produce things, whereas they would often favor the remedy of specific performance for breach of

---

<sup>26</sup> LARROUMET (2004), pp. 17-32.

<sup>27</sup> Barros Bourie claims that the compensatory claim is subject to additional requisite conditions, as it generally implies that non-performance is an illicit act. In this case, pecuniary liability resulting from non-performance and from torts coincide, since in both cases the action generally has as a requisite the illicitude of the act of the person liable. BARROS BOURIE (2007), p. 724.

<sup>28</sup> PEÑAILILLO ARÉVALO (2003), p. 429.

<sup>29</sup> MEZA BARROS (1990), p. 256.

<sup>30</sup> LÓPEZ SANTA MARÍA (2012), pp. 26-30.



contracts to convey property.<sup>31</sup>

Shavell considers that the general rule for breach of contract is damages; however, he leans towards specific performance in the case of the obligations to give a non-fungible thing (specific performance).<sup>32</sup>

#### **I.4 The abandonment of contract literalism or “*pacta sunt servanda*”**

Chilean law, as well as that of other countries, is gradually moving away from contractual literalism. Undoubtedly, the abandonment of contractual literalism has been strongly encouraged by what is known as the law of remedies. According to the law of remedies, faced with default, the creditor has a series of remedies available that tend to satisfy their broken expectation. Moreover, they could opt, with certain limitations, for specific performance, termination, or damages.<sup>33</sup> Substitution would also be a right of the creditor (in consumer law). It appears through the law of remedies, as seen in articles 75 and 76 CISG, and 9:102(2)a & b PECL, as a remedy that may be the general rule. In this regard, comparative scholarship agrees that this remedy is equivalent to performance *in natura* and not to be confused with damages. This remedy is independent, and consequently, the contract remains valid. Besides, this specific performance option might lead to damages.<sup>34</sup> Under American law, this concept applies through the notion of “expectation interest” or “expectation damages” as a criterion to determine the *quantum* of damages.<sup>35</sup> In this sense, if, for example, the seller does not fulfil a contract for the sale of materials, and the buyer has to buy a substitute, the difference in price between that charged by the first seller - who did not fulfil - and the second seller, will be part of the damages against the first seller. Problems of price restitution, under American law, are solved by compensation for damages. For contractual literalism this problem is solved through agreement. Thus, termination leads to possible restitution of the price, insofar as the buyer has paid the first seller, also giving rise to the compensation of damages (which is qualified as compensatory and in arrears). The usefulness of damages, as an independent right, would be to be make it unnecessary for the buyer, in the example, to prove

---

<sup>31</sup> SHAVELL (2006), p. 832.

<sup>32</sup> SHAVELL (2006), p. 831.

<sup>33</sup> VIAL DEL RÍO (2015), pp. 57-64.

<sup>34</sup> MORALES MORENO (2014), pp. 97-106.

<sup>35</sup> FISCHER (2006), pp. 27-28.

beforehand that he purchased and paid for a replacement of the thing. It would be sufficient for the buyer to sue the first seller for damages in order to in the end obtain the latter's goods, which would allow the buyer - at market price - to acquire the goods that the seller did not deliver. Naturally, unlike the literalist thesis, for the law of remedies, the contract is not necessarily dissolved, and the seller may in turn demand performance of the buyer's obligation. Termination appears as an independent remedy. Notwithstanding the above, *PECL* presents damages as a remedy preferential to specific performance, given the limitations on specific performance of non-monetary obligations in Article 9:102 (2) and the regulation of damages in Article 9:103, both of the *PECL*.

### **I.5 SOME CONSEQUENCES OF CONTRACTUAL LITERALISM OR “*PACTA SUNT SERVANDA*”**

The modern, or Enlightenment, conception of *pacta sunt servanda*, typical of Continental Law, explains the penal clause as a way to ensure the promise made, by allowing the penalty to exceed the actual loss.<sup>36</sup> This thesis threatens the internal logic of Continental Law because according to it, damages cannot exceed the actual loss (*restitutio in integrum* principle).<sup>37</sup> And this contradiction is justified precisely by the importance of *pacta sunt servanda*. *In natura* performance is the object of the contract, and therefore the penalty clause can generate incentives for the debtor to comply, with the penalty clause being substantially more significant than the damages. Therefore, the view against the possibility of the penalty clause exceeding the damages is, in common law countries, consistent with the rejection of specific performance as the creditor's primary right.<sup>38</sup> This is because the penalty clause encourages contractual compliance, especially when the penalty exceeds the damages. Thus, the literalist or Enlightenment system, historically adopted by continental law countries, favors and encourages compliance to the pledged word, at the expense of the reparatory function of damages.

In Chile, the effects on third parties are exceptional in terms of ownership-transferring effects that *traditio* can have as a mode of acquiring property (to the extent that the seller delivers the thing to the buyer, who, in turn, fails to pay the

<sup>36</sup> PRADO PUGA (2019), pp. 57-64. See: SEVERIN FUSTER (2016), pp. 7-37.

<sup>37</sup> This principle currently needs to be reviewed, as it excludes an indispensable tool in civil liability, namely private penalties. Against: DOMÍNGUEZ HIDALGO (2009), pp. 671-685; DOMÍNGUEZ HIDALGO (2012), pp. 561-572; and RUZ LÁRTIGA (2009), pp. 661-677.

<sup>38</sup> ZIMMERMANN (2000), pp. 43-44.

price), and in relation to the impossibility of resorting to imprisonment for debt.<sup>39</sup> If the buyer alienates the thing to a third party, the creditor/seller may only reach the third party through an action to reverse the sale (*actio pauliana*), whereas contract termination due to non-payment affects third parties (at least with regard to immovable property as per article 1491 of the ChCC). The action to rescind better protects the creditor/seller because it involves an implicit guarantee over the immovable property transferred for which the buyer has not paid the price. In many cases, either termination or damages are the only course of action for the creditor in cases of impossibility to perform the obligation. Thus, the effect on third parties under Chilean law is different based on the remedy used. In the event of specific performance, once the debtor transferor disposes to a third party, only an action to reverse the sale (*actio pauliana*) can reach such third party (Art. 2468 ChCC). As for rescission, the creditor may use an action of revendication against third parties (Art. 1490 and 1491 ChCC). In a way, the action to reverse is more efficient than the enforcement action,<sup>40</sup> which leads us to conclude that there is a definitive denaturalization of the literalist theory of the contract. In short, specific performance has declined as an effect of the prohibition of imprisonment for debt. Currently, the preference for one remedy over another comes from the effectiveness of the action against the third party. However, the decline of contractual literalism is not only due to the decline of specific performance, but fundamentally because the law is now articulated through principles, and among them, the principle of good faith is the one most strongly affected.

For the reasons stated above, contractual literalism has been put aside by legal scholarship, which poses to us the challenge of construing the contract from a new perspective. This new perspective can be summed up by a shift away from the principle of free will or principle of private autonomy.

---

<sup>39</sup> It is not necessary to go into this problem in depth, given that the seller can opt for an efficient breach of contract by exploiting the application of Article 1819 of the ChCC, that is, the seller can make the rights of a second buyer prevail over the rights of a first buyer, but ultimately what will determine the efficient breach of contract will be the assessment of the compensatory “quantum” made by the courts. The preceding rule, Art. 1819, states that: When a thing belonging to another is sold and delivered to someone else, if the seller later acquires ownership of it, the buyer will be regarded as the true owner from the date of delivery. Therefore, if the seller sells it to another person after acquiring ownership, the ownership of it shall remain with the first buyer.

<sup>40</sup> It is possible to detect an obvious transaction cost in the Chilean legal system since in most legal systems ownership is transferred by the contract - at least for goods that are linked to registration systems - so that in practice the creditor will not face default concerning the transfer of ownership.

In this part we have explained some of the main problems faced by the principle of contractual literalism. But we have also exposed its main inconsistencies. These flaws of contractual literalism explain its displacement by the principle of good faith.

## II. A POSTMODERN VIEW OF THE CONTRACT: THE TENSION BETWEEN GOOD FAITH AND THE PRINCIPLE OF FREE WILL

Legal scholarship recognizes the tension between free will<sup>41</sup> and good faith.<sup>42</sup> The main aim of good faith is to model private autonomy,<sup>43</sup> acting as a guarantee for the business to adjust and be equitable for the parties.<sup>44</sup> In this regard, scholars have stated that contract supplementation does not happen because the parties leave loopholes or there is presumed consent, but because there are elements beyond their will, such as good faith.<sup>45</sup> Contract literalism does not support contract supplementation since the judge is concerned only with unravelling the will of the parties.

Modern views (Alpa and Ghestin, among others)<sup>46</sup> give more and more importance to good faith,<sup>47</sup> and not solely in order to fill gaps<sup>48</sup> and interpret the

---

<sup>41</sup> Case law has also referred to the interaction between Articles 1091 and 125 of the Spanish CC. Judgement by the Supreme Court on 20 September 1996. See: FERNÁNDIO XIOL RÍOS (2010), pp. 90-91.

<sup>42</sup> In this sense, Almagro Nosete points out that: “Good faith is a difficult concept to explain and yet easy to understand, perhaps because it must always be considered in relation to concrete behavior and with respect to specific cases”. ALMAGRO NOSETE (2000), p. 518.

<sup>43</sup> Regarding the importance of good faith in contractual matters, Betti expresses the following: “[Good faith is] an evaluation criterion which is not forged by law, but which the law assumes and receives from the social conscience [...]”. BETTI (1969), p. 70.

<sup>44</sup> Di Majo said: “*Ma è evidente che, così interpretato, il principio di buona fede è destinato a restare lettera morta. È invece da riconoscere, come del resto ha fatto la giurisprudenza successiva, che il principio di buona fede e correttezza è destinato ad esercitare una funzione integrativa (del contenuto) del contratto al di là di quanto le parti convenuto e/o anche come limite a comportamenti deginiti appunto «scorretti» o «inesigibili» [...]*”. DI MAJO (1997), p. 590.

<sup>45</sup> See DÍEZ-PICAZO Y PONCE DE LEÓN (1993), p. 437.

<sup>46</sup> Also older views, *v. gr.*, in Germany, ENNECCERUS (1954), pp. 18 ff.

<sup>47</sup> Almagro Nosete indicates that “Good faith must be required as a principle informing the whole system in relation to the conduct of the subjects, who are subject to it”. ALMAGRO NOSETE (2000), p. 518.

<sup>48</sup> Navarro Mendizábal indicates that “as can be seen, the rigorous orbit of what has been agreed is notably extended with the integration of the contract”. NAVARRO MENDIZÁBAL (2013), p. 374.

law,<sup>49</sup> but also to limit and moderate it<sup>50</sup> from the “excesses” caused by private autonomy.<sup>51</sup> As per said principle, the contract is not the mere attainment of economic objectives,<sup>52</sup> but is grounded on a series of values and aims,<sup>53</sup> that require better consistency in the contract.<sup>54</sup> Thus, freedom is at the service of values and aims,<sup>55</sup> such as natural equity, solidarity, fraternity, equality, etc.<sup>56</sup> According to legal doctrine, public order limits free will when contractual clauses go against the principle of good faith.<sup>57</sup> Under some legal systems, such as Spanish law, case law has suggested the need to act with caution on this topic. A judgement by the Supreme Court from December 3<sup>rd</sup>, 1991 states that: “[...] the possibility of extending or modifying, under its auspices, what was agreed, must be admitted with great caution and notorious justification [...]”.<sup>58</sup>

The importance of good faith,<sup>59</sup> particularly in contractual issues is evidenced in case law, v. gr., in the judgement by the Supreme Court from April 13<sup>th</sup>, 2004 which ruled that: “[...] good faith, as a general principle of law, must inform every contract and mandate objectively fair, legal, honest and logical human behaviour ...”.<sup>60</sup>

<sup>49</sup> See DE LOS MOZOS (2005), pp. 268 ff.

<sup>50</sup> In France, Van Ommeslaghe mentions: “*La bonne foi peut aussi avoir pour fonction d'imposer la modération dans l'exercice d'un droit. Tel est notamment le cas dans l'appréciation des sanctions à appliquer en cas d'inexécution d'une convention*”. VAN OMMESLAGHE (2010), p. 178.

<sup>51</sup> See BIANCA (2007), pp. 55-57.

<sup>52</sup> The Colegio de Registradores de la Propiedad y Mercantiles de España states that “In order to achieve this [European unification of private law], an open spirit is needed that does not focus solely on the logic of the market...”. DÍAZ FRAILE (1994), p. 189.

<sup>53</sup> See JIMÉNEZ GÓMEZ (s/f), pp. 194-195.

<sup>54</sup> See ORDOGUI CASTILLA (2011), pp. 57-58.

<sup>55</sup> Salvioli indicates that “This solidarity of interests develops a new moral conception within the community, and both have an impact on the law, which cannot remain within the narrow individualistic orbit, but must give more space to the interests of the community, or, better said, must reconcile individualism with the new demands of solidarity. SALVIOLI (1979), p. 136.

<sup>56</sup> See PEÑA & AUSÍN (2001), p. 8.

<sup>57</sup> See GALINDO GARFIAS (1981), p. 169.

<sup>58</sup> See MORENO GIL (2006), p. 1321.

<sup>59</sup> Albácar López indicates that “The regulations contained explicitly in Article 1.258 of the CC and generally in Article 7 of the substantive legal precepts, insofar as they recognise that rights must be exercised in accordance with demonstrable good faith ...”. ALBÁCAR LÓPEZ & SANTOS BRIZ (1991), p. 592.

<sup>60</sup> See FERNÁNDIO XIOL RÍOS (2010), p. 1312. See Supreme Court from November 12th, 2020; Supreme Court from July 2nd, 2019; Supreme Court from January 9th, 2019; Supreme Court from

Similarly, we could claim that some expressions of good will are the prohibition of the abuse of dominant position, the recognition of the principle “*venire contra factum proprium non valet*” and the protection of legitimate expectation.<sup>61</sup> Currently, trends favor free will and good faith, as argued by Ordoqui Castilla since the contract allegedly concluded under private autonomy follows good faith<sup>62</sup> and justice.<sup>63</sup> In Chile, the same is true regarding abusive clauses (referred to as “grey”), that is, those that violate article 16, paragraph g) of the Consumer Protection Act.<sup>64</sup>

The question that arises is: How does good faith limit the autonomy of the will? One might think that in order to overcome problems and defects in the contractual clauses, rather than resorting to the literal wording one might resort to the intrinsic content of the contract, under the principle of good faith, which is required by the law from each party. Good faith, then, is presented as a useful tool through which the judge reviews the legal transaction and corrects its content, following the principles of natural equity and solidarity.<sup>65</sup> Therefore, good faith becomes a principle that “moderates” and “models” private autonomy. In this context, the judge has to establish or re-establish the balance between the parties whose obligations might have been created in unequal scenarios.<sup>66</sup> Maybe one of the most important uses of the principle of good faith is the judicial revision of the contract using the *clausula rebus sic stantibus*.<sup>67</sup> It is precisely concerning the

---

November 7, 2017; Supreme Court from January 20, 2017; Supreme Court from January 18, 2017; Supreme Court from March 24th, 2015; Supreme Court from March 26th, 2014.

<sup>61</sup> See LARGO TABORDA (2012), p. 143.

<sup>62</sup> See ORDOQUI CASTILLA (2011), pp. 58-59, who adds that this trend materializes, *v. gr.*, in the enactment of the Brazilian 2002 Civil Code.

<sup>63</sup> Although some authors argue about natural equity as a source of Law, that is, justice applied to a specific case. See: BRANCA (1978), pp. 8-9. See: CANO MARTÍNEZ DE VELASCO (2009), pp. 63 ff.

<sup>64</sup> This rule establishes as grey unfair terms those which are contrary to the requirements of good faith, taking into account objective parameters, and which cause, to the detriment of the consumer, a significant imbalance in the rights and obligations of the parties arising from the contract. To this end, the purpose of the contract and the special or general provisions governing it will be considered. BARCIA LEHMANN (2017), pp. 103-120. Véase DE LA MAZA GAZMURI (2007), pp. 571-592; MOMBERG URIBE (2013), pp. 9-27.

<sup>65</sup> See O'CALLAGHAM MUÑOZ (2001), pp. 1237-1238.

<sup>66</sup> See SORO RUSELL (s/f), pp. 243-244. In Chile, this trend is supported by: LÓPEZ DÍAZ (2015), pp. 115-181.

<sup>67</sup> See MARTORELL ZULUETA (2011), p. 1451.

application of the *clausula rebus sic stantibus*<sup>68</sup> where the tension between good faith and free will arises.<sup>69</sup> In this regard, Spanish scholarship has stated that, first, the interpreter must carry out the hermeneutic work establishing the true or real will of the individuals (intention), and then supplement it with the provisions of art. 1258 of the Spanish Civil Code that is, good faith, customs and the law, “shaping” this intention, by natural equity. Therefore, natural justice “restates” the literal wording of the contracting parties.<sup>70</sup> In other words, there are two areas in which the principle of autonomy of will operates: a positive side, which means that the parties are bound by everything they have agreed, and a negative side, in which the will of the contracting parties is entirely irrelevant since the elements of art. 1258 of the Spanish Civil Code supplement the wording.<sup>71</sup> Naturally, the judicial revision of the contract comes from German law.<sup>72</sup> In Germany, Wieacker argues that one of the main functions of § 242 *BGB* is to serve as an “disruption of legal morality via statutory law”.<sup>73</sup> The principle of good faith in Germany would lead to the creation of the theory of judicial revision of the contract through case law. Such case law would establish the theory of the judicial revision of contracts in §§ 275 and 313 of the *BGB*.<sup>74</sup> Thus, Germany abandoned contractual literalism early in favor of the objective view of the contract.

In 2016, the Association of Professors of Civil Law in Spain proposed amending books five and six of the Civil Code to include the following remedies:<sup>75</sup>

---

<sup>68</sup> See Judgment of Supreme Court from June 11th, 1959, (RJ/1959/1649); RIVERA RESTREPO & BARCIA LEHMANN (2016), pp. 117-150; RIVERA RESTREPO (2015c), pp. 31-48.

<sup>69</sup> See VÁZQUEZ IRUZUBIETA (1989), pp. 2078-2079.

<sup>70</sup> See BERCOVITZ RODRÍGUEZ-CANO (2009), p. 1279.

<sup>71</sup> See CASTIÑEIRA JEREZ (2012), p. 73.

<sup>72</sup> Espinoza Espinoza indicates that “In the middle of the 1800s, especially in Germany, *fides* was understood by Danz, *Der sacrale Schutz im römische Rechtsverkehr*, Jena, 1857, as an entity that was born from a sworn promise, which acquired binding force and relevance in social life because it was the fruit of a combination of both sacred and legal components. Twenty years later, PERNICE, *Marcus Antistius Labeo*, I, Halle 1873; II, Halle 1878, presented the *fides* as an element of life in the broadest sense of the word, taken into consideration by the legal system in the field of substantive law, thus bringing the bona fides, understood as a dynamic aspect of the fides, into line with the procedural field”. ESPINOZA ESPINOZA (s/f), p. 2. See also: SOLARTE RODRÍGUEZ (s/f), p. 284.

<sup>73</sup> See WIEACKER (1982), p. 74. Also see for this concept: SCHERMAIER (2000), pp. 64-66.

<sup>74</sup> BARCIA LEHMANN & RIVERA RESTREPO (2018), pp. 361-403.

<sup>75</sup> See ASOCIACIÓN DE PROFESORES DE DERECHO CIVIL (2016), pp. 125 ff.

claim for performance (arts. 518-5 a 518-8); price reduction (arts. 518-9 a 518-11);<sup>76</sup> suspension (arts. 518-12);<sup>77</sup> termination for breach<sup>78</sup> and damages.<sup>79</sup> In general, it constitutes an excellent private effort, which includes extrajudicial or unilateral resolution as an innovation. Nonetheless, we propose reviewing the content of good faith as indicated above, since when reconceiving the balance within the contract what the judge must do is to reconstruct the optimal contract for the parties given the effect of the principle of good faith which must be applied in a restrictive manner.

In conclusion, although good faith has clearly displaced the principle of contractual literacy, it seems to us that an effort must be made in its delimitation.

### **III. SOME NOTES ON EAL AND GOOD FAITH AS PRINCIPLES THAT SUPPLEMENT AND CORRECT CONTRACTS**

#### **III.1 Legislative views as contract justification**

EAL has certainly not ignored the problems caused by private autonomy, nor does it reject the supplementary and even corrective role of good faith as a principle of law. However, it does not accept that this principle gives rise to notions of fundamental rights to positive acts based on social rights. The contract must be based on the logic of exchange inherent in the market. The supplementary function

---

<sup>76</sup> Art. 518-9 of the proposal of the Association of Civil Law Professors indicates that the party who receives a service that does not conform to the contract may accept it and reduce the price in proportion to the difference between the value the service has at the time it is provided and the value it would have had at that time if it had conformed to the contract. ASOCIACIÓN DE PROFESORES DE DERECHO CIVIL (2016), p. 126.

<sup>77</sup> Art. 518-12 of the proposal of the Association of Civil Law Professors indicates that in synallagmatic binding relationships, the party who is obliged to provide the service at the same time as, or after the other party, may suspend the provision of the service in whole or in part until the other party provides or agrees to provide the service. The exception to this is where the suspension is contrary to good faith, given the extent of the breach. ASOCIACIÓN DE PROFESORES DE DERECHO CIVIL (2016), p. 127.

<sup>78</sup> Art. 518-13 of the proposal of the Association of Civil Law Professors indicates that 1. Either party to a binding synallagmatic relationship may terminate it when the other party commits a breach which, in view of its purpose, is to be considered as essential. 2. The power of termination shall be exercised by notice to the other party. ASOCIACIÓN DE PROFESORES DE DERECHO CIVIL (2016), p. 127.

<sup>79</sup> Art. 518-20 of the de proposal of the Association of Civil Law Professors indicates that 1. The creditor has the right to be compensated for the damage caused by non-performance. 2. This right is compatible with the other remedies available to him by law in case of non-performance. ASOCIACIÓN DE PROFESORES DE DERECHO CIVIL (2016), p. 128.



is necessary, but it is not formulated on the basis of principles such as solidarity or sociability of the contract, or even equity, but rather is based on the principle of efficiency. The tendency to ground the contract on principles such as sociability or solidarity is not new; it began in the 1930s under a collectivist or interventionist vision of the State in society. Thus, the objective view of the contract not only sought to ensure that the private interest of the contract was not against the public interest, but also that it was disciplined in accordance with the public interest. Thus, according to these statutory theses, it would be pointed out that the spirit of the German people is superior in legal matters. What is new is that these theses are being reconfigured in Latin America, this time on the basis of fundamental rights.

Betti warns that the autonomy of the will, and therefore the individual, is not entirely free, as it has crucial limitations on its actions, which extend to contracts. In a sense, for Betti, the autonomy of the almighty will would be nothing more than a “mirage”. The contract does not depend on the individual, it is indeed the individual who gives rise to it, but once it is born it is disengaged from the parties to immerse itself in a “normative bundle”. So, the contract must separate from the will and the psyche of the parties that created it. For supporters of this theory, the contract is nothing more than a mirror of reality, and especially of economic phenomena. This theory seeks to explain the “segmentation of private law” and the birth of actual “parcels”, which would give rise to a series of autonomous regulations, such as general conditions or consumer rights. In this way, private law is limited to receiving in a somewhat automatic way the entities that come from economic and social reality. Betti's theory gives the State a vast regulatory domain since it ultimately requires that the private interest, for which the contract is entered into, coincides with the public interest; otherwise, the latter prevails. Nevertheless, this theory transforms all private law into public law, since there is only one step from there to saying that one can only act - through a contract - to the extent that there is a public interest that justifies it. Moreover, the notion that serves as the basis for this theory - which is “public interest”- is vague and ambiguous. This approach is evident in Betti's work, as can be seen in the following words: “[...] the cause of the legal transaction is, strictly speaking, the economic-social function that characterizes the type of transaction as an act of private autonomy (typical in this sense) and determines its minimum necessary content”.<sup>80</sup> Notwithstanding that, the objective theses of the legal transaction would be a narrower expression of this

---

<sup>80</sup> BETTI (2000), p. 163.

contract theory.<sup>81</sup> We believe that the current distributive or contractual balance is a consequence of these statutory theses.

This approach is certainly dangerous and can lead to a reversal of the contract as a means of exchange. That is why we believe it is necessary to articulate a notion of good faith that really allows an exchange that promotes beneficial agreements for the parties.

### III.2 Economic analysis to justify the contract through good faith

The principle of good faith, from the point of view of the EAL, is a statutory duty of loyalty and a guarantee and is justified in the contract as a reliable supplier. Thus, the rules on good faith understood in these terms, have an impact on the efficient behavior of the parties, which prevents *ex post* opportunistic behavior.<sup>82</sup> Thus, one party could impose very burdensome conditions on the other party which has incurred sunk costs that force it to accept a contract amendment. In this situation, good faith must take precedence over private autonomy. Thus, the judge should be able to alter the contract, using different devices of civil law. However, intervening the contract on the basis of good faith must be justified by a market failure. The justification of judicial intervention based merely on the interest of the parties seems dangerous.<sup>83</sup> In the case of opportunistic behavior by the opposing party –which imposes an alteration of contract- the mediate justification for the revision of the contract is the principle of good faith (contractual loyalty), but the immediate justification is malice. Therefore, a new contract in which one party takes advantage of the other party's sunk costs in order to renegotiate the contract would be void by vitiated consent. Good faith, understood in these terms, provides *ex ante* confidence to the parties in the performance of the contract that we could qualify as efficient. That is why the justification for the application of good faith, and its impact on the definition of malice, is precisely the market failure. The opposite would imply making one party bear significant transaction costs. Parties would have to adopt unnecessarily costly legal strategies to prevent this kind of opportunistic behavior. However, there is a second variant of good faith, which runs counter to

---

<sup>81</sup> See Zweigert and Kötz's (ZWEIGERT & KÖTZ (2001)) and Flume's (FLUME (1998)) works.

<sup>82</sup> MONROY CELY (2011), pp. 55-76.

<sup>83</sup> De la Maza points out that contracts are justified on grounds of commutative justice rather than distributive justice, and good faith is expressed concretely in contractual loyalty. For the author, it is essential that the judge, in accordance with the principle of good faith, weigh up the interests of the parties arising from the contract. DE LA MAZA GAZMURI (2014), pp. 204-206 and 213-225.

the EAL. This second strand applies this principle as a rule of fairness, whereby the judge can examine the fairness of the parties' performance and eventually protect the contracting party deemed weaker. This is an emerging trend concerning the possibility that, under the regulations of consumer law, the judge may declare one of the contract terms unfair if the elements of the essence of the contract are altered. It goes against the traditional view that the elements of the essence of the contract cannot be subject to a substantive control, as unfair terms, since this represents price control. The traditional view in consumer matters is that the specific elements of the essence of a contract, such as thing and price in the case of sale, are freely accepted by the consumer (but not the natural and accidental elements, which are added to standard-form contracts by means of a tangle of terms provided by the supplier). However, several abuses of the accidental elements - which affect the essential elements - have led to extending control over unfair terms, based on the principle of good faith, to these cases. These controls can be carried out formally in the terms set out, but require controlling the content, based on the proper functioning of the market. And the key concept for this is that of market failure. Thus, for example, it is not enough for the producer to impose an accidental stipulation, or to alter an element of the nature of the contract, and for this to cause an imbalance in the performance of the parties, but it must be justified by a correction of a market failure, for example, if exempting the producer from liability is not associated with an advantage for the consumer or a reduction in the price.

### CONCLUSIONS

This article analyzed the tension in the evolution of Contract Law in relation to what in Continental law is known as contractual literalism, which had been strongly criticized since the German Pandectists. This criticism, which did not wait for the enactment of the *Code* in 1804, led to instituting objective criteria that allowed judges to intervene in contracts using the classical structure of the juridical act. Naturally, the law has historically incorporated new concepts, such as judicial revision of contracts. This move toward objective criteria in the theory of contracts is the basis for the modern European law of remedies, and it has led to the most recent stage, which aims at getting the judge to apply equitable criteria to intervene the contract. The last trend is contrary to the Economic Analysis of Law which provides us with market tools to increase social welfare, and among one of them market failure is of the essence to apply the principle of good faith.

This paper also highlights the dangers posed by the principle of good faith

when applied according to public law criteria.

---

**BIBLIOGRAPHY CITED**

- ABELIUK MANASEVICH, R. (1983). *Las obligaciones [Obligations]*. Santiago de Chile: Ediar Editores Ltda.
- ALBÁCAR LÓPEZ, J. L. & SANTOS BRIZ, J. (1991). "Volume IV. Obligations. Sections I and II", in *Código civil. Doctrina y jurisprudencia*. IV. Albácar López, J. L. (Dir., coord., selection of case law, table of contents and bibliography). Madrid: Trivium, 3-843.
- ALBALADEJO, M. (1997). *Derecho Civil [Civil law]*. II. Barcelona: Bosch.
- ALESSANDRI R. & SOMARRIVA U. (1941). *Curso de Derecho Civil [A course on civil law]*. III. (Vodanovic H.: drafts and revises). Santiago de Chile: Editorial Nascimento.
- ASOCIACIÓN DE PROFESORES DE DERECHO CIVIL (2016). *Propuesta de Código Civil. Libros Quinto y Sexto [Civil code proposal. Volumes five and six]*. Valencia: Tirant lo Blanch.
- ATIYAH, P. S. (1986). *Essay on contract*. Oxford: Clarendon Paperbacks.
- BAHAMONDES OYARZÚN, C. & PIZARRO WILSON, C. (2018). "Fundamento, jerarquía y límites del cumplimiento específico. ¿Una tensión entre dos modelos?" [Basis, hierarchy and limits of specific performance], *Revista de Derecho: Universidad Austral de Chile*, 31(2), 29-51.
- BARCIA LEHMANN, R. (2017). "Análisis de la letra g) del artículo 16 de la Ley de Protección de los derechos de los consumidores a la luz de la jurisprudencia" [Analysis of letter g) of article 16 of the law on consumer right protection according to case law], in *Sentencias destacadas*. Santiago de Chile: Libertad y Desarrollo, 103-120.
- \_\_\_\_\_ (2008). *Lecciones de Derecho Civil Chileno. De la teoría de las Obligaciones III [Lessons in Chilean Civil Law. Theory of Obligations]*, Collection of manuals. 118. Santiago de Chile: Editorial Jurídica de Chile.
- BARCIA LEHMANN, R. & RIVERA RESTREPO, J. (2018). "Convergencias y divergencias del Derecho de incumplimiento del Código Civil alemán con los Principios de Derecho Europeo de los Contratos y otros textos internacionales" [Convergence and divergence of the law of non-compliance of the German Civil Code with the principles of European contract law and other

- international texts], in *Revista de Derecho de la Pontificia Universidad Católica del Perú*. 81, 361-403.
- BARROS BOURIE, E. (2007). “La diferencia entre «estar obligado» y «ser responsable» en el derecho de los contratos” [The difference between “being bound” and “being responsible” in contract law], Corral Talciani, H. and Rodríguez Pinto, M<sup>a</sup>. S. (Coord.), *Estudios de Derecho Civil II, Jornadas Nacionales de Derecho Civil*. Santiago de Chile: Editorial Lexis Nexis, 721-752.
- BERCOVITZ RODRÍGUEZ-CANO, R. (2009). *Comentarios al Código Civil [Comments on the civil code]*. Navarra: Aranzadi.
- BETTI, E. (2000). *Teoría general del negocio jurídico [General theory of the legal business]*. Granada, Editorial Comares S. L.
- BIANCA, C. M. (2007). *Derecho civil. 3. El contrato [Civil law 3. The contract]*. Bogotá: Universidad Externado de Colombia.
- BRANCA, G. (1978). *Instituciones de Derecho privado [Private law institutions]*. Macedo, P. (trad.). Mexico: Porrúa, 1978.
- CANO MARTÍNEZ DE VELASCO, J. I. (2009). *La equidad en el Derecho privado [Equity in private law]*. Barcelona: Bosch.
- CARDENAL FERNÁNDEZ, J. (1979). *El tiempo en el cumplimiento de las obligaciones [Time and obligations' performance]*, Prologue by Francisco de Asís Sancho Rebullida. Madrid: Editorial Montecorvo, S. A.
- CARMONA TINOCO, J. U. (1996). *La interpretación judicial constitucional [Constitutional judicial interpretation]*. Mexico: Universidad Nacional Autónoma of Mexico.
- CASTIÑEIRA JEREZ, J. (2012). “*Pacta sunt servanda*, imprevisión contractual y alteración sobrevenida de las circunstancias” [*Pacta sunt servanda*, contractual unforeseeability and sudden change in circumstances], in López y López, Á.; Vicent Chuliá, F.; Miquel González, J. M<sup>a</sup>. and Capilla Roncero, F. (dir.), *Revista Aranzadi de Derecho Patrimonial*. 29. Navarra: Aranzadi, 73.
- CLARO SOLAR, L. (1977). *Explicaciones de Derecho Civil Chileno y Comparado [Explanations on Chilean civil law and comparative law]*. VI(II). Santiago de Chile: Editorial Jurídica de Chile.

- 
- CLEMENTE MEORO, M. E. (2009). *La resolución de los contratos por incumplimiento: presupuestos, efectos y resarcimiento del daño [Contract termination due to breach; budgets, effects and damage compensation]*. Barcelona: Bosch.
- CONTARDO GONZÁLEZ, J. I. (2011). “Los criterios de interés contractual positivo y negativo en la indemnización de perjuicios derivada de resolución contractual” [The criteria of positive and negative contractual interest in compensation for damages resulting from contract termination], en *Revista de Derecho de la Universidad Católica del Norte*. 18 (1), 85-118.
- DE LA MAZA GAZMURI, Í. (2014). “La Buena fe como dispositivo de ponderación” [Good faith as a weighting element], *Estudios de Derecho de Contratos. Formación, cumplimiento e incumplimiento [Contract Law studies. Conclusion, compliance and non-compliance]*, De la Maza, Í., Morales, M. & Vidal, Á. Santiago de Chile: Legal Publishing, Thomson Reuters.
- \_\_\_\_\_ (2009). “A propósito del artículo 1861” [Regarding article 1861], *Estudios de Derecho Civil V. Jornadas Nacionales de Derecho Civil*. Concepción (Chile): Editorial Abeledo Perrot.
- \_\_\_\_\_ (2007). “Justicia contractual, contratos por adhesión electrónicos y buena fe” [Contractual justice, electronic adhesion contracts and good faith], *Estudios de Derecho Civil*, 571-592.
- DE LOS MOZOS, J. L. (2005). *Estudios sobre derecho de contratos, integración europea y codificación [Studies about contract law, European integration and coding]*. Madrid: Fundación Beneficentia et Peritia Iuris.
- DÍAZ FRAILE, J. M<sup>a</sup>. (Coord.). (1994). *Estudios de Derecho europeo privado [Studies of European private law]*. Madrid: Centro de Estudios Registrales.
- DOMÍNGUEZ HIDALGO, C. (2009). “El principio de reparación integral del daño y su contenido: Algunas consecuencias para el Derecho chileno” [The principle of full compensation for damage and its content: Some consequences for Chilean law], at Department of Private Law, Universidad de Concepción, (ed.). *Estudios de Derecho Civil*. V. Santiago de Chile: Abeledo Perrot.
- ENNECCERUS. L. (1954). *Derecho de obligaciones [Law of obligations]*, Undécima Revisión por Henrich Lehmann, Traducc. de la 35.<sup>a</sup> Edición alemana, Estudios de comparación y adaptación a la legislación y jurisprudencia españolas por Blas Pérez González y José Alguer, vol. Primero, Doctrina

- general, Segunda Edición al cuidado de José Puig Brutau. Barcelona: Bosch, Casa Ed.
- ESPINOZA ESPINOZA, J. (no date). “El principio de la buena fe” [The principle of good faith]. Online: <http://www.justiciayderecho.org/>.
- FERNÁNDEZ XIOL RÍOS, F. J. (dir.) (2010). *Civil Code*. Madrid: Grupo El Derecho y Quantor, S. L.
- FISCHER, J. M. (2006). *Understanding remedies*. San Francisco (USA): Lexis Nexis.
- FLUME, W. (1998). *El Negocio Jurídico [The legal business]*. Madrid: Fundación Cultural del Notariado.
- FUEYO LANERI, F. (1992). *Cumplimiento e Incumplimiento de las Obligaciones [compliance and breach of obligations]*. Santiago de Chile: Editorial Jurídica de Chile.
- GALINDO GARFIAS, I. (1981). *Estudios de Derecho civil [Studies on civil law], Estudios Doctrinales*. 51. México: Universidad Nacional Autónoma de México.
- GARCÍA CARACUEL, M. (2014). *La alteración sobrevenida de las circunstancias contractuales [The unexpected modification of contractual circumstances]*. Madrid: Dykinson.
- JOSSERAND, L. (2017). *Teoría general de las obligaciones [General theory of obligations]*. Santiago de Chile: Ediciones Jurídicas de Santiago.
- JIMÉNEZ GÓMEZ, J. R. (s/f). “El principio de la buena fe en la teoría general del contrato” [The principle of good faith in the general contract theory]. Online: <http://www.biblio.juridicas.unam.mx/>, 189-197.
- LARGO TABORDA, A. (2012). *Tensión entre autonomía y buena fe en la contratación privada contemporánea [Tension between autonomy and good faith in contemporary private contracts]*. Medellín: Universidad de Antioquia.
- LARRAÍN RÍOS, H. (1994). *Lecciones de Derecho Civil [Lessons of Civil law]*. Santiago de Chile: Editorial Jurídica de Chile.
- LARROUMET, Ch. (2004). “A Propósito de la Negación de la Responsabilidad Contractual en la Doctrina Francesa reciente” [Regarding the denial of contractual responsibility in recent French Doctrine], *Cuadernos de Análisis Jurídicos*. I. Santiago de Chile: Ediciones Universidad Diego Portales. 23, 17-32.



- 
- LÓPEZ DÍAZ, P. (2015). “El principio de equilibrio contractual en el Código Civil chileno y su particular importancia como fundamento de algunas instituciones del moderno Derecho de las obligaciones en la dogmática nacional” [The principle of contractual balance in the Chilean Civil Code and its particular importance as the foundation of some institutions of modern law of obligations in national dogma], in *Revista chilena de Derecho Privado*. 25, 115-181.
- \_\_\_\_\_ (2014). “La autonomía de la indemnización de daños en la jurisprudencia nacional reciente: ¿un cambio de paradigma? [The autonomy of damage compensation in recent national case law: a change of paradigm?], *Revista Chilena de Derecho Privado*. 23, 139-207.
- \_\_\_\_\_ (2010). “La indemnización compensatoria por incumplimiento de los contratos bilaterales como remedio autónomo en el Derecho Civil chileno” [Compensatory damages for breach of bilateral contracts as an autonomous remedy under Chilean civil law] *Revista Chilena de Derecho Privado*. 65-113.
- MARTÍNEZ MUÑOZ, J. A. (2005). *El conocimiento jurídico [Legal knowledge]*. Madrid: School of Law. Universidad Complutense in Madrid.
- MARTORELL ZULUETA, P. (2011). *Código Civil, Jurisprudencia sistematizada [Civil code: systematic case law]*. Valencia: Tirant lo Blanch.
- MEZA BARROS, R. (1990). *Manual de Derecho Civil. De las Obligaciones [Civil law manual. Obligations]*. Santiago de Chile: Editorial Jurídica de Chile.
- MOISSET DE ESPANÉS, L. (1992). “Reflexiones sobre la llamada escuela de la Exégesis” [Reflections on the exegesis school], *Revista del Centro de Investigaciones de Filosofía Jurídica y Filosofía Social*, 15, 78-85.
- MOMBERG URIBE, R. (2013). “El control de las cláusulas abusivas como instrumento de intervención judicial en el contrato” [The review of unfair terms as an instrument of judicial intervention in the contract], *Revista de Derecho*, 26(1), 9-27.
- MONROY CELY, D. (2011). “Análisis económico de la buena fe en el derecho de contratos” [Economic analysis of the good faith in contract law], *Revista Contexto. Revista de Derecho y Economía*. 33, 55-76.
- MORALES MORENO, A. (2014). “Claves de la modernización del Derecho de contratos” [Keys to modernising contract law], *Estudio de Derecho de contratos*. Santiago de Chile: Legal Publishing and Thomson Reuters, 97-106.

- 
- MORENO GIL, Ó. (2006). *Código civil y jurisprudencia concordada [Civil code and concurred case law]*. Madrid: Imprenta Nacional del Boletín Oficial del Estado.
- NAVARRO MENDIZÁBAL, Í. A. (2013). *Derecho de obligaciones y contratos [Obligations and contract law]*. Navarra: Aranzadi.
- O'CALLAGHAM MUÑOZ, X. (2001). *Código civil. Comentado y con jurisprudencia [Civil code: comments and case law]*. Madrid: La Ley-Actualidad.
- ORDOGUI CASTILLA, G. (2011). *Buena fe en los contratos [The Good faith in contracts]*. Madrid: Reus.
- OVIDEO-ALBÁN, J. (2014). “Indemnización de perjuicios por vicios redhibitorios en el Código Civil chileno-colombiano” [Damage compensation due to hidden defects in the Chilean-Colombian Civil Code], *Vniversitas*. 129, 239-276.
- PEÑA, L. & AUSÍN, T. (2001). “El principio de autonomía y los límites del consentimiento” [The principle of autonomy and the limits of consent], in Minutes of the III Congress of the Spanish Society of Analytic Philosophy. Granada: Editorial by J. J. Acero *et alii*, 1-12.
- PEÑAILILLO ARÉVALO, D. (2003). *Obligaciones. Teoría general y clasificaciones. La resolución por incumplimiento [Obligations. General theory and classifications. Termination for breach]*. Santiago de Chile: Editorial Jurídica de Chile.
- PERELMAN, Ch. (1988). *La lógica jurídica y la nueva retórica [Judicial logic and new rhetoric]*. Madrid: Civitas.
- PIZARRO WILSON, C. & AGUAD DEIK, A. (2009). “Comentario de jurisprudencia de Obligaciones y Responsabilidad civil” [Commentary on the case law of obligations and civil liability], *Revista Chilena de Derecho Privado*. 3, 239-245.
- PRADO PUGA, A. (2019). “Algunos aspectos de la cláusula penal en el derecho chileno” [Some aspects of the criminal clause in Chilean law], *Revista de Derecho*. 26, 57-64.
- RAMOS PAZOS, R. (2004). *De las Obligaciones*. Santiago de Chile: Lexis Nexis.
- RIVERA RESTREPO, J. M. (2017a). “El derecho de opción del acreedor ante el Derecho alemán de las obligaciones” [The creditor’s right of option under German Law of obligations], *Revista Jurídicas*. 14(1), 40-53.
- \_\_\_\_\_ (2017b). “[The creditor’s right of option in Italy](#)“, *Revista Direito GV*. 13(1), 303-333.

- 
- \_\_\_\_\_ (2017c). “[La Propuesta de Modernización del Código Civil Español en materia de Obligaciones y Contratos de la Comisión General de Codificación, Sección Civil, en lo que se refiere al derecho de opción del acreedor por incumplimiento contractual](#)” [Proposal of modernize the Spanish civil code regarding obligations and contracts of the general commission of coding, civil section regarding the creditor’s right of option for breach], *Revista de la Facultad de Derecho de la Universidad de la República de Uruguay (2º epoch)*. 42, 188-217.
- \_\_\_\_\_ (2017d). “Es necesaria la imputabilidad para que opere el derecho de opción del acreedor” [Is a culpable mental state necessary for the creditor’s right of option to operate], *Revista Boliviana de Derecho y Actualidad Jurídica Iberoamericana*. 34, 120-139.
- \_\_\_\_\_ (2017e). “En torno al efecto retroactivo del derecho de opción del acreedor, en el Sistema jurídico español” [Aspects of the retroactive effect of the creditor’s right of option in the Spanish legal system], *Revista de Derecho de la Universidad de Concepción*. 241(LXXXV), 83-98.
- \_\_\_\_\_ (2016a). “Tres cuestiones en torno al derecho de opción del acreedor en España” [Three issues related to the creditor’s right of option in Spain], *Revista Prudentia Iuris*. 82, Buenos Aires: Universidad Católica Argentina, 82, 187-203.
- \_\_\_\_\_ (2016b). “Del fundamento del derecho de opción del acreedor ante el incumplimiento contractual (condición resolutoria tácita)” [Aspects of creditor’s right of option in the event of contract breach (implicit condition subsequent)], *Foro. Revista de Ciencias Jurídicas y Sociales. Nueva Época. Universidad Complutense de Madrid*. 19(1), 203-244.
- \_\_\_\_\_ (2016c). “[A common frame of reference and the creditor's option in breach of contract](#)”, *Revista Dikaion*. 25(2), 266-288.
- \_\_\_\_\_ (2016d). “Algunas observaciones acerca del derecho de opción del acreedor ante el incumplimiento contractual, en el *common law*” [Some comments about the creditor’s right of option in the event of contract breach under the common law], *Revista de Derecho Transnacional*. 8(1), 223-233.
- \_\_\_\_\_ (2016e). “La diligencia como elemento del derecho de opción del acreedor”, en *Revista de Derecho de la Universidad Centroamericana de Nicaragua*. 20, 3-10.

- 
- \_\_\_\_\_ (2016f). “¿Es necesaria la mora del deudor para que opere el derecho de opción del acreedor?” [Is the debtor’s default necessary for the creditor’s right of option to operate], *Revista Jurídica Cajamarca. Derecho y cambio social*. 45(XIII), 1-15.
- \_\_\_\_\_ (2016g). “[La gravedad del incumplimiento como requisito del derecho de opción del acreedor. Tendencias modernas](#)” [Severity of breach as requisite of the creditor’s right of option Modern trends], *Revista Jurídica Universidad Autónoma de Madrid*. 34, 267-291.
- \_\_\_\_\_ (2015a). “[Del concepto y de la naturaleza jurídica del derecho de opción del acreedor \(la mal llamada condición resolutoria tácita\), en el Derecho civil español](#)” [Concept and legal nature of the creditor’s right of option (or wrongly called implicit condition subsequent) under the Spanish civil law], *Revista del Consejo de Defensa del Estado*. Santiago de Chile: Public Entities Defender Office 69-104.
- \_\_\_\_\_ (2015b). “Notas marginales sobre la culpa contractual, como elemento del derecho de opción del acreedor” [Observations about contract guilt as an element of the creditor’s right of option], *Revista Vis Iuris*. 2(3), 9-17.
- \_\_\_\_\_ (2015c). “Historia y fundamentos de la cláusula *rebus sic stantibus* (teoría de la imprevisión). Una mirada a la doctrina española” [History and basis for the *rebus sic stantibus* clause. An approach to Spanish doctrine], in *Revista Ars Boni et Aequi*. 11(1), 31-48.
- RIVERA RESTREPO, J. M. & BARCIA LEHMMAN, R. (2019a). “El derecho de opción del acreedor ante el incumplimiento contractual en el Derecho de remedios europeo” [The creditor’s right of option in contract breach under the European remedy law], *Ius et Praxis: Universidad de Talca*, 25(3), 19-68.
- \_\_\_\_\_ (2019b). “¿En qué sentido es objetiva la noción de incumplimiento en el «soft law»?” [How objective is the notion o breach under eth soft law], *Opinión Jurídica*. 18(36), 165-181.
- \_\_\_\_\_ (2016). “Aspectos generales en torno a la cláusula *rebus sic stantibus* (teoría de la imprevisión) en España” [General aspects about the clause *rebus sic stantibus* in Spain], in *Revista de Derecho*. 47(2), 117-150.

- 
- RUZ LÁRTIGA, G. (2011). *Explicaciones de Derecho Civil. Parte general y acto jurídico* [Explanations of civil law. General part and legal act] I. Santiago de Chile: AbeledoPerrot.
- \_\_\_\_\_ (2009). “La reparación integral del daño: ¿Mito o realidad?” [Integral Reparation of Damage: Myth or Reality?], in Pizarro Wilson, C. (coord.), *Estudios de Derecho Civil* [Studies of civil law] IV. Olmué (Chile): Editorial Legal Publishing, 661-677.
- SALVIOLI, G. (1979). *El Derecho civil y el proletariado* [Civil law and the proletariat]. Sevilla: Publications from Universidad de Sevilla, 136.
- SÁNCHEZ LORENZO, S. A. (2011). “Chapter III: La europeización de las reglas de interpretación de los contratos en la Propuesta de Modernización del Código Civil español en materia de Obligaciones y Contratos” [Europeanisation of contract interpretation rules in the proposal to modernize the Spanish civil code regarding obligations and contracts], Albiez Dohrmann, K. J. (dir.), *Derecho privado europeo y modernización del Derecho contractual en España*. Barcelona: Atelier, 152.
- SEVERIN FUSTER, G. (2016). “Sobre el carácter secundario y discrecional del remedio del cumplimiento específico en el *common law*. perspectiva histórica y aproximación actual” [Specific performance in common law: An equitable and secondary remedy. Historical and current perspectives], *Revista Chilena de Derecho*. 43(1), 7-37.
- SHAVELL, S. (2006). “Specific Performance versus Damages for Breach of Contract: An Economic Analysis”, *Texas Law Review*. 84 (4) 831.
- SOLARTE RODRÍGUEZ, A. (s/f). “La buena fe contractual y los deberes secundarios de conducta” [Contractual Good faith and secondary behavioural duties]. Online: <http://www.javierina.edu.co/>, 284.
- SORO RUSELL, O. (s/f). “El principio de autonomía de la voluntad privada en la contratación: génesis y contenido actual” [The principle of private autonomy: origin and current content]. Universidad Complutense de Madrid. Online: <http://eprints.ucm.es/>, 243-244.
- VAN OMMESLAGHE, P. (2010). *Droit des obligations*. I. Bruxelles: Bruylant.

- VÁZQUEZ IRUZUBIETA, C. (1989). *Doctrina y jurisprudencia del Código civil [Doctrine and case law of the civil code]*. Madrid: Editorial Revista de Derecho Privado, 2078-2079.
- VIAL DEL RÍO, V. (2015). “Algunas reflexiones en torno a la excepción de contrato no cumplido” [Some thoughts about the exceptio non adimpleti contractus], en *Actualidad Jurídica*. 32, 57-64.
- WIEACKER, F. (1982). *El principio general de la buena fe* [The general good faith principle]. Madrid: Civitas, 74. Also see for this concept: Schermaier, M. J. (2000): “Bona fides in Roman contract law”, in Zimmermann, R. and Whittaker, S. (eds.), *Good faith in European Contract Law*. Cambridge: Cambridge Press, 64-66.
- ZWEIGERT, K. & KÖTZ, H. (2001). *An Introduction to Comparative Law*. Oxford University Press.
- ZIMMERMANN, R. (2000). *Estudios de Derecho Privado Europeo [Studies on European private law]*. Madrid: Civitas Ediciones.