Essays

Corrective Justice in Contract Law: A Comparative Law Analysis

Larry A. DiMatteo* and Jan Halberda**

Abstract

An overlooked element of contract law is the importance of corrective justice principles in maintaining its credibility. The civil and common laws possess flexible principles under the guise of numerous names such as abuse of right in civil law and estoppel in common law, as well as the duty of good faith in various degrees in both legal traditions. Despite semantic differences, as well as degrees of application, these contract law systems use such principles to provide courts with discretion to prevent injustice when contract law rules are strictly applied. The article concludes that principles of contract wedded to notions of corrective justice will continue to be needed in order to maintain the relevancy of contract law in the era of complex contracts, long-term relational contracts, and due to the acceleration of technology. Contractual justice or fairness will remain, often covertly, a core ingredient of contract law. This article shows the workings of this part of contract law, whether in common or civil law. It brings the use of general justice-based principles out into the open to show that contract law not only provides the tools that facilitate the formation of contracts (freedom) but also has something to say about the content of contracts through the exercise of contractual rights in a just or fair way.

I. Introduction

An overlooked element of contract law is the importance of corrective justice[1] principles in maintaining its credibility. The civil and common laws possess flexible principles under the guise of numerous names such as abuse of right[2] in the civil

* Larry A. DiMatteo, Huber Hurst Professor of Contract Law, Warrington College of Business and Levin College of Law, University of Florida, J.D. Cornell University, LL.M. Harvard University, Ph.D. Monash University.

** Jan Halberda, PhD, Associate Professor of General History of State and Law, Faculty of Law and Administration, Jagiellonian University in Cracow, Poland, Attorney-at-Law and Expert Witness (common law).

[1] Corrective or commutative justice focuses on 'whether one party has committed and the other has suffered a transactional injustice.' E. Weinrib, 'Corrective Justice in a Nutshell' 52 *University of Toronto Law Journal*, 349 (2002). The idea of corrective justice is traced to Aristotle, *Nicomachean Ethics* (Cambridge, Massachusetts: W. Heinemann, 1934, transl. by H. Rackham), 2-5.

[2] This article uses the term 'abuse of right' in the singular instead of the plural. This is because, in the context of an abuse of right, it is a question of whether there is an abuse of that particular right in a given context. On top of that, 'abuse of right' is indeed a shorthand for 'prohibition against abuse of right'.

law and estoppel in the common law, as well as the duty of good faith[3] in various degrees in both legal traditions. Despite semantic differences, as well as degrees of application, these contract law systems use such principles to provide courts with discretion to prevent injustice when contract law rules are strictly applied.

A major difference between the common and civil laws was how equitable principles developed. The common law evolved out of parallel courts systems – the law courts and the courts of equity.[4] Because of this, the equity courts were able to establish a holistic body of justice-focused principles before their transfer into the main body of contract when the equity courts where merged into the law courts in the later 19th century.[5] The civil law 'equity' was developed with the body of contract law from the beginning. The importance of this is that the role justice or fairness play in contract law has a much longer lineage in the civil than the common law. It is important to note that the merger of equity law into the common law of contracts continues to cause much confusion as to what principles of equity actually survived the merger and the role they should play in a contract law wedded to the principle of freedom of contract.

The importance of the current analysis is to untangle the differences and assess the degree of difference between the two legal traditions. First, if we unpack semantical differences do we find that the principles of corrective justice are more firmly implanted in the civil law versus the common law? Second, can civil law principles, such as the abuse of right doctrine, be used to clarify the vagaries introduced into the common law of contract due to the merger of the two court systems and their competing focuses – one on corrective justice and the other in promoting freedom of contract? Third, does this comparative analysis provide any normative insights on how to align the two systems best or how principles taken from the more organized body of corrective justice principles found in the civil law can be transplanted into the common law?

This article will compare Anglo-American law to Polish law. Polish law was chosen since it draws from the two major civil law traditions – French and German. American law refers to the laws applicable in various US jurisdiction, as revealed by the law of sales enunciated in the Art 2 of Uniform Commercial Code (UCC), and as stated in the case law's reference of the Restatement (Second) of Contracts

[3] Specifically, good faith in the objective meaning; as to the objective and subjective meanings of good faith see Section III.3.a) below.

[4] The origins of equity traces back to the Court of Chancery in the early 14th century. See J. Baker, *An Introduction to English Legal History* (Oxford: Oxford University Press, 5th ed, 2019), 105-125 (brief review of development of equity).

[5] The fusion of law and equity began in New York with the enactment of the Field Code of Civil Procedure in mid-19th century, followed by a merger in England in the 1870s (The Supreme Court of Judicature Act 1873, chapter 66, The Supreme Court of Judicature (1873) Amendment Act 1875, chapter 77). Thus, the equitable principles of fairness and justice were incorporated into a common law of contract. See K. Funk, 'The Union of Law and Equity. The United States, 1800-1938', in J. Goldberg et al, *Equity and Law: Fusion and Fission* (Cambridge; New York: Cambridge University Press, 2019), 46-69; J. Gordley, 'Equality in Exchange' 54 *California Law Review*, 1587 (1981).

(*Restatement Second*). Despite the differences in terminology, American law mimics English law in allowing the affected party to protest inconsistent or opportunistic conduct through the use of a variety of estoppels. Except for some case law in the state of Louisiana (a mixed jurisdiction), Anglo-American law does not recognize the doctrine of abuse of right.[6] However, cases decided under the abuse of right doctrine in the civil law may have similar outcomes through the use of various principles of Anglo-American substantive law. This is especially true in the United States through its adoption of the principle of good faith,[7] which continues to be rejected in English law.[8]

The article seeks to unveil functional equivalents of abuse of right in common law and in civil law, and then, by explaining the meaning of abuse of right, to find whether this doctrine should be recognized in Anglo-American law. This work focuses on the way in which three legal systems belonging to the common and civil law traditions prevent abuse of right in cases where formality conflicts with precepts of fairness. The cases considered in this article include mainly those dealing with the inconsistent conduct of a party who first asserts an intention to refrain from exercising its right, and then opportunistically changes its mind and attempts to exercise that right: for example, one promises not to plea statute of frauds, but later raises such defense. The question follows, whether the other party might defend against the exercise of the right if considered to be unfair or unconscionable for the promisor to not honor its promise, especially where the promisee relied on that promise to its detriment. Finally, the analysis centers on the abuse of right in the context of contract law. It asks under what scenarios is the exercise of a contractual right to be deemed abusive?

Under Polish civil law, courts may use the doctrine of abuse of right to the promisor in the above hypothetical from exercising the defenses related to statute of frauds. The use of abuse of right would be dependent on the court determining that such exercise would lead to an unfair or unconscionable outcome. Abuse of right and the common law's estoppel doctrine are used to protect private interests but also serve to protect the integrity of the court system. In Poland, the doctrine of abuse of right rationales include the notion of socio-economic purpose of a given right and the principles of community life. Principles of community life are a functional counterpart to the principle of good faith in the objective meaning.

The perspective of the article is to analyze the divergence between the civil

[6] Although some common law scholars have argued for its adoption. See H. Gutteridge, 'Abuse of Rights' 5 *Cambridge Law Journal*, 35 (1933); J. Perillo, 'Abuse of Rights. A Pervasive Legal Concept' 27 *Pacific Law Journal*, 37 (1995); S. Rowan, 'Abuse of Rights in English Contract Law: Hidden in Plain Sight?' 84 *Modern Law Review*, 1066 (2021).

[7] See Uniform Commercial Code (UCC) §§ 1-201 (20) and 1-304; American Law Institute, Restatement (Second) of Contracts (hereinafter Restatement Second) § 205 (1981) ('Duty of Good Faith and Fair Dealing').

[8] Cf J. Steyn, 'Contract Law: Fulfilling the Reasonable Expectations of Honest Men' 113 *Law Quarterly Review*, 438 (1997): 'English lawyers remain resolutely hostile to any incorporation of good faith principles into English law.'

and common laws on the abuse of right doctrine. Again, on the surface, the abuse of right doctrine is associated with the civil law and rejected by the common law. This generalization serves as an illustration of the divergence between the civil and common laws. But the reality is much more nuanced. As is the case in some comparative law analysis, divergences are often associated with the differences in terminology, and more broadly, in the structure of legal concepts between different legal systems. The purpose of this article is to show whether the lack of an abuse of right doctrine in the common law is true. The answer is the infrequent use of the phrase in the common law does not mean the abuse of right is not a rationale used in common law decisions and doctrines. The goal of this article is to see if abuse of right is a covert element of the common law and to see what recognized doctrines often serve as functional equivalents that are used to reach the same outcomes as those achieved in the civil law's application of the doctrine of abuse of right.

It then moves to determine if the differences are a matter of kind or degree. In the former case, the divergence would be of a substantive matter resulting in similar cases having different outcomes in different legal traditions. In the latter case, the divergence would be a superficial one in which the systems generally decide common fact patterns in the same way. In sum, different doctrines and terminology disguise functional equivalency; that is these doctrines produce similar case outcomes. In the end, the article poses the question of whether the common law should recognize the doctrine of abuse of right.

Functional equivalency does not mean that the various principles and doctrines are the same, but that in similar cases, the different laws reach the same conclusion. In Polish law, the doctrine of abuse of right is aligned with the principles of community life. In the common law, abuse of right scenarios are dealt with by a variety of doctrines such as, promissory estoppel, proprietary estoppel, estoppel by convention, and equitable estoppel,[9] along with the general duty of good faith and the principle of unconscionability found in American law.

Section II discusses the commonality in contract law across the civil and common laws in the necessity of balancing freedom of contract and justice or fairness concerns. This section provides the background to study the civil law concept of abuse of right against mechanisms in common law that serve the same purposes. Sections III and IV offer a comparative analysis of the civil and common laws regarding the place of corrective justice in contract law. Section V extends the analysis of the place of corrective justice to the role of formality in contract law and how the law attempts to mollify injustices caused by the applications of formalities to supplant substantive contract law.

[9] American equitable estoppel is the equivalent of English estoppel by representation. See L. Cox, *Equity: Principles and Procedures in Virginia and West Virginia* (Richmond: Richmond Press, Inc, 1951), § 288; equitable estoppel or estoppel in pais is a broad term that gives courts discretion to intervene when a 'party claiming the right knowingly misled the other party, the other party relied on that conduct, and the other party suffered some harm.' Cornell, Legal Information Institute, available at https://tinyurl.com/47x4pr5w (last visited 31 January 2026). See n 206 below.

II. A General Theory of Contract: Commonality Across Legal Systems

This section sketches out the tensions inherent in contract law, whether civil or common, between the freedom of contract rationale and its counterpoise, the importance of ensuring a degree of contractual fairness or justice in the exercise of that freedom. Despite its ancient origins, a form of Aristotelian corrective or commutative justice is embedded in all national contract laws. However, the degree and the expression of this dimension of contract law varies. This article focuses on the expression of this ethical principle in Anglo-American contract and the civil law as represented in Polish law. Polish law was chosen because, as shown below, it was influenced by the two foundational civil law systems, German and French.[10]

A comparative analysis will bring forth the arguments for and against the recognition of abuse of right in the common law. The analysis of the doctrine in Polish law provides a foundation for ferreting out its benefits. A more focused analysis distinguishes American and English law on the subject. As noted above, American law has not been averse to a concept of good faith, while English law has rejected it. Despite this divergence in Anglo-American law, abuse of right remains underdeveloped and under-theorized in the common law jurisprudence.

Comparative law generally focuses on the differences between the civil and common laws, but it is important to note the differences across civil and common law countries. The general consensus is that there has been a convergence between the civil and common laws. In contracts, for example, the American recognition of a general duty of good faith and the principle of unconscionability[11] aligns with the civil law and against English common law. The Supreme Court of the United Kingdom's recognition of the enforceability of penalty clauses[12] has brought it closer to the civil law, but its persistent rejection of the duty of good faith remains a major difference. The important development in civil law has been the 2016 reform of the French Civil Code, which has brought it closer to German versions of civil law.[13]

1. Tensions in Contract Law

The preeminent paradigm of all contract laws is that contracts are essentially private law made by the parties. This rationale undergirds the principle of freedom of contract in which the courts play a limited role with their primary duty to enforce the parties' agreement. Freedom of contract includes positive freedom to agree to

[10] See Section III.1 and 2 below.

[11] See UCC §§ 1-201 (20); 1-304 (good faith) and 2-302 (unconscionability).

[12] See *Cavendish Square Holding BV* v *El Makdessi* and *ParkingEye Limited* v *Beavis* [2015] UKSC 67 (penalties are enforceable if it has a commercial justification). See L. DiMatteo, 'When Penalties are not Penalties? - A Study of Judicial Reasoning' 88 *George Washington University Law Review*, 1846 (2017) (argues that Cavendish justifies the complete elimination of the common law's penalty rule).

[13] B. Häcker, 'German Lawyer Looks at the Reform of French Contract Law', in J. Cartwright and S. Whittaker eds, *The Code Napoléon Rewritten: French Contract Law After the 2016 Reforms* (Oxford, Portland, Oregon: Hart Publishing, 2017), 390-405.

any terms with the expectation of enforceability and negative freedom that suggests that the private agreement should be enforced with a minimum intervention (mandatory rules or implied terms) from the government or courts. This paradigm is overstated since freedom of contract has operated in various degrees and contract law has always been restrained by notions of fairness or justice. Thus, contract law's evolution has been a product of the tension between freedom and justice:

> 'In formulating principles of law, both of law and equity, judges not only have regard to the ever-present tension between the desirability of generating just outcomes and the demand that law be certain, consistent and predictable.'[14]

The pervasiveness of equity is found across legal systems. Henry Smith states that

> 'equity [is] a function that every legal system serves in some way, it sheds unique light on our system; equity as meta-law pervades the interstices between property and contract.'[15]

So, despite contract law's fixation on the freedom of contract principle, it is important to stress that contract law serves two functions – a facilitative one to provide a pathway to allow private parties to form binding agreements (freedom of contract) and a regulatory function to prevent the abuse of freedom or the taking advantage of weaker parties by stronger ones (fairness or justice). Although the second function is second in importance to the first, it is a vital part of contract law. The facilitative function takes an *ex-ante* perspective to promote free contracting, while the regulatory function is a *post hoc* examination of the outcome of supposedly free contracting. Freedom of contract focuses on enforcing contracts that are a product of private autonomy or the giving of consent, while contract law's regulatory principles (abuse of right, unconscionability, good faith) allow courts to question the genuineness of that consent and to rectify unexpected injustices stemming from the *ex-ante* agreement.

a) Corrective Justice and Contract law

Corrective justice as applied to contract law is directed at correcting unjust outcomes caused by the strict application of rules. Contract rules, like much of law, are rationalized as a form of rule utilitarianism where in the great number of cases, the rule provides an efficient and just outcome, however, in a few cases their application results in an unjust outcome. In the common law of contracts, the rules provide certainty and predictability at the cost of injustice in a few cases. Equitable principles focus on those particular cases and attempt to rectify the unjust outcomes. No system of rules is comprehensive. Equitable principles are

[14] A. Mason, 'Equity's Role in the Twentieth Century' 8 *King's College Law Journal*, 1, 3 (1998).
[15] H. Smith, 'Equity as Meta-Law' 130 *Yale Law Journal*, 1050, 1058 (2021).

the glue that holds the system together. D.P. Waddilove described equity as a

> 'second order system intended to correct the abuse of primary legal rights. It focuses especially on 'opportunism,' insistence upon technical right in unjustified circumstances… Opportunities for *abuse of legal right* arise out of problems of 'high complexity and uncertainty, which lack foreseeability' with which the law cannot cope.'[16]

Hessel Yntema correctly states that equity serves as 'a bridge between the law that is and the law that is to be.'[17] Anthony Mason sees the motivation for the creation of equitable principles in inhibiting unconscientious conduct and providing for relief against it.[18]

Alexander Pekelis in the middle of the 20th century observed that:

> 'If someone were compelled to explain the essence of the civil law to a common lawyer in one sentence, he could perhaps say that the civil law is what the common law would have been if it had never known a court of chancery (equity).'[19]

This is one way of saying that while equitable principles were developed in a separate court system (one in law and one in equity),[20] such principles were developed in the substantive body of contract law in the civil law system. It is understandable that the two systems would create dissimilar justice-based doctrines to prevent injustice in a particular case by the formal application of contract rules. This article will show that these differences have one thing in common in that they seek corrective justice in the face of an abuse of freedom of contract. Finally, some of the differences in civil and common law doctrines are substantive, while others are merely semantic.

Two of these corrective justice doctrines of good faith and abuse of right will be the focus of this article. The principle of good faith is akin to the abuse of right in that they recognize that with the right to performance comes an obligation to cooperate and adjust demands and to do otherwise is an act of bad faith or an abuse of right. The increased complexity of modern transactions with a shift to service and technology-centered contracting, the increased importance of long-term relational contracts and the acceleration of technology will continue to pressure courts and rule-making bodies to intervene to ensure fairness. Anglo-American law beginning in the 20th century has witnessed numerous judicial and legislative

[16] D. Waddilove, 'Anticontract' 61 *American Business Law Journal*, 135, 159 (2024) (emphasis added).

[17] H. Yntema, 'Equity in Civil Law and in the Common Law' 15 *American Journal of Comparative Law*, 60, 66 (1967).

[18] A. Mason, n 14 above.

[19] A. Pekelis, 'Legal Techniques and Ideologies' 41 *Michigan Law Review*, 665, 690 (1943).

[20] L. DiMatteo, *Principles of Contract Law and Theory* (Northampton: Edward Elgar Publishing, 2023), 5-6.

interventions into contract law and a shift away from the idea of an absolute freedom of contract.[21] The role of equity, described as fairness or justice in contract, has been a part of the civil and common laws from their beginnings. In the end, the regulatory function of contract law's task is to differentiate between permissible and impermissible types of advantage-taking.[22] Equitable principles also provide the flexibility to fill the void of legal obsolescence as law continuously lags following developments in society. This has never been truer than in the present with the acceleration of technology.

Corrective justice aims at correcting an injustice or harm inflicted on a party. It is the type of justice most closely aligned with contract law. Unlike the notion of distributive justice that looks to fairly distribute the wealth of society, corrective justice in a contract situation sees the formation of a contract as setting the base line of equality. If the contract was freely entered, the parties' valuation of the things exchanged should be recognized as the contractual equilibrium.[23] Subsequent to the formation, a party's behavior may cause an unexpected harm to the other party. This harm is sometimes caused by a party exercising a right created under the contract that causes unnecessary harm to the other party. Again, corrective justice focuses on transactions between individuals that are voluntary and in which the focus is on the reasonable expectations of both parties.

b) Formalism and Contextualism

The friction between freedom or private autonomy and abuse of freedom or unfairness-injustice pervades all of contract law, whether common or civil. For example, in the area of contract interpretation, it is seen in the two approaches to interpretation, formalism, and contextualism. Freedom of contract is supported by a formulaic application of fixed rules. Justice or fairness is represented by general principles that allow courts some degree of discretion when the formal application of rules results in an unjust outcome. In the area of contract interpretation, formalism is associated with the literal interpretation of contracts, their strict enforcement, and the strict application of contract rules despite the inequities caused by such an application. The application of general principles requires a contextual interpretation of contracts. The literal interpretation of contracts may hide the real intent and reasonable expectations of the contracting parties. This approach uses the perspectives of the promisor and the promisee. What was the intent of the promisor in entering the contract? What were the reasonable expectations of the promisee given the context of the promise? Contract law primarily focuses on the intent of the

[21] P. Atiyah, 'Contract and Fair Exchange' 35 *University of Toronto Law Journal*, 1, 3 (1985) ('huge growth of statutory interventions in contract law designed to ensure substantive fairness in the exchange').

[22] L. DiMatteo, *Equitable Law of Contracts: Principles and Standards* (Ardsley, New York: Transnational Publishers, 2001), 263.

[23] E. Weinrib, n 1 above, 349 ('corrective justice (…) feature the maintenance and restoration of the notional equality which the parties enter the transaction').

promisor, while equitable principles often focus on the expectations of the promisee.

Thus, the interface between contract rules and general principles also reflects the realization that for every promise given by a promisor, there is the creation of an expectation in the promisee. Contract law's obsession of the intent of the promisor should be balanced against the expectations of the promisee. This can be abstracted to the difference between promissory and reliance theories of contract. The traditional view is that the basis of contract is promise. This remains the case, but contract law will at times take the perspective of the person receiving the promise where the promise induces reliance. In some cases, the promisor is held to be responsible for the detrimental reliance of the other party.[24] The reliance theory's focus on the promisee perspective can best be linked to contract's regulatory or defense doctrines. The most direct application is the American view of promissory estoppel. Section 90 of the *Restatement Second* states:

> 'A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee, and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.'

While formalism seeks to resolve contractual disputes through application of fixed rules and strict interpretation of contracts, common law equity and civil law's justice principles place the rule application in a broader contextual frame. Equitable defenses such as laches, hardship, and unconscionability, as well as the equitable remedies of injunction, specific performance, rescission, and reformation, look to a broader scope of evidence that lies outside the four-corners of the contract. Formalism finds meaning in the literal interpretation of the words of a contract whereas contextualism seeks the true meaning of the words by looking at the background or the context of their use. A simple hypothetical example would be a contract between two diamond merchants that negotiate a contract for the sale of six diamonds of a certain quality. Dealer A sends six diamonds to Dealer B who rejects the diamonds despite them meeting the quality criteria of the contract. Dealer A sues for breach of contract. This is an easy case for a formalist judge who holds in favor of Dealer A because six means six. But such an outcome would be one of contractual injustice in the case where extrinsic evidence would have shown that in the diamond business, there is a trade practice that six means seven. The trade practice is that in a sale of six diamonds the seller is obligated to send seven diamonds to allow the buyer to determine which of them are the best six. The buyer would, then, return one diamond and pay for the six. In most claims of injustice or inequity, the defendant asks the court to take a broader view to determine if the injustice can be avoided through the use of contextual evidence.

The equitable principles were viewed as exceptions to contract law rules and are

[24] See Restatement Second § 90.

thereby mostly framed as defenses to the application of rules in a particular case.

> 'The problem with fixed rules is that they may work in a great majority of cases or scenarios but cause injustice in certain situations. The recognition of general principles provides courts with the discretion needed to respond when a strict application of rules leads to an unfair outcome.'[25]

2. Conflation of Equity, Good Faith, and Abuse of Right

It needs to be noted that courts apply numerous ways, expressed and covert, of interpreting and enforcing contracts to avoid injustice. The grounding of these adjustments to the formal application of contract rules or literal interpretation of contracts is, in concepts, tied to contractual fairness and justice. This article reviews the mechanisms found in the civil and common law. The differences between them are more a matter of degree than of kind. In fact, similar fact scenarios can support the use of one or more than one of these principles. The common law uses vague notions of equity, while the civil law developed the abuse of right doctrine. The more widely-held principle of good faith transcends the civil-common law divide. Although English law expressly rejects a general implied duty of good faith, the duty of good faith has been a part of American contract law for more than a half century. Furthermore, the trend in common law countries, such as in Canada[26] and Australia,[27] is towards the acceptance of the principle of good faith. Even though the English courts reject such a principle as an attack on the certainty of contract, often they reach the same outcomes through the use of notions of commercial reasonableness such as voiding contract terms held to be unreasonable and unconscionable.[28]

The differences between common law equity and civil law's abuse of right are meaningful, but as noted above, similar fact patterns may illicit the use of one or more of these doctrines, along with the duty of good faith. The conflation of bad faith with abuse of right is seen in numerous cases. For example, in *Brown* v *AVEMCO Inv Corp*,[29] one of the US Courts of Appeals held that a jury should have been instructed on whether the lender's exercise of a due-on-lease clause

[25] L. DiMatteo, *Principles* n 20 above, 7.

[26] *Bhasin* v *Hrynew* 2014 SCC 71, [2014] 3 S.C.R. 494. See J. Halberda, 'Winds of Change in Common Law Jurisdictions: The Concept of Good Faith and Fair Dealing in the Performance of Contracts', in C. Griffiths and Ł.J. Korporowicz eds, *English Law, the Legal Profession, and Colonialism. Histories, Parallels, and Influences* (Abingdon, Oxon; New York: Routledge, Taylor & Francis Group, 2024), 234-257.

[27] *Renard Constructions (ME) Pty Ltd* v *Minister for Public Works* (1992) 26 NSWLR 234; *Hughes Aircraft Systems International* v *Airservices Australia* (1997) 76 FCR 151. See J. Halberda, n 26 above.

[28] Bingham LJ. in *Interfoto Picture Library Ltd* v *Stiletto Visual Programmes Ltd* [1989] QB 433, 439 (referring to piecemeal solutions).

[29] 603 R.2d 1367, 1375-80 (9th Cir. 1979).

was based on an 'inequitable desire' to take advantage of a technical default. The notion of an 'inequitable desire' can easily be construed as an act of bad faith or an abuse of right. In *Willcox* v *Lloyds TSB Bank*,[30] the court held that although a bank has the right to increase an interest rate on a variable rates loan, it could be argued that there was an implied condition that it would not do so 'for purposes of greed rather than for commercially reasonable reasons.' Such an implied condition can be based on numerous rationales found in equity, good faith, and abuse of right.

Even though the justice-based principles of equity, good faith, and abuse of right are cut of the same cloth, the common law's lack of an abuse of right doctrine limits its abilities to ensure just outcomes in cases not covered by estoppel and good faith. The result has been a more chaotic jurisprudence and injustice in certain cases. Covertly, the courts have twisted contract interpretation and equitable principles like unconscionability, in ways that could be more directly policed under the abuse of right doctrine. More alarmingly, English law especially rejects broad principles (good faith and unconscionability[31]) leading to more unjust outcomes that could be cured by the adoption of abuse of right. These gaps in the common law will be discussed in the following sections.

3. Civil-Common Law Divide

When discussing the civil-common law divide, it is important, at least in the area of contract law, to recognize the high degree of commonality between these two legal traditions. In areas of profound differences, a closer look shows that the divergences are not nearly as wide as argued. The two core differences are: (1) the common law follows the objective theory of contract's construction, while the civil law seeks the subjective understanding of the parties and, (2) the common law adopts strict liability for contractual breach, while the civil law also uses the fault principle to determine if the breaching party is liable. This section will focus on these two general differences to gauge their significance and assess how they explain the role of abuse of right in both systems.

The common law's objective theory rests upon the interpretation of a contract based upon the objective manifestations of the parties. In short, the focus is on what they said and did and not on what they believed they said and did. The common law of the late 19th century and early 20th century applied a formalistic interpretation of contracts and contract rules. The consequences were two-fold. If the parties entered into a final written agreement, then their obligations are determined by a plain interpretation of the words of the contract (objective meaning). Any evidence that the parties meant something other than the plain or literal meaning was inadmissible. Thus, the courts were restricted to a four-corners analysis of the written form and were barred from considering extrinsic evidence such as prior

[30] No 13-00508 ACK-RLP, 2014 US Dist. LEXIS 176706, at *38 (D. Haw. 2014).

[31] D. Capper, 'The Unconscionable Bargain in the Common Law World' 126 *Law Quarterly Review*, 403 (2010).

dealings between the parties, trade usage, and business customs. The parties' real intent and the true meaning of the contract were irrelevant. This objective or formalistic approach favors fixed rules that can be strictly applied and disfavors more vague principles that are more pliable and increases judicial discretion.[32] Abuse of right would be disfavored since it is vague and subject to judicial discretion.

The civil law seeks to determine the agreement-in-fact and sees the written contract as one piece of evidence to be used in finding the subjective agreement of the parties. Thus, extrinsic evidence that contradicts the objective or plain meaning of a contract is welcomed in the quest to find the actual intent of the parties. Despite the common law's argument against the use of extrinsic evidence, such evidence is objective by nature, eg the parties must prove that a business or trade usage is established within a given business community and that the parties knew or should have known of its existence. The narrow objectification of the written contract as the sole source of probative evidence of meaning is said to bring certainty and predictability to contracts. The civil law seeks to balance those rationales with those of contractual fairness and justice.

These different approaches to contract interpretation provide insight into the use of the abuse of right doctrine in the two legal traditions. The variance in the objective-subjective approaches explains the abuse of right's existence in the civil law but rejection in the common law. However, the common law's modern movement to a contextual interpretation approach[33] makes the abuse of right doctrine more palatable to the common law.

This article's descriptive thesis focuses on finding abuse-of-right-like devices in operation in Anglo-American law. Various piecemeal solutions in the common law achieve similar goals as those of abuse of right. Ultimately, the civil and common law struggle to strike a balance between freedom of contract and justice or fairness concerns. The common law has more strictly adhered to freedom of contract, while the doctrine of abuse of right evolved due to fairness concerns. The doctrine of abuse of right addresses specific issues of unfairness which are addressed differently in other systems.

The article's thesis argues that the common law should recognize the doctrine of abuse of right and that that would help courts to avoid covert mechanisms to do justice and, thus, to develop a clearer jurisprudence. On the other hand, civil law uses abstract concepts and general clauses[34] such as prohibition against

[32] See Lord Greene in *Hankey* v *Clavering* [1942] 2 All ER 311: ('documents are not to be strained and principles of construction are not to be outraged in order to do what may appear to be a fair in an individual case'). See *Arnold* v *Britton* [2015] UKSC 36.

[33] *Investors Compensation Scheme Ltd* v *West Bromwich Building Society* [1997] UKHL 28.

[34] The general clauses in civil law are what the common law would call general principles. They are vaguely worded to allow courts a leeway in their judgment, forcing them to evaluate a case using extra-legal criteria or values. General principles or clauses include good faith, unconscionability, reasonableness, public policy, and so forth.

abuse of right, duty of good faith and fair dealing and allows courts to respond to justice concerns caused by a formal application of rules.

III. Abuse of Right in Civil Law

The idea of a separate equity law system was never needed in the civil law. The common law's origins reach back to the Middle Ages.[35] The need for equity stemmed from the old common law's rigid writ system where numerous wrongs went unremedied. Eventually, the king responded by sending such matters not covered by a writ to the chancellor, and subsequently to the Court of Chancery, which possessed equitable jurisdiction over law cases that produced unjust outcomes.[36] Thus, a separate legal system was developed based on equitable principles to 'soften the harshness of the common law.'[37] In contrast, the French and German civil codes of the 19th century created a less rigid system and the need to develop a separate system of equity never arose. Instead, equity-like doctrines like good faith and abuse of right were developed in the law courts to provide judges' discretion when the application of legal rules led to unjust outcomes.

1. Sources of Polish Law in its Historical Context

Polish private law is a product of a complicated history in that it was influenced by the French and German legal cultures.[38] Its legal framework after the fall of communism (1989) is provided by the Constitution of 1997[39] and the (Polish) Civil Code (PCC)[40] adopted in 1964, supplemented by the regulations and directives imposed by the European Union (EU).

In common with the civil law tradition, Polish law does not recognize a doctrine of binding precedent, but view decisions of the Supreme Court (*Sąd Najwyższy*) and upper appellate courts as persuasive. Judge-made law and legal scholarship constitute sources of legal knowledge, which is used in solving disputes. For example, the scope of the doctrine of abuse of right or the meaning of principles of

[35] See M. Glendon et al, *Comparative Legal Traditions: Text, Materials, and Cases on the Civil Law, Common Law, and Socialist Law Traditions, with Special Reference to French, West German, English, and Soviet Law* (Saint Paul, MN: West Publishing Company, 1985), 268.

[36] The development of the law of equity traces back to the 13th century with the ability to 'appeal' law court decisions to the chancellor and then later to the Court of Chancery. See J. Baker, n 4 above, 105-125; J. Parkes, *A History of the Court of Chancery with Practical Remarks on the Recent Commission, Report, and Evidence, and on the Means of Improving the Administration of Justice in the English Courts of Equity* (London: Longman, Rees, Orme, Brown, and Green, 1828), 29-30.

[37] R. Youngs, *English, French and German Comparative Law* (London: Cavendish Publishing, 1998), 54.

[38] W. Dajczak, 'Historical Development of Private Law in Poland', in Id et al eds, *Foundations of Law. The Polish Perspective* (Warszawa: Wolters Kluwer Polska, 2021), 65-66; P. Machnikowski et al, *Contract Law in Poland* (Alphen aan den Rijn: Wolters Kluwer, 2020), 25.

[39] The Constitution of the Republic of Poland 1997 (Journal of Laws of 1997, no 78, item 483).

[40] The Civil Code 1964 (Journal of Laws of 1964, no 16, item 93).

community life is found in case law and not in the statutes. The doctrine of judicial review is acknowledged in cases where a statutory provision is found to be inconsistent with the Constitution, international agreements, and EU law. The decisions of the Constitutional Tribunal are considered binding rules of law.[41] One of its decisions confirmed the constitutionality of the abuse of right doctrine.[42]

2. Historical Background of Contemporary Private Law

Polish private law was influenced by the country's partition by Russia, Prussia, and Austria in the late 18th and the 19th century, and Napoleon's creation of the Duchy of Warsaw in 1807 that enacted French law.[43] After independence following the end of the World War I (1918), Poland consisted of five regions in which different legal regimes were in force. Central Poland was governed by the French Civil Code of 1804, supplemented by Russian legislation; in its north and western parts, the German Civil Code (BGB of 1896) formed the basic law; in the southern part, Austrian law (ABGB of 1811) prevailed; in the eastern part, Russian law controlled; and Hungarian law was applied in a small area.[44]

Poland needed to unify its legal system through codification. It established the Codification Commission (*Komisja Kodyfikacyjna*), which drafted numerous laws,[45] including the 1933 Code of Obligations (*Kodeks zobowiązań*).[46] The Code was the precursor to the civil code and covered contract, wrongs, and unjust enrichment. The drafters employed a comparative method, seeking to find the most appropriate solutions drawn from French, German and Austrian laws. They also reviewed Swiss law (*Obligationenrecht* of 1911) and the French-Italian draft law of obligations of 1927 (*Code des obligations et des contrats franco-italien*).[47] The resulting code was masterful in combining the various Continental legal traditions.[48]

[41] Arts 8 section 2 and 188 of the Constitution of the Republic of Poland.

[42] The Constitutional Tribunal 17 October 2000, SK 5/99, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy*, 1208 (2000) (held that doctrine of abuse of right, as found in the PCC Art 5, was consistent with constitutional principles). See Arts 2, 20, 32 section 1, 45 section 1, and 64 section 2 of the Constitution.

[43] The Civil Code of 1804, the Code of Civil Procedure of 1806 and the Commercial Code of 1807 were adopted there under the reign of Napoleon.

[44] Z. Kuhn, 'Comparative Law in Central and Eastern Europe', in M. Reimann and R. Zimmermann eds, *The Oxford Handbook of Comparative Law* (Oxford: Oxford University Press, 2019), 182-184.

[45] To review the variety of disconnected laws existing at that time see 'Iura. Sources of Law from the Past' project, available at https://tinyurl.com/5b7tbm5y (last visited 31 January 2026).

[46] The Code of Obligations 1933 (Journal of Laws of 1933, no 82, item 598).

[47] J. Halberda, 'The Unjustified Enrichment in Polish Code of Obligations of 1933', in G. Béli ed, *Institutions of Legal History with Special Regard to Legal Culture and History* (Bratislava: Publikon, 2011), 95-103; Z. Nagorski, 'Codification of Civil Law in Poland (1918-1939)', in *Studies in Polish and Comparative Law: a Symposium of Twelve Articles* (London: Stevens, 1945), 46, 58-60.

[48] L. Górnicki, 'Metoda opracowania i koncepcja kodeksu zobowiązań z 1934 roku' ('Methodology and the General Idea of the Code of Obligations of 1934') 35 *Acta Universitatis Wratislaviensis*, 93 (2008); W. Wagner, 'General Features of Polish Contract Law', in Id, *Polish Law Throughout the Ages* (Stanford, California: Hoover Institution Press, 1970), 391-392.

The Code of Obligations drew on German law by making extensive use of general clauses such as notions of good faith and fair dealing (*dobra wiara i zwyczaje uczciwego obrotu*),[49] good customs (*dobre obyczaje*),[50] and fairness (equity) (*względy słuszności*).[51] The influence of French law was seen in the general principle of liability for wrongs[52] and the prohibition of abuse of right:

> 'Whoever intentionally or negligently caused damage to another in the exercise of his right, shall be liable to make good such damage, if he has exceeded the limits imposed by good faith or the purpose for which the right was granted'.[53]

Thus, the principle that rights (also those of contractual origin) are not absolute was ensconced in Polish law.

In 1945, Poland became a satellite state of the Soviet Union. In order to impose a more socialistic order, the general clauses of social purpose of a right (*społeczne przeznaczenie prawa*) and principles of community life (*zasady współżycia społecznego*) were added.[54] These clauses allowed communist controlled courts to deviate from the existing laws not fitting the new socio-economic order. These general clauses were intended to allow judges to create a Marxist's society.[55]

The 1964 Civil Code remained rooted in the work of the Codification Commission.[56] Despite communism, Polish law continued to share many similarities with the contemporary civil laws of Western Europe.[57] As noted above, the Code

[49] See Arts 107 and 189 (good faith and fair dealing) and 48, 135, 205 and 269 (good faith).

[50] See Arts 49, 55, 56, 118 and 132.

[51] See Arts 60, 61, 143, 139 and 162. The term 'equity' is used in this section of the article in the meaning of fairness. The English concept of a specific body of laws developed by the Court of Chancery is referred to as the 'equity law'.

[52] See Art 134.

[53] See Art 135. See A. Szpunar, *Nadużycie prawa podmiotowego* (Kraków: Polska Akademia Umiejętności, 1947).

[54] The Decree on General Provisions of Civil Law 1946 (Journal of Laws of 1946, no 67, item 369) referred to the general clause of 'social purpose of a right and requirements of good faith' in Art 5. The General Provisions of Civil Law Act 1950 (Journal of Laws of 1950, no 34, item 311) introduced the general clause of 'principles of community life' in Art 3. See A. Rudzinski, 'Marxist Ethics and Polish Law' 11 *Natural Law Forum*, 55 (1966).

[55] Cf A. Doliwa, *Funkcje zasad współżycia społecznego w prawie cywilnym* (*Functions of the Principles of Community Life in Civil Law*) (Warszawa: C.H. Beck, 2021), 4-7; A. Rudzinski, 'New Communist Civil Codes of Czechoslovakia and Poland: A General Appraisal' 41 *Indiana Law Journal*, 63 (1965); W. Wagner, 'Recent Application of the Idea of Principles of Community Life', in R. Newman ed, *Equity in the World's Legal Systems. A Comparative Study Dedicated to René Cassin* (Brussels: Établissements Émile Bruylant, 1973), 540.

[56] A. Brzozowski, 'Civil Law: Law of Contracts, Property and Obligations', in S. Frankowski ed, *Introduction to Polish Law* (The Hague: Kluwer Law International, 2005), 38.

[57] The Code's content is organized according to the Pandectist structure. It has a general part of civil law, which includes the concept of legal act (cf n 74 below) and general clauses found in the German BGB. The Code provides for a general principle of liability for wrongs (Art 415) which follows the French law (Art 1240 of the Code Civil after the 2016 reform). Nevertheless, the similarity of blackletter laws in the states of Western and Eastern Europe should not mislead. In the communist

retained general clauses imported from Soviet law: principles of community life (*zasady współżycia społecznego*) and application of a right based on its socio-economic purpose (*społeczno-gospodarcze przeznaczenie prawa*). These general principles replaced good faith and fair dealing, good customs, and fairness concepts found in the previous 1933 Code of Obligations. After the fall of communism in 1989, the older civil law principles were reinstated to encourage the development of a market economy.[58] After 1989, Polish law was also influenced by Western Europe law prior to its admittance to the EU (2004).[59]

3. Doctrine of Abuse of Right and Principles of Community Life

Principles of community life require courts to balance individual interests with social-economic interests. This idea lays the foundation for the abuse of right doctrine by requiring the weighing of individual interests with societal interests in determining if the exercise of the right would be damaging to others' protected interests. It also provides for an inter-party dimension, in which the purpose or benefit of a party's exercise of a right is weighed against the harm caused to the other party.[60] The Art 5 of the Civil Code states:

> 'One cannot exercise a right in a manner which would contradict its socio-economic purpose or the principles of community life. Such act or omission on the part of the person entitled shall not be considered the exercise of that right and shall not be protected.'

The importance of the doctrine was emphasized by it being moved from the law of wrongs in Art 135 of the Code of Obligations to the general part of the Civil Code, which facilitates its application to other areas of law including contract law.

This doctrine of abuse of right is intended to address situations where a party's conduct complies with the verbatim wording of either statute of contract, but when placed in a broader context, it is shown to be abusive. Art 5 expresses the

countries there has been vast cleavage between the law in books and the law in action, with the 'thick forest of administrative regulation' (the latter referred to as: 'duplicating machines law') adjusting law as found in the statutes to the reality of communist life. See K. Grzybowski, 'Reform of Civil Law in Hungary, Poland, and the Soviet Union' 10 *American Journal of Comparative Law*, 253, 256-257 (1961).

[58] These included abolition of special privileges of state and social ownership, revival of freedom of contract (Art 353(1)), and of *clausula rebus sic stantibus* (adjustment or termination of contract due to an unexpected change of circumstances) (Art 357(1)).

[59] Before its accession to the EU, Poland implemented Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts (which adopted criterion of good faith to assess the unfairness of contract terms in consumer contracts).

[60] While the principles of community life emphasize the balance that has to be found between individual and social interests, the socio-economic purpose of a right focuses on the right's goal. See A. Zbiegień-Turzańska, 'Art. 5 Nadużycie prawa' ('The Art 5 Abuse of Right'), in K. Osajda ed, *Kodeks cywilny. Komentarz* (*Civil Code. The Commentary*) (Warszawa: C.H. Beck, 2017), 76.

Aristotelian idea of *epieikeia*[61] that supported rectification of law when a formal application of legal rules resulted in an unjust outcome. It reflects the nature of legal rules that may, on the whole, be proper but in specific cases may render injustice. In such cases, the rule needs to be adjusted or ignored.[62]

Despite enactment of a new constitution in 1997 and membership in the EU, the Polish Civil Code retains the concept of principles of community life.[63] However, these principles play a much different role today than they did during the communist period. Its open-endedness has allowed courts to make incremental adjustments in response to societal and economic change.[64] Today, these principles have been accepted into the civil law as referring to extra-legal standards and values shared across the European community.[65] The principles of community life are commonly linked to notions of fairness (*słuszność*),[66] moral norms (*normy moralne*),[67] standards of ethical dealing (*zasady etycznego postępowania*),[68] honest dealing (*zasady uczciwego postępowania*),[69] norms of good customs (*dobre obyczaje*),[70] good faith,[71] reliability (*rzetelność*),[72] and loyalty (*lojalność*).[73]

Polish law's principles of community life apply to contract law. Therefore, a legal act[74] may be considered an afront to principles of community life (the PCC

[61] *Epieikeia* is a Greek word that means equity or reasonableness.

[62] L. Maniscalco, *Equity in Early Modern Legal Scholarship* (Leiden; Boston: Brill Nijhoff, 2020), 33-34.

[63] There is an ongoing debate on replacing 'principles of community life', a remnant of the communist era, with the notions of good faith or good customs. See W. Dajczak, 'Zasady współżycia społecznego czy dobra wiara?' ('Principles of Community Life or Good Faith?') *Rejent*, 51-54 (2001). Cf M. Wilejczyk, *Zagadnienia etyczne części ogólnej prawa cywilnego* (*Ethical Issues of the General Part of Civil Law*) (Warszawa: C.H. Beck, 2014), 84.

[64] A. Doliwa, n 55 above, 52; A. Rudzinski, 'Marxist Ethics' n 54 above, 73.

[65] The Constitutional Tribunal 17 October 2000, n 42 above, 1214.

[66] The Supreme Court 8 May 2014, V CSK 322/13; 23 March 2017, V CSK 393/16; 20 December 2017, I CSK 163/17; the Court of Appeal in Cracow 11 December 2018, I ACa 216/18.

[67] The Supreme Court 15 April 2004, IV CK 284/03; 4 August 2005, III CK 627/04; 23 March 2017, V CSK 393/16; 20 April 2017, II CSK 491/16; A. Rudzinski, 'Marxist Ethics' n 54 above, 67, 73.

[68] The Supreme Court 28 November 2001, IV CKN 1756/00; 8 May 2014, V CSK 322/13; 23 March 2017, V CSK 393/16; the Court of Appeal in Cracow 11 December 2018, I ACa 216/18.

[69] The Supreme Court 24 February 2016, I CSK 269/15; 23 March 2017, V CSK 393/16; 20 April 2017, II CSK 491/16; the Court of Appeal in Cracow 11 December 2018, I ACa 216/18.

[70] The Supreme Court 20 April 2017, II CSK 491/16; 7 February 2018, V CSK 180/17. The concept of good customs is found in the PCC Art 72 para 2 ('The party which started or carried on negotiations infringing good customs, particularly without an intention to conclude a contract, shall be obligated to redress the damage that the other party suffered in result of counting on conclusion of the contract').

[71] The Supreme Court 9 March 2018, I CSK 295/17; the Court of Appeal in Warsaw 9 November 2017, I ACa 1385/16; the Court of Appeal in Cracow 9 January 2020, I ACa 1301/18.

[72] The Supreme Court 4 March 2015, IV CSK 437/14.

[73] See PCC Arts 58(2) & 353(1). See also, the Court of Appeal in Cracow 20 December 2012, I ACa 1167/12 ('In business-to-business relations, the principles of community life are to be understood as the rules of reliability and loyalty towards the contractual partner…[as well as] the observance of good customs, principles of fair dealing, reliable dealing or loyalty and trust').

[74] Following German law, Polish law resorts to the concept of a legal or juridical act (*czynność prawna*, *Rechtsgeschäft*) consisting of statements of will (promises) by which a party affects

Art 56) leading to the invalidation of a contract provision or nullification of an exercise of a right.[75] Contract interpretation should be conducted in accordance with the principles of community life. The interpretation of a contractual right would be placed in the context of its legitimate exercise versus the abuse of that right.[76]

For example, a party is obligated to perform its contractual duty in accordance with the principles of community life and the other party has a duty to cooperate. These principles supplement the content of the parties' contract and, in Anglo-American law, may be the basis for inserting an implied term. However, under Polish law, the implied duty may be broader in scope. Under common law, a party should not impede the other party in its performance. Polish law would go further by requiring a party to go beyond its formal obligations to consider what best satisfies the other party's interest. In considering the interest of the other party, the court may imply duties of disclosure, confidentiality, and even to refrain from competitive activities. The application of these implied duties cannot be contracted out under Art 354.[77] The duty to act in accordance with principles of community life corresponds to the duty of good faith found in American law and, to a lesser extent, in English law.

An associated principle, *clausula rebus sic stantibus* ('as things stand'),[78] is found in Art 357(1). It allows for judicial adjustments to legal relationships, including termination of contract, if there is an unforeseen change of circumstances after contract formation that causes an undue hardship for one of the parties. In such cases the court may modify a party's obligation or terminate the contract in advancing the principles of community life.[79]

a) Meaning of Good Faith

There are subjective and objective versions of the duty of good faith. Each of these is applied in a different context and has different goals to achieve. The concept of good faith functions in a subjective way, focusing on whether a party believed

rights and duties in the area of private law. These principles (community life and good faith) can apply to creation, modification, or termination of rights.

[75] The PCC Art 353(1) refers particularly to contracts in the context of the freedom of contract. This provision was introduced in 1990s while Arts 56, 58, para 2, 65, and 354 did not change since the Code's enactment.

[76] The principles supplement the description of right in the interpretation of the content of contracts. See PCC Arts 56, 65, 357(1) and 358(1).

[77] A. Doliwa, n 55 above, 106-114.

[78] The strict enforcement of contracts is supported by the principle of *pact sunt servanda* (promises must be kept). *Clausula rebus sic stantibus* acts as an equitable counterweight to strict enforcement when there has been an unexpected major change of circumstances (such as an outbreak of war or a pandemic) after the formation of the contract.

[79] Another provision of the PCC, Art 358(1), allows a court to modify a payment amount in cases of hyperinflation. The Polish courts also used Art 5 before these specific provisions were introduced into the PCC, as German courts did under the BGB § 242 (good faith). See R. Zimmermann, *The New German Law of Obligations: Historical and Comparative Perspectives* (Oxford; New York: Oxford University Press, 2005), 46.

it was acting in good faith or honestly.[80] For example, in Anglo-American law, a purchaser knowingly dealing with an unauthorized person would be estopped from claiming a right of ownership.[81]

The objective approach uses the perspective of a reasonable person to determine if a party was acting in good faith. Legal scholars consider the principles of community life to be a version of the duty of good faith in the objective meaning.[82] In the same way, good faith and the abuse of right often deal with the same phenomena.[83]

The principles of community life and the duty of good faith introduce an element of fairness into the legal system.[84] These doctrines provide flexibility in responding to changing socio-economic conditions. In sum, general principles like the principles of community life and good faith are mechanisms of corrective justice applied in cases where the formal exercise of rights or application of legal rules render an unjust outcome.[85]

b) Civil Law Tradition

European civil law incorporates general clauses or equitable (fairness) principles that establish a standard of assessment centered on objective good faith. Examples include Arts 1134(3) and 1135 of the old French Civil Code (good faith performance and enforcement),[86] as well as the German BGB § 157 (good faith interpretation of contracts) and § 242 (good faith in the performance and enforcement of contract; *Treu und Glauben*).[87]

[80] The Civil Code refers to the presumption of good faith in the subjective sense (Art 7), bona fide purchase of movables for value (Art 169), positive prescription (Art 172), or improvements made on another's property (Arts 224-231). The cases covered by Arts 172 and 224-231 correspond to English cases where estoppel by acquiescence is applied. Instead of asking whether a party acted in good faith, the court in England would look to see whether a party acted in reliance on the other party's conduct.

[81] The common law also recognizes agency by estoppel to hold a principal liable for acts of an unauthorized person that another believed was acting on behalf of the principal. See *Hannon* v *Siegel-Cooper Co* 167 NY 244, 60 NE 597 (1909) (department store was found liable for the malpractice of a dentist working in its store since the store marketed that it offered dental services).

[82] A. Doliwa, n 55 above, 2-3, 22; M. Kępiński and J. Kępiński, 'Civil Law: General Provisions of the Civil Code', in W. Dajczak et al, *Foundations of Law* n 38 above, 166.

[83] Good faith in this sense acts as a 'bad faith excluder.' R. Summers, 'The General Duty of Good Faith – Its Recognition and Conceptualization' 67 *Cornell Law Review*, 823 (1982) (American law); J. Stapleton, 'Good Faith in Private Law' 52 *Current Legal Problems*, 7-8 (1999) (English law).

[84] The Constitutional Tribunal 17 October 2000, n 42 above, 1214.

[85] See A. Doliwa, n 55 above, 86-91.

[86] Code of Napoleon or the French Civil Code, subsequently revised in 2016. See C.S. *Lobingier, 'Napoleon and His Code' 32 Harvard Law Review, 114, 131 (1918).*

[87] Other general clauses found in civil codes are broader in scope such as Art 2(1) of the Swiss ZGB (general good faith clause), Art 6:2 of the Dutch Civil Code (reasonableness and fairness), and Art 1104 of the French Civil Code as amended in 2016 (good faith clause in contract law). See The Law of Contract, the General Regime of Obligations, and Proof of Obligations. The New Provisions of the Code Civil Created by Ordonnance n 2016-131 of 10 February 2016 (translated by J. Cartwright et al, 2016) available at https://tinyurl.com/3myykubm (last visited 31 January 2026); E. Hondius and H. Van Kooten, *The Principles of European Contract Law and Dutch Law: a*

The general clauses of the Swiss and Dutch civil codes expressly prohibit the abuse of right.[88] There are no similar provisions in the French and German civil codes. Nevertheless, the doctrine of abuse of right (*abus de droit*) was developed in France in the 19th century in the opposition to absolute ownership rights. The right of ownership seemed to be unlimited under Art 544 of the Code, but courts began to decide cases considering the motives behind the conduct of an owner. These judgments started to set limits on the rights of owners. In 1905, Louis Josserand conceptualized the case law into a doctrine of abuse of right.[89] Traditionally, the concept of abuse of right in France was found in property law with the doctrine of good faith applying to contract law.[90] In Germany, the application of § 242 BGB was initially limited, but over the course of the 20th century, the courts broadened its application and it evolved into a principle that pervades German law.[91]

c) Application of Art 5

Generally, the party claiming a breach of principles of community life does not need to enumerate the specific principle being violated. Today the situational approach prevails over the normative one that held sway in the second half of the 20th century. It is left to the court to determine if the exercise of right was justified or violated moral values. This application of principle focuses on the context of a particular litigation. A formal approach presumes rights to be enforced since it values legal certainty at all costs. The application of general principles places a higher value on achieving fairness in a given case. The mainstream position uses both approaches – allowing a certain subjectivity of decision-making but matching it with the fundamental values embedded in society.[92]

The courts have provided guidance for the application of Art 5's doctrine of

Commentary (Nijmegen: Ars Aequi Libri; The Hague; New York: Kluwer Law International, 2002), 44.

[88] Swiss ZGB Art 2:2 ('the manifest abuse of right is not protected by law'); Dutch Civil Code Art 3:13 ('a right may be abused, among others, when it is exercised with no other purpose than to damage another person or with another purpose than for which it is granted').

[89] According to the Josserand theory of abuse of right, 'subjective rights are function-rights; they keep within the bounds of the function which they are to fulfil; otherwise the holder commits an excess, an abuse of right; an abusive act is an act contrary to the object of the institution, its spirit and its purpose.' L. Josserand, *De l'esprit des droits et de leur relativité* (Paris: Dalloz, 1939), 292, cited in O. Garibaldi, 'Abuse of Rights in Investment Disputes: A Critical Analysis' *Revista de Arbitraje Comercial y de Inversiones* (2), 34, 49 (2021).

[90] Judgments of appellate courts in Colmar (fake chimney case) (1855), Lyon (Saint Galmier mineral waters case) (1856); J. Gordley, 'The Betrayal of the French Civil Code: A Tragedy in Three Acts' *Krakowskie Studia z Historii Państwa i Prawa*, (2), 163, 176 (2023).

[91] W. Ebke and B. Steinhauer, 'The Doctrine of Good Faith in German Contract Law', in J. Beatson and D. Friedmann eds, *Good Faith and Fault in Contract Law* (Oxford: Clarendon Press; New York: Oxford University Press, 1995), 171-174; R. Zimmermann and S. Whittaker, *Good Faith in European Contract Law* (Cambridge; New York: Cambridge University Press, 2000), 24-25, 30.

[92] The Supreme Court has stated that it is no longer needed to name a particular principle of community life, thus, favoring a more situational approach. See the Supreme Court 8 May 2014, V CSK 322/13; 27 October 2022, II CSKP 306/22; 26 January 2023, II CSKP 817/22.

abuse of right. The case law shows that the courts use factors similar to those used in the application of promissory estoppel in Anglo-American law to be discussed below.[93] First of all, the doctrine is used only in exceptional circumstances when other legal devices prove to be insufficient (doctrine of last resort).[94] It cannot be used as a substitute for more specific provisions such as where statutory law provides protection against unexpected change of circumstances,[95] usurious interest,[96] or exorbitant contractual penalties.[97] Furthermore, abuse of right does not extinguish a right in toto.[98] It merely voids a specific exercise of the right.[99] However, a party in breach of the principles of community life is preempted from claiming an abuse of right against the other party.[100] This would also be the case under the common law's equitable clean hands doctrine.[101] Finally, the abuse of right doctrine has broader application than contract law[102] and has been applied in the fields of property[103] and family law.[104] It is also used in company law to pierce the corporate veil.[105]

[93] See Section IV.3.a) below.

[94] The Constitutional Tribunal 17 October 2000, n 42 above, 1218.

[95] The Supreme Court 16 May 2023, II CSKP 870/22 (*clausula rebus sic stantibus*).

[96] The Court of Appeal in Warsaw 9 November 2017, I ACa 1385/16 (the court used abuse of right before the enactment of usury law).

[97] The PCC provides in Art 484(2) that a debtor may demand a court to reduce the amount of contractual penalty if obligation was performed in a substantial amount or where penalty is exorbitant.

[98] The Constitutional Tribunal 17 October 2000, n 42 above, 1217. It is questionable whether the doctrine of abuse of right can be exercised by a defendant possessor against an eviction (*rei vindicatio* or reclaim of property). See the Supreme Court 30 May 2000, IV CKN 28/00) (Art 5 does not apply). Contra, the Supreme Court 13 July 2022, II CSKP 1397/22; 21 June 2023, II CNPP 25/22) (Art 5 may be applicable in *rei vindicatio* claims).

[99] The Constitutional Tribunal 17 October 2000 n 42 above, 1217.

[100] ibid 1219.

[101] The Supreme Court challenged the 'clean hands rule', claiming that a party's abuse of right should not be automatically ruled out on the basis that the party had misbehaved. See the Supreme Court 26 January 2023, II CSKP 817/22). See Z. Chafee, Jr, 'Coming into Equity with Clean Hands' 47 *Michigan Law Review*, 1091-1096 (1949) (finding principle not very helpful in Anglo-American case law).

[102] See eg the Supreme Court 31 May 2023, II CSKP 1732/22 (termination without notice of a credit agreement or the demand for usurious interest constitutes an abuse of right); 24 February 2016, I CSK 269/15 (short deadline for remediation of an improper performance was considered disloyal and unfair).

[103] See the Supreme Court 20 June 2000, I CKN 742/00 (abuse of right to bring an eviction claim against one's parents who donated the property to the claimant); 6 January 2005, III CK 129/04 (violation of the principles of community life to bring a nuisance claim seeking removal of community water pipes running through the claimant's property). Compare, English case of *Bradford Corporation* v *Pickles* (1895) UKHL 1 (same).

[104] Abuse of right is not applicable in establishing parentage. It has been long held that no circumstances can stand in the way of finding the true father. An exception is where a claimant cannot deny paternity if he consciously consented to *in vitro* fertilization with the other's sperm (the Supreme Court 27 October 1983, III CZP 35/83). In American law, see 'parent by estoppel' where one knowingly treats a child as his own. M. Gergen, 'Towards Understanding Equitable Estoppel', in C. Rickett and R. Grantham eds, *Structure and Justification in Private Law: Essays for Peter Birks* (Oxford; Portland, Oregon: Hart Publishing, 2008), 324, 335.

[105] The Supreme Court 17 March 2015, I PK 179/14.

d) Italian Law Analogy

Abuse of right doctrine is primarily found in Italian case law. Rescigno notes that good faith and abuse of right are similar but apply to different types of cases and use different factors.[106] Good faith is purely objective in nature while abuse of right may use both subjective (motive to harm) and objective (benefit to the owner of the right versus the harm suffered by the other party) factors.[107] Good faith is mostly used in obligations and contracts, while abuse of right was used primarily in the exercise of real property rights. Art 833 of the Civil Code of 1942 describes the abusive use of property rights when they are used in a way not ordinarily used and cause harm to the other party.[108] Despite abuse of right origins in the abuse of ownership rights, it is an autonomous principle applicable in numerous situations whether in the exercise of property or contractual rights.[109] In sum, good faith and abuse of right can be considered as independent general clauses often aligned in theory but different when applied to concrete cases.

In contract law, abuse of right has been recognized when a creditor demands partial payments not agreed upon in the contract: 'Where the creditor is motivated solely by the purpose of causing harm to the debtor, it should not be difficult to detect the extremes of abuse.'[110] Abuse of right has also been applied in employment[111] and agency contracts. An unfair or discriminatory termination can be considered an abuse of right. Unlike the common law, a court may order a reinstatement of the wrongfully discharged employee. A principal's rejection of an agent's procurement of business can be considered abusive.[112]

Another example is found in atypical contracts. An example is distribution agreements where the distributor buys goods from a seller or manufacturer and resells the goods to third parties. The Civil Code provides specialized rules for supply contracts but not for distribution contracts. Therefore, such contracts must be dealt with under general contract law. The contract may provide a short notice for termination, but the exercise of that right may be considered abusive, especially in long-term relationships. In such cases, a much longer notice of termination would be fair and reasonable. If the notice provided in the contract creates a disproportionate amount of harm to benefit, than exercising that right may be considered abusive.

[106] P. Rescigno, 'L' Abuso del diritto' *Rivista di diritto civile*, I, 205 (1965)

[107] This is despite the Caso Fiuggi case where the court conflated the two doctrines: 'good faith is defined as prohibiting abuse and granting the injured party a far more effective remedy than damages, that is, the termination of the contract.' Court of Cassation 20 April 1994, no 3775.

[108] P. Gallo, *Trattato del contratto* (Torino: Wolters Kluwer Italia, 2010), II, 1395-1400.

[109] C. Consentino, 'Prohibition of Abuse of Rights: From Rule to Principle' *Comparazione e diritto civile* (2018).

[110] P. Gallo, n 108 above, 1396.

[111] The Supreme Court 12 June 1985, no 6158, *Rivista giuridica del lavoro e della previdenza sociale*, II, 80 (1987).

[112] The Supreme Court 18 December 1985, no 6475, *Giurisprudenza italiana*, 1650 (1986).

'As a consequence, a contracting party might be stopped from exerting its power to withdraw from the contract when such exercise may be qualified as an abuse of right.'[113]

IV. Functional Equivalents in Anglo-American Law

The notion of abuse of right is underdeveloped and under-theorized in the common law. On the surface, formal law denies any such notion. But the better answer is that the common law rejects the formal doctrine of abuse of right,[114] but, in practice, it has developed numerous principles and doctrines that seek to address the injustices that the civil law principle attempts to rectify. The first section below (IV.1) provides a background for the common law's lack of recognition of abuse of right in contract law. The second section (IV.2) examines the common law's development of concepts that have tempered the most severe cases of abuse of right.

1. Freedom to Exercise Rights

Oliver Wendell Holmes, Jr set the path for American contract theory in his infamous work 'The Path of the Law' where he separated morality from contract law by stating: 'The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it, and nothing else.'[115] Thus, if one breaches a contract, for a good reason or bad, with or without intent to harm, there is no consequence other than to pay compensatory damages. The same would hold true for bargained for contract rights, in which a party has full discretion on whether to exercise or not exercise its rights. Thus, whether the exercise of a right is to gain a benefit or merely to cause harm to the other party is immaterial. Again, the rationale is that freedom of contract allows private parties to negotiate their own contractual rights and duties, and the courts should not intervene into such allocations. A party harmed by the other party's exercise of its rights only has themselves to blame for not negotiating a better contract. Simply stated, there can be no abuse of right when the rights were created by the exercise of the individual's

[113] D. Palazzo, *Italian Law System: Distribution Agreement and Abuse of Right* (23 March 2017), available at https://tinyurl.com/mvwj4c6w (last visited 31 January 2026).

[114] *Jenkins* v *Fowler* 24 Beav 308, 310 (1855) repulsed the notion of abuse of right stating that: 'Malicious motives make a bad act worse; but they cannot make that wrong which, in its own essence, is lawful.' A number of cases involved the erection of 'spite fences.' In *Burke* v *Smith* 37 NW 838, 838-839 (Mich. 1888), a party built a fence to deprive its neighbor of light and air to his first floor. The court used nuisance law against the fence builder and interestingly cited civil law which furnishes redress, because the injury is malicious and unjustifiable. On the presence of abuse of right in the Anglo-American property law see L. Katz, 'Spite and Extortion: A Jurisdictional Principle of Abuse of Property Right' 122 *Yale Law Journal*, 1448 (2013); A. di Robilant, 'Abuse of Rights: The Continental Drug and the Common Law' 61 *Hastings Law Journal*, 687, 696 (2009).

[115] O. Holmes Jr, 'The Path of the Law' 10 *Harvard Law Review*, 461, 465 (1897).

private autonomy in voluntarily entering into a contract.

This common law mindset focuses on the enforcer of rights and asks whether the contract provides that party the freedom to exercise those rights.[116] The civil law follows a two-step process. First, it starts with an interpretation of the contract to determine the rights and duties allocated to the parties. This is the same as in the common law where the court determines that a party is in possession of certain rights and whether there are any contractual restrictions as to their exercise. Second, the civil law shifts the focus to the party subject to the exercise of a right and balances the benefits to the enforcer in exercising the right and the costs or harm to the obligee in the exercise of the right.[117] If the balance between the two are grossly disparate, then the court will undertake a deeper contractual analysis. Disproportionality between benefit and harm is in itself no reason for the court to intervene since such imbalances are inherent to the capitalistic system. But when the harm becomes an afront to the goal of creating greater net wealth, the question is whether denying the exercise of those rights is in the best interests of the performing party, the economy, and society as a whole.[118] It is for such cases that the abuse of right doctrine was created to address.

The notion of restraining the exercise of right is abhorrent to the common law because, it is believed, it would diminish the principle of freedom of contract and reduce the certainty-predictability of contracts. The abusive use of right is considered a minor cost to the core rationales for contracts – the free creation, exercise, and enforcement of contractual rights. Thus, the sanctity of contract is preserved at the cost of unfairness or contractual injustice.

Both the civil and common laws of contract are inherently complicated because of the modern complexity of contracts so no one rationale can adequately justify all of contract law. Freedom of contract, although the core principle of contract law, is balanced against issues of contractual justice and fairness, which act as a counterpoise to unlimited freedom of contract. This counterweight expresses itself differently between the civil and common laws. In Polish law, the idea that a party may abuse the exercise of their contractual rights (and so the law should provide a remedy against that) is a recognized principle of law. It is not recognized in the common law since it is contrary to the law's belief in the free exercise of rights. There can be no abuse when courts are simply enforcing the private law of the parties. But the full story is that the common law does regulate

[116] See M. Bridge, 'Freedom to Exercise Contractual Rights of Termination', in L. Gullifer and S. Vogenauer eds, *English and European Perspectives on Contract and Commercial Law. Essays in Honour of Hugh Beale* (Oxford; Portland, Oregon: Hart Publishing, 2014), 88 ('uncompromising assertion that termination rights conferred by the contract may be exercised without let or hinderance'), citing *Petroleo Brasiliero SA* v *ENE Kos 1 Ltd* [2012] UKSC 17, para 7 ('There is no legal policy specific to termination rights restricting their availability or the consequences of their exercise more narrowly than does the language of the contract').

[117] See A. Yiannopoulos, 'Civil Liability for Abuse of Right: Something Old, Something New…' 54 *Louisiana Law Review*, 1173, 1192, 1194 (1994) (balancing).

[118] See PCC Art 5; Section III.3.c) above.

the abuse of right, which will be discussed in the next section.

2. Abuse of Right and Good Faith in Common Law

This section discusses the rudiments of the abuse of right doctrine in Anglo-American contract law. It researches the rationale for abuse of right underlying certain common law contract doctrines. These doctrines are often referred to as equitable principles. The analysis will conclude that abuse of right has played a role in the development of the common law and continues covertly to play a role in judicial decisions.

The orthodox position is that English law recognizes neither the doctrine of abuse of right[119] nor the implied duty of good faith.[120] The main argument against these doctrines is the fear of arbitrariness, legal uncertainty, and unpredictability of judicial decisions their recognition could introduce into the English legal system. Acknowledgment of broad concepts such as abuse of right is found to be contrary to the incremental path of English law development and to the individualistic feature of its private law (pursuance of commercial self-interest, sanctity of contract, freedom of contract).[121] While the doctrine of good faith has been a highly discussed topic in cases and scholarship, the doctrine of abuse of right seems to be taboo for many.[122]

Instead of accepting good faith as a general standard, English courts resort to a number of particular legal doctrines, referred to as 'piecemeal solutions', following the notion coined by Bingham LJ in *Interfoto Picture Library Ltd* v *Stiletto Visual Programs Ltd*.[123] These piecemeal solutions have incrementally evolved in the case law and include, among others, construction of contracts (including rectification and implied terms), doctrines of frustration of contract, economic duress, undue influence, unconscionable bargain, fiduciary duty, and estoppel.[124] On top of these,

[119] The leading case in this area is *Crofter Hand Woven Harris Tweed Co* v *Veitch* (1942) AC 435, 468, in which Lord Wright opined that, unless a party's conduct is explicitly prohibited by law, their motive, even if malicious, is irrelevant. Any prospects for development of the doctrine of abuse of right were jettisoned. See also, *Bradford Corporation* n 103 above (defendant, in order to force a claimant (local community) to purchase his property, diverted a flow of a river and so deprived the vicinity of access to clear water. The court found that the defendant's motive to cause harm was irrelevant).

[120] See *Mid Essex Hospital Services NHS Trust* v *Compass Group UK and Ireland Ltd (The Medirest)* (2013) EWCA Civ 200, para 105 ('there is no general doctrine of good faith in English contract law, although a duty of good faith is implied by law as an incident of certain categories of contract'); A. Burrows, *A Restatement of the English Law of Contract* (Oxford; New York: Oxford University Press, 2020), 50, 96; J. Carter and W. Courtney, 'Good Faith in Contracts: Is There an Implied Promise to Act Honestly?' 75 *Cambridge Law Journal*, 608, 613 (2016); S. Whittaker, 'Good Faith, Implied Terms and Commercial Contracts' 129 *Law Quarterly Review*, 463 (2013).

[121] See P. Davies, 'The Basis of Contractual Duties of Good Faith' 1 *Journal of Commonwealth Law*, 5 (2019). Cf J. Steyn, n 8 above, 438 ('Since English law serves the international marketplace it cannot remain impervious to ideas of good faith, or of fair dealing').

[122] Cf S. Rowan, n 6 above, 1066-1092 (abuse of right is already present in English law and is better than good faith in explaining constraints on contractual power).

[123] [1989] QB 433.

[124] ibid 439; *Pakistan International Airline Corp* v *Times Travel* [2021] UKSC 40 at paras 3,

there are statutory instruments that introduce a notion of good faith into specific areas of law, such as consumer law[125] and insurance law.[126]

Despite the rejection of good faith as a general principle, there has been a trend of using good faith in a narrower sense. Leggatt J, in the 2013 case of *Yam Seng Pte Ltd* v *International Trade Corp Ltd*,[127] argued that even though good faith could not be implied as a matter of law, it could be implied as a matter of fact such as when the parties reasonably expected each other to act in good faith,[128] which is especially the case in relational contracts.[129] The decision has been criticized as not setting a precedent since the decision could have been issued without any reference to a notion of good faith, and therefore, it was mere speculation (*obiter dictum*).[130] That said, parties are free to set standards that could be used to effectuate a duty of good faith.[131]

Some have argued, correctly, that good faith is already part of English law.[132] The content of a duty to act in good faith is vague and hardly possible to be defined in abstraction. However, depending on context, Mindy Chen-Wishart and Victoria Dixon distinguish four types of contracts in which increasing levels of good faith could be implied: (1) arm's length contracts (including duty not to exercise its contractual rights arbitrarily), (2) relational contracts (duty of confidentiality), (3) contracts characterized by inequality of bargaining power such as concluded in

27 (relevance of piecemeal solutions). See also, E. McKendrick and Q. Liu, 'Good Faith in Contract Performance in the Chinese and Common Laws', in L. DiMatteo and L. Chen eds, *Chinese Contract Law: Civil and Common Law Perspectives* (Cambridge; New York: Cambridge University Press, 2018), 72-75.

[125] English law adopted the notion in the course of United Kingdom's implementation of European directives. See, eg The Unfair Terms in Consumer Contracts Regulations 1994 schedule 2 (SI 1994/3159), recently replaced by The Consumer Rights Act 2015 chapter 15, section 62.

[126] See Lord Mansfield in *Carter* v *Boehm* (1766) 3 Burr 1905, 1910 ('duty of utmost good faith'); The Marine Insurance Act 1906, chapter 41, section 17 (in insurance contracts, the duty of good faith is a term implied in law).

[127] *Yam Seng Pte Ltd* v *International Trade Corp Ltd* (2013) 1 CLC 662.

[128] Later on, Leggatt LJ. found the duty to act in good faith to be a term implied in law. See *Al Nehayan* v *Kent* [2018] EWHC 333 (Comm), para 174.

[129] Relational contracts are long-term contracts, such as joint venture agreements, franchise agreements, and long-term distributorship agreements, that 'require a high degree of communication, cooperation and predictable performance based on mutual trust and confidence and involve expectations of loyalty which are not legislated for in the express terms of the contract but are implicit in the parties' understanding and necessary to give business efficacy to the arrangements'. *Yam Seng* n 127 above, 699; M. Chen-Wishart, *Contract Law* (Oxford: Oxford University Press, 7th ed, 2022), 634-636 (symbiotic contracts). See n 281 below.

[130] E. McKendrick, 'Good Faith in the Performance of a Contract in English Law', in L. DiMatteo and M. Hogg eds, *Comparative Contract Law: British and American Perspectives* (Oxford: Oxford University Press, 2016), 204-206.

[131] ibid 202.

[132] M. Arden, 'Coming to Terms with Good Faith', in Id, *Common Law and Modern Society: Keeping Pace with Change* (Oxford: Oxford University Press, 2016), 54, 61-63; A. Burrows, n 120 above, 50, 96 (there are doctrines doing the same job as good faith); M. Chen-Wishart and V. Dixon, 'Good Faith in English Contract Law', in P. Miller and J. Oberdiek eds, *Oxford Studies in Private Law Theory* (New York: Oxford University Press, 2020), I, 195, 198-204.

consumer or employment context (duty to inform), (4) fiduciary contracts (duty of loyalty and care).[133] All these types also imply a duty not to enforce contractual rights in an arbitrary manner.

The scope of the duty to act in good faith is, therefore, a matter of contractual construction.[134] A party is expected to act in an honest manner.[135] Depending on context, a party might be obliged to share relevant information.[136] A party thus owes fidelity to the parties' bargain,[137] a duty not to willfully obstruct or hinder the operation of contractual obligations[138] and a duty not to enforce its contractual powers arbitrarily or for an ulterior motives.[139]

The idea of abuse of right in the common law was rejected in the 1895 case of *Mayor of Bradford* v *Pickles*,[140] which argued for the strict enforcement of rights even in cases where the exercise of the right is in bad faith or other offensive motive. Lord Halsbury stated that 'if it was a lawful act, however ill the motive might be, he had a right to do it.'[141] More recently Bruce Pardy asserted that:

> 'When the enforcement of rights is dependent upon the proper motivation of the rights holder, rights become opportunities for moralistic judicial oversight. Therefore, doctrine of abuse of right should be rejected because it is a paternalistic compulsion to supervise.'[142]

However, Anna di Robilant argues that this ignores the covert recognition of abuse of right in the common law:

> a look at courts' records suggests that abuse of rights was silently at work

[133] M. Chen-Wishart and V. Dixon, 'Good Faith' n 132 above.

[134] *Unwin* v *Bond* [2020] EWHC 1768 (Comm), para 229.

[135] ibid para 230 ('they must act honestly'); *Yam Seng* n 127 above, 697; *Astor Management* v *Atalaya Mining* (2017) EWHC 425, para 98 ('a contracting party will act honestly towards the other party').

[136] *Unwin* v *Bond* n 134 above, paras 230, 232, 246-249 ('when acting they must deal fairly and openly with the claimant').

[137] *Yam Seng* n 127 above, 698; *Al Nehayan* n 128 above, para 167; *Bates* v *Post Office* [2019] EWHC 3408 (QB), para 738; *Unwin* v *Bond* n 134 above, para 230 ('they must be faithful to the parties' agreed common purpose as derived from their agreement').

[138] *Astor Management* v *Atalaya Mining* n 135 above, para 98 ('will not conduct itself in a way which is calculated to frustrate the purpose of the contract'); *UTB LLC* v *Sheffield United Limited* [2019] EWHC 2322 (Ch), paras 529-530; *Unwin* v *Bond* n 134 above, paras 246-248 ('they can consider and take into account their own interests but they must also have regard to the claimant's interest').

[139] *Unwin* v *Bond* n 134 above, para 230.

[140] [1895] AC 587.

[141] ibid 594.

[142] B. Pardy, 'Disabusing the Common Law of 'Abuse of Rights': The Only Legitimate Rule Redux' 84 *Supreme Court Law Review*, 2d Series, 201, 222 (2018). This assertion seems more of a normative or ideological statement that was true in fact. Paternalism has always played a role in contract law. See A. Kronman, 'Paternalism and the Law of Contracts' 92 *Yale Law Journal*, 763, 797 (1983) ('Our legal system restricts contractual freedom in many ways and for many reasons. Some of these reasons are paternalistic').

> in English and, more significantly, in American law… In various areas of the law, judges relied on 'functional equivalents' of abuse of rights. In other words, the sociolegal function played by abuse of rights on the continent, ie limiting the amplitude of individual rights and balancing conflicting rights, was performed by a variety of 'malice' tests and 'reasonable user' rules that, although not integrated into a unitary category of abuse of rights, presented a highly similar conceptual pattern.[143]

Joseph Perillo, in his 1995 article 'Abuse of Rights: A Pervasive Legal Concept'[144] traces the principle in American common law. He notes that the doctrine of abuse of right evolved out of French law but that 'the scope and the shape of the doctrine varies from country to country'[145] and that the need for such a doctrine is dependent on how rights are construed in a given legal system.[146] Perillo argues that numerous common law doctrines serve similar purposes as the abuse of right in civil law:

> 'doctrine exists in American law and is employed under such labels as nuisance, duress, good faith, economic waste, public policy, misuse of copyright and patent rights, lack of business purpose in tax law, extortion.'[147]

Perillo then summarizes the types of conduct that abuse of right is directed:

> '(1) the predominant motive for the action is to cause harm; (2) the exercise is totally unreasonable given the lack of any legitimate interest in the exercise of the right and its exercise harms another; and (3) the right is exercised for a purpose other than that for which it exists.'[148]

Oscar Garibaldi notes the common scenarios in which the abuse of right doctrine has been commonly applied:

> (1) A right is abused if the holder exercises it solely to cause harm to another (*solo animo nocendi*); (2) A right is abused if it is exercised in a manner that causes damage to another without any benefit to the holder. This criterion is sometimes used as evidence that the holder acted solely with the intention of causing harm to another, or as a presumption of such an intention; (3) A right is abused if, having a choice between equally beneficial ways of exercising a right, the holder chooses the way that is harmful to others; (4) A right is abused if the holder exercises it in bad faith; (5) A right is abused if the holder

[143] A. Di Robilant, n 114 above.
[144] J. Perillo, n 6 above.
[145] ibid 38.
[146] He notes that the Enlightenment idea of absolute rights is no longer accepted especially in the area of contract rights; ibid 48.
[147] ibid 40.
[148] ibid 47.

> exercises it in a way that causes harm to another to pursue a personal benefit out of all proportion to the harm caused; and (6) A right is abused if the holder exercises it in a manner that contradicts the ends or purposes for which the right has been created or the function that it fulfils.[149]

Perillo correctly notes that abuse of right theory influences courts' interpretation of contract rights. As a justice-based concept abuse of right can be linked to the concept of estoppel 'which appears in the law of contracts, torts, civil procedure and probably in every other field of law.'[150]

An exception to the rejection of a separate abuse of right doctrine in American law is Louisiana, which recognizes the doctrine as a legacy of its French civil law heritage. The Louisiana Supreme Court, in the 1979 case of *Central Gulf Railroad Co* v *International Harvester Co*,[151] recognized the abuse of right doctrine and described it as follows:

> In its origin, the abuse of rights doctrine limited circumstances because its application was applied to prevent the holder of rights or powers from exercising those rights exclusively for the purpose of harming another, but today most courts in civil law jurisdictions will find an act abusive if the predominant motive for it was to cause harm… The doctrine has been applied where an intent to harm was not proven, if it was shown that there was no serious and legitimate interest in the exercise of the right worthy of protection. Protection or enforcement of a right has been denied when the exercise of the right is against moral rules, good faith or elementary fairness. Another criteria, (…) would require an examination of the purpose for which the right was granted. If the holder of the right exercised the right for a purpose other than that for which the right was granted, then he may have abused the right.[152]

It is worth noting that the vagueness of the above scenarios provides courts a great deal of flexibility when applying the doctrine. In fact, the courts have narrowly construed these conditions and will find an abuse of right 'only in limited circumstances because its application renders unenforceable one's otherwise judicially protected rights.'[153] Thus, in practice, abuse of right has been used sparingly.[154] The lack of use of the abuse of right doctrine in Louisiana is an example of the difference between law in books and law in action. The blackletter law recognizes abuse of

[149] O. Garibaldi, n 89 above, 48.

[150] J. Perillo, n 6 above, 52.

[151] 368 So.2d 1009 (La. 1979); see also, *Morse* v *J. Ray McDermott & Co* 344 So.2d 1353, 1369 (La. 1977) ('the exercise of a right [...] without legitimate and serious interest, even where there is neither alleged nor proved an intent to harm, constitutes an abuse of right which courts should not countenance').

[152] ibid 1014.

[153] *Truschinger* v *Pak* 513 So.2d 1151, 1154 (La. 1987).

[154] A. Yiannopoulos, n 117 above, 1197.

right as part of substantive law but the courts rarely apply it.[155]

The 2002 case of *Wagner* v *Fairway Villas Condominium Associates*[156] showed that the doctrine remains relevant. The court restated that the doctrine could be applied in four scenarios: (1) when the predominant motive for exercise of the right is to cause harm; (2) if there is no legitimate motive for the exercise of the right; (3) if the exercise of the right violates moral rules, good faith, or elementary fairness; and (4) if the exercise of the right is for a purpose other than that for which it was granted.[157] It remains true that the scope and the definition of abuse of right remains a subject of debate. But what is clear is that a party who exercises a contractual right for the sake of exercising it to the detriment of the other party must show 'a serious and legitimate interest to justify its exercise.'[158] More importantly, violation of good faith and fairness is only one of the scenarios showing that abuse of right is broader in some areas than the duty of good faith.

Since a breach of good faith and abuse of right only partially overlap, it is not unusual for abuse of right to be used as an alternative cause of action:

> The abuse of rights doctrine provides an alternative cause of action in many factual settings in the contract area. Plaintiffs in Louisiana, having discovered the doctrine, are becoming more creative in its application. Defendants are using the doctrine in defense to a plaintiff's attempt to enforce a contractual right and are asserting claims under the doctrine as counter claims.[159]

Thus, despite similarities, the abuse of right is substantively different from good faith. Good faith standard asks whether a reasonable person would have found the exercise of a right as an act of bad faith. Abuse of right focuses solely on the particulars of a given case to determine if there has been an abuse. Notice the subjectivity found in above scenarios (1) (motive), (2) (no legitimate motive), and (4) (illegitimate purpose). There are not the types of questions that the reasonable person standard is meant to answer. It should also be noted that abuse of right should not be viewed as an equitable principle since equity in the common law sense evolved out of the equity courts, while abuse of right evolved in the law courts. They are both based on issues of justice or fairness but have historically been applied in different ways.[160] Equity focuses almost solely on the harm caused,

[155] cf in Poland as well – while the blackletter provision on abuse of right apparently provides courts with immense power to engage with the parties' rights and duties, they resort to Art 5 of the Civil Code moderately.

[156] 813 So.2d 512 (La. 2002).

[157] ibid 518. See also, *Baronne St Ltd Partnership* v *First Nat'l Bank of Commerce* 543 So. 2d 502, 507 (La. App. 4th Cir. 1989); *Oliver* v *Cent Bank* 658 So.2d 1316, 1321 (La.Ct.App.1995) (four scenarios).

[158] *Illinois Central Gulf Railroad Co* v *International Harvester Co* 368 So.2d 1009, 1014 (La. 1979).

[159] G. Redmann, 'Abuse of Rights: An Overview of Historical Evolution and the Application in Louisiana Contracts' 32 *Loyola Law Review*, 946 (1987).

[160] '[T]he abuse of right is an equitable doctrine in the Aristotelian sense, that is, a correction

while abuse of right often balances the benefits gained by the exercise of a right against the harm caused by the exercise.[161]

a) Balancing Contractual Rights with Contractual Discretion

Lord Greene in *Associated Provincial Pictures Houses Ltd* v *Wednesbury Corporation*,[162] referred to commercial situations where one party has the discretion to alter their relationship with the other. Without a justiciable standard of decision-making, the exercise of that discretion could be abusive:

> The court is entitled to investigate the action of the local authority with a view to seeing whether they have considered matters which they ought not to consider, or conversely, have refused to consider or neglected to consider matters which they ought to consider. Once that question is answered in favour of the local authority, it may still be possible to say that, although the local authority have kept within the four corners of the matters which they ought to consider, they have nevertheless concluded so unreasonable that no reasonable authority could ever have come to it.[163]

The first limb focusses on the decision-making process – whether the right matters have been considered in reaching the decision. The second focusses upon outcome – whether, even though the right things have been considered, the result is so outrageous that no reasonable decision-maker could have reached that decision. The latter is often used as a shorthand for the *Wednesbury* principle.

In *Abu Dhabi National Tanker Co* v *Product Star Shipping Ltd*,[164] the discretion in question was the master or owner's ability to refuse to proceed to any port which, in their discretion, was considered as dangerous. Leggatt LJ stated the following principle in relation to the exercise of a contractual discretion:

> 'the authorities show that not only must the discretion be exercised honestly and in good faith, but, having regard to the provisions of the contract by which it is conferred, it must not be exercised arbitrarily, capriciously or unreasonably.'[165]

The rationale for such a limitation is not grounded in the doctrine of good faith,

of the harshness of the positive law. (...) However, it is incorrect to consider the abuse of right as resort to equity.' A. Yiannopoulos, n 117 above, 1192.

[161] ibid 1194.

[162] [1948] 1 KB 223.

[163] ibid 233-234.

[164] [1993] 1 Lloyd's Rep 397.

[165] ibid 404. See Lord Sumption in *British Telecommunications Plc* v *Telefónica O2 UK Ltd* [2014] UKSC 42, para 37 ('it is well established that in the absence of very clear language to the contrary, a contractual discretion must be exercised in good faith and not arbitrarily or capriciously'); *Braganza* v *BP Shipping Limited* [2015] UKSC 17, para 20; *Bates* v *Post Office* n 137 above, paras 879, 895, 899, 1122(3).

but is implied from the intent and reasonable expectations of the parties.[166] A term can be implied in fact provided that it is necessary to enforce a contract based on the general intent of the parties.

It is fundamentally a matter of construction of the particular contractual provision whether the party has an absolute contractual right or mere contractual discretion. The duty to act in good faith cannot be implied if that would be inconsistent with the express terms of the contract.[167] This would be the case when express terms prescribe in detail how to apply deductions of price or levy contractual penalties.[168] That said, where a party is entrusted with performing a quasi-adjudicative role in the context of conflicting interests, the performance of that role (exercise of right) will be scrutinized by the courts. For example, in *WestLB AG* v *Nomura Bank International Plc*,[169] a fund was to be valued by the calculation agent 'in its sole and absolute discretion.' However, the court held that language was still subject to the requirements of honesty and good faith. If a contractual provision expressly limits or qualifies the way in which a party can exercise a right or perform its obligations, then it is likely that the exercise of contractual discretion is based on a standard of reasonableness or good faith.

How are we to interpret the above limitations on the exercise of contractual discretion? What are the standards that should be imposed in determining the invalidity of exercising a right? The requirements of honesty and good faith suggest that the exercise should not be in furtherance of an ulterior motive.[170] The relevant discretion must not be exercised arbitrarily, capriciously, perversely or unreasonably. However, it seems settled that 'reasonableness' in this context is not analogous to a duty to take reasonable care. In order to overcome a presumption of reasonableness[171] in the exercise of contractual rights, the exercise of discretion must rise to a level above mere reasonableness. For example, if, despite the harm caused by the exercise of discretion, a party is seen as protecting its interests, then the exercise is presumed to be reasonable. Still, in some cases, the exercise may be seen as satisfying the test of honesty, good faith, and rationality.

Courts mainly look at the consequences of the exercise of a contractual

[166] See *Cantor Fitzgerald International* v *Horkulak* [2004] EWCA Civ 1287.

[167] *Bates* v *Post Office* n 137 above, paras 725-726; *Kabab-Ji SAL (Lebanon)* v *Kout Food Group (Kuwait)* [2021] UKSC 48, para 74; *Mackie Motors* v *RCI Financial Services* [2023] EWCA Civ 476, para 56; similarly, an implication of duty of good faith is not necessary if an express term covering given scope is found in place. See Leggatt J. in *Astor Management* v *Atalaya Mining* n 135 above, para 99.

[168] See *Mid Essex* n 120 above.

[169] *WestLB AG* v *Nomura Bank International Plc* [2012] EWCA Civ 495.

[170] *Unwin* v *Bond* n 134 above, para 230 ('they must not use their powers for an ulterior purpose').

[171] *WestLB AG* v *Nomura Bank International Plc* n 169 above (the exerciser of a right is 'entitled to have an entirely proper regard for any danger to itself from valuing too optimistically'); *Lehman Brothers International (Europe) (in administration)* v *ExxonMobil Financial Services BV* [2016] EWHC 2699 (Comm) (non-defaulting party valuing securities is 'entitled to have regard to its own commercial interests').

discretion. However, in *Braganza* v *BP Shipping Limited*,[172] the court referred to standards of reasonableness while employing contractually-granted discretion, specifically in the context of an employment contract. BP's investigation found that Braganza's death had six possible causes and ruled suicide the most likely cause, denying compensation to the widow. The court found that BP had not been unreasonable in the procedure used to make its decision. Lady Hale stated:

> Contractual terms in which one party to the contract is given the power to exercise a discretion, or to form an opinion as to relevant facts, are extremely common. It is not for the courts to re-write the parties' bargain for them, still less to substitute themselves for the contractually agreed decision-maker. Nevertheless, the party who is charged with making decisions which affect the rights of both parties to the contract has a clear conflict of interest. That conflict is heightened where there is a significant imbalance of power between the contracting parties as there often will be in an employment contract. The courts have therefore sought to ensure that such contractual powers are not abused. They have done so by implying a term as to the manner in which such powers may be exercised, a term which may vary according to the terms of the contract and the context in which the decision-making power is given.[173]

In *Lehman* v *ExxonMobil*,[174] the court held that the process where a party solely determines the value of assets in a reposition between sophisticated commercial parties was not a factor. However, the parties' agreement specifically stated the party doing the evaluation shall 'act in good faith and use commercially reasonable procedures in order to produce a commercially reasonable result.' This language allowed the court to analyze the process.

The case law on contractual discretion was summarized by Lord Rix in *Socimer International Bank Ltd* v *Standard Bank London Ltd*.[175] In his conclusion, his Lordship substituted 'irrationality' for unreasonableness:

> It is plain from these authorities that a decision-maker's discretion will be limited, as a matter of necessary implication, by concepts of honesty, good faith, and genuineness, and the need for the absence of arbitrariness, capriciousness, perversity and irrationality. The concern is that the discretion should not be abused. Reasonableness and unreasonableness are also concepts deployed in this context, but only in a sense analogous to Wednesbury unreasonableness, not in the sense in which that expression is used when speaking of the duty to

[172] *Braganza* v *BP Shipping Limited* n 165 above.
[173] ibid para 18.
[174] *Lehman Brothers International (Europe) (in administration)* v *ExxonMobil Financial Services BV* n 171 above.
[175] [2008] EWCA Civ 116.

> take reasonable care, or when otherwise deploying entirely objective criteria: as for instance when there might be an implication of a term requiring the fixing of a reasonable price, or a reasonable time. In the latter class of case, the concept of reasonableness is intended to be entirely mutual and thus guided by objective criteria. ... Lord Justice Law in the course of argument put the matter accurately, if I may respectfully agree, when he said that pursuant to the Wednesbury rationality test, the decision remains that of the decision-maker, whereas on entirely objective criteria of reasonableness the decision-maker becomes the court itself.[176]

Lord Sumption subsequently asserted that rationality has 'played an increasingly significant role in the law relating to contractual discretions, where the law's object is also to limit the decision-maker to some relevant contractual purpose.'[177] This is consistent with *British Telecommunications Plc* v *Telefónica*:[178]

> As a general rule, the scope of a contractual discretion will depend on the nature of the discretion and the construction of the language conferring it. But it is well established that in the absence of very clear language to the contrary, a contractual discretion must be exercised in good faith and not arbitrarily or capriciously. This will normally mean that it must be exercised consistently with its contractual purpose.[179]

English law continues to struggle with the application of open-ended principles such as good faith and abuse of right in its ability to control the use of contractual discretion. The vagueness of such notions remains an obstacle to their application by English common law.[180] In contrast, civilian lawyers have a longer history in applying such terms as principles of community life in Poland. In the end, the use of such principles to prevent injustice does not jeopardize the rule of law. The themes of freedom and corrective justice require the constant balancing of legal certainty and predictability of decisions with flexibility and fairness.

b) Satisfaction and No-Oral Modification Clauses

The open exercise of corrective justice principles has been used in targeted ways involving specific types of clauses. Two examples – satisfaction and no-oral

[176] ibid para 66.
[177] *Hayes* v *Willoughby* [2013] UKSC 17, para 14.
[178] *British Telecommunications Plc* v *Telefónica* n 165 above.
[179] ibid para 37.
[180] Other doctrines that resort to open-ended concepts have already been tamed by tons of cases decided by English courts up to now. See S. Burton, 'Reply to Ewan McKendrick', in L. DiMatteo and M. Hogg eds, *Comparative Contract Law* n 130 above, 221-222 (offer, acceptance, consideration, repudiation); J. Steyn, n 8 above, 434 ('Reasonableness is a familiar concept and no definition is necessary'). Cf P. Davies, n 121 above, 32 ('Good faith is too novel and potentially disruptive to become a default rule').

modification clauses will be discussed here.[181] Satisfaction clauses allow for one of the parties to unilaterally determine the sufficiency of the other party's performance. The courts have policed the abuse of such clauses by disregarding the clear subjective nature of the clause and replacing it with an objective standard. So, the question is not whether the party is satisfied with the performance, as the clause indicates, but whether a reasonable person would be satisfied by the performance.[182] The rationale is that such a right to reject can be used as a loophole out of the contract. To prevent such a bad faith usage of a contractual right, the courts use an objective lens to determine if the performance is satisfactory.[183]

A common clause found in written contracts is the no-oral modification (NOM) clause. Contracts containing a NOM clause can only be amended in writing. The issue is whether a party should be able to use the NOM clause to challenge the effectiveness of a contract's oral amendment. Should the performing party be allowed to resort to equitable doctrines when the modification led to that party incurring additional costs. Under freedom of contract, parties are entitled to consensually impose a duty to observe a written form when amending a contract. But can they subsequently waive the requirement or be deemed to manifest an intention to abolish such term of contract.[184] This issue was considered by the Supreme Court of the United Kingdom in *Rock Advertising Limited* v *MWB Business Exchange Centres Limited*.[185] Lord Sumption held that an oral modification of contract was invalid since the parties had previously agreed that a modification could not be made orally. The court did, however, stipulate that even in such circumstances there may be a need to examine whether premises of estoppel or waiver are met.[186] Interestingly the court found the similarity of good faith, abuse

[181] Other examples include reading the word reasonable into assignment clauses found in commercial leases. The clause gives the landlord sole discretion as to whether a tenant may assign the lease to a third-party. The courts often intervene by asserting that the consent cannot be unreasonably withheld. See *Kendall* v *Ernest Pestana, Inc* 709 P.2d 837 (Cal. 1985). Another example involves exculpatory or exemption clauses, which hold that a party may disclaim liability for acts of negligence but not of gross negligence. Restatement Second § 195(1) ('unenforceable on grounds of public policy'). The difference between negligence and gross negligence is undefinable and is left to the discretion of the court to determine. Finally, equitable principles have been used to prevent the unenforceability or invalidation of contracts due to a lack of a required formality. See Section V below.

[182] See Restatement Second § 228 ('Satisfaction of the Obligor as a Condition'). It notes that the standard for such clauses is either honest or reasonable dissatisfaction. § 228 Comment a). See also, L. DiMatteo, 'The Norms of Contracts: The Fairness Inquiry and the 'Law of Satisfaction' – A Nonunified Theory' 24 *Hofstra Law Review*, 349 (1995) (satisfaction as a contract norm).

[183] See *Misano di Navigazione SpA* v *United States* 968 F.2d 273, 274 (2d Cir. 1992) ('courts generally require performance upon the satisfaction of the reasonable man').

[184] A. Trukhtanov, *Contractual Estoppel* (Abingdon, Oxon; New York: Routledge, 2022), 151-153; *Globe Motors Inc* v *TRW Lucas Varity Electric Steering Ltd* [2016] EWCA Civ 396.

[185] *Rock Advertising Limited* v *MWB Business Exchange Centres Limited* [2018] UKSC 24, paras 10-16; J. Morgan, 'Contracting for Self-denial: On Enforcing: No Oral Modification Clauses' 76 *Cambridge Law Journal*, 589 (2017); J. O'Sullivan, 'Unconsidered Modifications' 133 *Law Quarterly Review* 191, 196-197 (2017).

[186] *Rock Advertising Limited* v *MWB Business Exchange Centres Limited* n 185 above, paras 10-16; *Kabab-Ji* n 167 above, para 74 (a clause demanding construction and interpretation of a

of right, and estoppel.[187]

The *Restatement Second* Section 150 provides a two-fold application – whether modifications need to be in writing under the UCC's statute of frauds provision[188] and whether a written NOM is enforceable. As for the first case, it states that a subsequent oral modification need not be in writing. Comment a) links the case for invalidating NOMs to detrimental reliance (promissory estoppel) found in Section 90. It states that the enforcement of NOMs 'rest(s) on waiver or estoppel.' Grounds for invalidating the clause is where a party relied on the oral modification to its detriment or when the parties had previously made oral modifications without objection.[189] The UCC also recognizes the equitable principle of waiver to enforce oral modifications.[190]

3. Search for Functional Equivalents in Contract Law

Oliver Wendell Holmes Jr stated that a breach of a contractual promise only gives the non-breaching party a right to compensation and nothing more,[191] or put more strongly, parties are free to breach. This is disingenuous given the important role equity played in the development of the common law of contracts. Equity placed justice and fairness as its prime goals at the expense of the strict enforcement of contractual rights. However, by the time of Holmes' declaration, there had been a fusion of equity into law. Instead of two court systems – one in law and one in equity – there remained only one in the law.[192] But fusion or merger does not equate to elimination. Equitable principles have remained part of the common law since the merger of law and equity at the end of the 19th century. The UCC adopts a secular morality by advancing contextual interpretation of contracts[193] where evidence of business custom and trade usage are used to fill in gaps and vagaries in a contract. The UCC also provides the standard definition of good faith

contract in good faith cannot overcome an explicit NOM clause unless case for estoppel is found; 'The only circumstances in which under English law it might be contrary to good faith to rely on a No Oral Modification clause would be where the minimum requirements for an estoppel identified in Rock Advertising were met.').

[187] *Rock Advertising Limited* v *MWB Business Exchange Centres Limited* n 185 above, para 16 ('In some legal systems this result would follow from the concepts of contractual good faith or abuse of right. In England, the safeguard against injustice lies in the various doctrines of estoppel.').

[188] UCC §§ 2-201.

[189] Restatement Second § 150, Comments d) & e). See *Canada* v *Allstate Ins Co* 411 P.2d 517 (5th Cir. 1969) (previous oral modification barred party from evoking the writing requirement).

[190] 'Although an attempt at modification or rescission does not satisfy the requirements of subsection (2) or (3) it can operate as a waiver.' UCC §§ 2-209(4) ('Modification, Recission and Waiver').

[191] O. Holmes, n 115 above, 457, 462.

[192] See n 5 above. There is one glaring exception. The state of Delaware retains the dual system to the present where the Delaware Court of Chancery (Equity) has been the primary creator of American corporate law. See S. Bray, 'The System of Equitable Remedies' 63 *UCLA Law Review*, 538 (2016).

[193] See UCC §§ 1-303 ('Course of Performance, Course of Dealing and Usage of Trade').

including the obligation of 'honesty in fact.' The continued role of equity in contract law can be seen in the UCC's adoption of the doctrine of unconscionability,[194] which was previously found in equity. The role of equity is openly recognized in the UCC, where § 1-103 states that

> 'the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause, supplement [UCC] provisions.'

The unfettered use of freedom of contract to create one-sided contracts remains a core principle in theory, but in practice, there are numerous countervailing principles and doctrines that are used to regulate the abuse of that freedom. The UCC § 102(3) states that:

> 'the obligations of good faith, diligence, reasonableness and care may not be disclaimed by agreement but the parties may by agreement determine the standards by which the performance of such obligations are to be measured if such standards are not manifestly unreasonable.'

So, the general theory of the common law of the strict enforcement of contract rights at the discretion of the right's holders is not absolute. The fact that there is no explicit abuse of right doctrine in Anglo-American law does not mean that such abuse is condoned. Instead, a hodgepodge of various principles, some found in substantive law and others in procedural law, have worked to arrive at similar outcomes to that of the application of the abuse of right doctrine. This section focuses on such principles found in substantive contract law.

a) Promissory Estoppel

Promissory estoppel was initially found in equity law before becoming a substantive doctrine in contract law. It might be resorted to by a promisee in order to prevent a promisor from withdrawing his promise to abstain from strict enforcement of the promisor's rights.[195] This would be the case where there has been a clear and unequivocal promise[196] made with an intention to encourage a promisee's reliance, which actually occurred, and the promisor's renouncing the promise results in inequitable or unconscionable consequences.

The sole aim of the doctrine, similar to abuse of right, is to prevent injustice that offends societal norms. It is most commonly found when an agreement is

[194] UCC §§ 2-302.

[195] *BP Exploration Co (Libya) Ltd* v *Hunt (No 2)* (1979) 1 WLR 783, 810 ('a representation, express or implied, by one party that he will not enforce his strict rights against the other').

[196] Lord Hailsham of St. Marylebone in *Woodhouse AC Israel Cocoa SA* v *Nigerian Produce Marketing Co Ltd* (1972) AC 741, 755-756 ('representations should be clear and unequivocal').

unenforceable due to a missing element of contract formation such as a lack of consideration[197] or a lack of a required formality (writing) prescribed by the statute of frauds.[198] In a hypothetical, an ailing woman reaches out to her niece and promises to leave the niece her home if the niece moved her family to the aunt's home.[199] The niece agreed and provided care to the aunt for ten years until the aunt's death. Subsequently, other nieces and nephews made a lawful claim to pro rata shares of the aunt's estate including the homestead. Any transfer of land needs to be executed in writing (statute of frauds). Since there was no written contract between the niece and the aunt, the oral agreement was not enforceable. In such a case, the court would use promissory estoppel as a defense to prevent the statute of frauds argument from being made. The agreement would, then, be enforced as a valid contract with the niece obtaining full ownership of the property.

Promissory estoppel is recognized in the *Restatement Second* under the term detrimental reliance. Section 90 states that the courts may provide a remedy where:

> 'A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.'[200]

In American law, unlike English law, this provision has been interpreted to mean that promissory estoppel not only can be used as a defense but also as an independent cause of action.[201]

Thus, the offensive use of promissory estoppel would be available if we changed the above hypothetical. Suppose, after taking care of the aunt for ten years at great costs (such as not being able to work outside the home) and inconvenience, the aunt reneges on her promise and soon before her death, ejects her niece and family from the home. This, then, becomes a case of enforcement of a non-contractual promise, that is, a promise that is not part of a binding contract. In the modified hypothetical, the aunt had made a promise, the niece reasonably relied upon it, and

[197] *Central London Property Trust Ltd* v *High Trees House Ltd* (1947) KB 130; *Collier* v *P & MJ Wright (Holdings) Ltd* (2008) 1 WLR 643.

[198] *Yaxley* v *Gotts*, (2000) Ch 162; *Actionstrength Ltd* v *International Glass Engineering SpA* (2003) 2 AC 541. See Section V below.

[199] For an illustration of this hypothetical see *Burns* v *McCormick* 233 NY 230, 135 NE 273 (1922).

[200] Restatement Second § 90(1). Similarly in the Section 90 Restatement (First) of the Contracts of 1932.

[201] *Hoffman* v *Red Owl Stores, Inc* 133 N.W.2d 267 (Wisc. 1965); *Wheeler* v *White*, 398 SW2d 93 (Tex. 1965); *Peterson Tractor Co* v *Orlando's Snack-Mobile Corp* 270 Cal App 2d 787, 76 Cal. Rptr. 221 (Cal. 1969); R. Barnett and M. Becker, 'Beyond Reliance: Promissory Estoppel, Contract Formalities, and Misrepresentations' 15 *Hofstra Law Review*, 489-491 (1987); S. Henderson, 'Promissory Estoppel and Traditional Contract Doctrine' 78 *Yale Law Journal*, 358 (1969); M. Metzger and M. Phillips, 'Promissory Estoppel and the Evolution of Contract Law' 18 *American Business Law Journal*, 173 (1980).

injustice would be done if the promise is not enforced. So, does the niece get the home? This is unlikely since American common law only provides for the granting of reliance damages (out of pocket expenses) for claims of promissory estoppel. A court could try to calculate the niece's expenses, such as the costs of moving and the out-of-home income she would have earned if not caring for her aunt. It could then order that amount to be paid out of the aunt's estate before further distribution of her assets. If the amount owed under reliance damages is close to the value of the home, then a court could order the transfer of the home to the niece.[202]

The above hypotheticals can be framed in the language of abuse of right. In the first case, the exercise by the other nieces and nephews of their rights on the home could be considered an abuse, especially in the scenario where they had not developed relationships with the deceased aunt and failed to care for her in anyway. In the second case, the aunt's right to revoke her promise given to the niece would be an abuse.

b) Other Estoppel Doctrines

Estoppel is frequently mentioned as the most prominent piecemeal solution to fill the gap that, in the continental legal tradition, is occupied by the doctrines of abuse of right and good faith. There are various species of estoppel which distinguish themselves as to premises and consequences of their application.[203] As a group, estoppel doctrines are intended to protect a party who, by acting (or omitting to act) in reliance on another's promise, representation, or conduct, would suffer harm, if the other party were to behave inconsistently to the reasonable expectations of the parties.

The terminology and classification of the numerous types of estoppels remain unsettled.[204] Even within the same jurisdiction, scholars and practitioners use the same labels for different species of estoppel. For example, typical member of this family – promissory estoppel – is sometimes referred by English as equitable estoppel.[205] That latter name, in turn, is used by Americans to identify doctrine which English call estoppel by representation.[206] English species of estoppel by convention and proprietary estoppel are treated by Americans as belonging to a

[202] cf English cases where proprietary estoppel was successfully applied to enforce informal testamentary dispositions include *Re Basham* (1986) 1 WLR 1498; *Thorner* v *Major* (2009) 1 WLR 776. See n 269 below.

[203] K. Lindgren, 'Estoppel in Contract' 12 *New South Wales Law Journal*, 153 (1989) (estoppel in law and equity).

[204] Lord Walker in *Thorner* v *Major* n 202 above ('the terminology and taxonomy of this part of the law are far from uniform').

[205] M. Chen-Wishart, n 129 above, 145 (equitable estoppel or forbearance in equity).

[206] T. Anenson, 'From Theory to Practice: Analyzing Equitable Estoppel Under a Pluralistic Model of Law' 11 *Lewis & Clark Law Review*, 633 (2007) (equitable estoppel is based on principles of ethics and morality); H. McClintock, *Handbook of Equity* (Saint Paul, MN: West Publishing Company, 1936), 44 (equitable estoppel falls within the family of equitable defenses).

broader concept of promissory estoppel covered by Section 90.[207]

Still, English estoppels can be divided into two groups, formal and reliance-based, depending on the relevance of protected party's reliance.[208] The formal estoppels include estoppel by record and estoppel by deed, and reliance-based estoppels include estoppel by representation, promissory estoppel, estoppel by convention, and proprietary estoppel. The first three estoppels are found in procedural law,[209] while the latter three are doctrines of substantive law, operating mainly in the areas of contract, property, and succession. It is the reliance-based estoppels that are the subject of this undertaking.

One of the oldest in the family, estoppel by record, prevented a party to an already concluded litigation from acting inconsistently with a final court judgment, such as re-arguing its outcome or issues that had been already established in the court's record.[210] Under American law, such cases would be covered by broader doctrines such as judicial estoppel or collateral estoppel.[211] In estoppel by deed, a party is prevented from raising an argument that is inconsistent with representation he or she has previously made in a deed.[212]

Estoppel by representation prevents counterfactual arguments that contradicted common knowledge and previous representations made by the party.[213] It prohibits

[207] Cases of expenditure on another's property, in England referred to as estoppel by acquiescence, which is proprietary estoppel's subspecies, would be qualified in the US as quasi-estoppel (estoppel by acquiescence, by election, by acceptance of benefits). See T. Anenson, 'The Triumph of Equity: Equitable Estoppel in Modern Litigation' 27 *The Review of Litigation*, 377, 394 (2007), or even, as an instance of unjustified enrichment covered by Section 27 of the Restatement of the Law (Third) Restitution and Unjust Enrichment (2011); R. Stevens, *The Laws of Restitution* (Oxford: Oxford University Press, 2023), 269-288 (claims that the scope of proprietary estoppel's application shall be limited in England in favor of unjust enrichment).

[208] See M. Barnes, *The Law of Estoppel* (Oxford; New York: Hart Publishing, 2020), 7; S. Bright and B. McFarlane, 'Proprietary Estoppel and Property Rights' 64 *Cambridge Law Journal*, 452 (2005); K. Handley, 'Further Thoughts on Proprietary Estoppel' 84 *Australian Law Journal*, 242-243 (2010).

[209] Their common denominator is that they prevent an estopped party from proving certain circumstances in a lawsuit. See A. Burrows, n 120 above, 80-81 (contractual estoppel as a rule of evidence as well); P. Keane, *Estoppel by Conduct and Election* (London: Sweet & Maxwell, 2023), 6-8.

[210] A statement in an official court record is presumed to be true, that is, a party is estopped from challenging the veracity of the statement. See, W. Sloan, 'Iowa Law on Estoppel by Record and Estoppel 'In Pais' ' 17 *Iowa Law Review*, 472, 472 (1932) (records in judicial proceedings 'are deemed conclusively to speak the truth'). See, eg *Kramer* v *Kramer* 68 Iowa 557, 27 NW 757 (1886) (a party is estopped from making a statement that is inconsistent to his sworn pleading in a previous case).

[211] T. Anenson, 'The Triumph of Equity' n 207 above, 394.

[212] Lord Mansfield in *Goodtitle d. Edwards* v *Bailey* (1777) 2 Cowp. 597, 601 ('No man shall be allowed to dispute his own solemn deed.'). A party cannot challenge the truth of recitals in a deed it has given. See eg *Yaali Ltd* v *Barnes & Noble, Inc* 269 Ga. 695, 697(2), 506 S.E.2d 116 (1998) (a grantor deeded a portion of land that it did not own but later acquired; the grantor is estopped in claiming the first deed was invalid).

[213] See eg *Mears Ltd* v *Shoreline Housing Partnership Ltd* [2016] EWHC 1235 (TCC). This was a case of a long-term supply contract, in which the parties subsequently orally agreed that the price would be determined by reference to a composite index. The court held that despite the existence of an entire agreement clause in the original contract, the party was estopped from contesting their subsequent representation. See also, *Jorden* v *Money* (1854) V HLC 185; *Steria*

a party from denying their own unambiguous statement or representation of facts.[214] This would apply in cases where the previous representation was given so that the other party would rely upon it, the other party did rely on it, and would suffer a detriment,[215] if the representor were free to withdraw its early representation. Estoppel by convention, unlike the above estoppels that rest on a statement of a single party, focuses on an assumption or practice held by both parties.[216] It prevents one of them, from contesting the assumed basis for their earlier dealings, where such a rejection would be unconscionable.[217]

The label of proprietary estoppel comes from its link to transactions involving real property. It assists a party who has relied on another one's conduct and incurred expenses regarding a piece of real property.[218] If a party relies on another's promise as to property rights, the promisor is estopped from challenging its own promise if that would result in unconscionable consequences.[219] Courts divide proprietary estoppel into two categories: estoppel by acquiescence and estoppel by encouragement. In estoppel by acquiescence, an owner consciously remains silent while another party makes improvements to its property. The owner may

Ltd v *Ronald Hutchison* (2007) ICR 445. In the US law, this would be referred to as equitable estoppel; T. Anenson, 'The Triumph of Equity' n 207 above, 384.

[214] Today this estoppel's scope has reached also representations concerning existing law: *Briggs* v *Gleeds* [2015] 1 Ch 212, paras 33-34. In *Shah* v *Shah* [2001] EWCA Civ 527, paras 30, 33, defendants were estopped to state that particular deeds were invalid. Pill LJ. opined that a witness who, by signing a document, certified that it was present when defendants had signed a document as a deed (a representation of fact), could not testify that their signatures were actually made at a different moment, and therefore the document was not a duly drafted deed, after another party (a representee) relied on representation and would suffer detriment because of the deed's invalidity. To the contrary, one cannot refer to estoppel if from the face of a deed it is visible that it does not comply with the statute of frauds (*Briggs*, above, paras 43, 52).

[215] M. Barnes, *Law of Estoppel* n 208 above, 294 (emphasizes unconscionability as a premise of this estoppel).

[216] Lord Bingham in *Norwegian American Cruises A/S (formerly Norwegian American Lines A/S)* v *Paul Mundy Ltd, The Vistafjord* (1988) 2 Lloyd's Rep 343, 350; Lord Steyn in *Republic of India and Another* v *India Steamship Co Ltd (No 2)* (1998) AC 878, 913 ('it is settled that an estoppel by convention may arise where parties to a transaction act on an assumed state of facts or law, the assumption being either shared by them both or made by one and acquiesced in by the other'.).

[217] In cases where the parties developed a course of performance or dealing, the parties are estopped by convention from arguing the contract was otherwise. In the *Mears*, n 213 above, the party that had made numerous payments based on a composite index was estopped from challenging it as contrary to the contract. This is similar to estoppel by waiver. See *Amalgamated Investment & Property Co Ltd* v *Texas Commerce International Bank Ltd* (1982) QB 84, 122 (Lord Denning); *Springwell Navigation Corp* v *JP Morgan Chase Bank* (2010) EWCA Civ 1212, paras 177-178; M. Spence, *Protecting Reliance. The Emergent Doctrine of Equitable Estoppel* (Oxford; Portland, Oregon: Hart Publishing, 1999), 50.

[218] *Sledmore* v *Dalby* (1996) 72 P&CR 196, 207. Proprietary estoppel is similar to promissory estoppel but only pertains to interests in real property and could be used as an independent cause of action.

[219] *Gillett* v *Holt* (2001) Ch 210, 225 ('all elements of the doctrine were permeated by the fundamental principle that equity was concerned to prevent unconscionable conduct'); Lord Briggs in *Guest* v *Guest* [2022] UKSC 27, para 94: 'aim remains what it has always been, namely the prevention or undoing of unconscionable conduct'.

be estopped from claiming its rights later. In turn, estoppel by encouragement involves a party making the improvements based upon the promise of future ownership. If so, the owner would not be allowed to act inconsistently and claim that relevant rights did not pass.[220]

English law recognizes the concept of contractual estoppel, which American law would recognize simply under the more general principle of equitable estoppel.[221] In English law, contractual estoppel is applied in a number of situations such as determining the enforceability of merger or entire agreement clause. These clauses are found in most written contracts and seek to exclude the admission of any evidence relating to the negotiation of the contract, including representations of the parties or preliminary agreements. The courts will often exclude evidence of innocent or negligent misrepresentations but will invalidate the merger clause from excluding intentional or fraudulent misrepresentations that the other party believed to be true.[222] In order to avoid contractual estoppel, a contract may also include a non-reliance clause that states the parties did not rely on the representations of the other party, whether fraudulent or not. Again, some courts have used contractual estoppel to limit the scope of the non-reliance clause to innocent and negligent misrepresentations but not fraudulent ones. That said, courts have used contractual estoppel to prevent parties from challenging the facts which were the basis of the contract. Thus, if both parties agreed to what the facts were, which later are shown to be false, they are not allowed to present evidence of the true facts.[223] Again, this would not be the case where one of the parties fraudulently misrepresented the facts.

In English law, a majority of estoppels, including promissory estoppel and estoppel by convention are purely defensive in nature. Therefore, they can only be used as a defense to a claim and not as the basis for a cause of action.[224] However, proprietary estoppel can stand as an independent cause of action.[225] In the US, the Section 90 allows the use of promissory estoppel as an independent cause of action.

The rationale for the different varieties of estoppel might be found in the consistency principle. The integrity of the legal system is based upon the consistency

[220] See *Taylors Fashions Ltd* v *Liverpool Victoria Trustees Co Ltd*, *Old & Campbell Ltd* v *Liverpool Victoria Friendly Society* (1982) QB 133; *Thorner* v *Major* n 202 above; Lord Briggs of Westbourne, 'Equity in Business' 135 *Law Quarterly Review*, 564, 571 (2019); B. McFarlane, *The Law of Proprietary Estoppel* (Oxford; New York: Oxford University Press, 2nd ed, 2020); B. McFarlane and P. Sales, 'Promises, Detriment, and Liability: Lessons from Proprietary Estoppel' 131 *Law Quarterly Review*, 613 (2015); Lord Neuberger, 'Thoughts on The Law of Equitable Estoppel' 84 *Australian Law Journal*, 230-232 (2010).

[221] See generally, L. DiMatteo, *Principles* n 20 above, 274-276.

[222] *Lowe* v *Lombank* [1960] 1 WLR 196.

[223] *Peekay Intermark* v *Australia and New Zealand Banking Group* [2006] EWCA Civ 386; *First Tower Trustees* [2018] EWCA Civ 1396. See also J. Braithwaite, 'The Origins and Implications of Contractual Estoppel' 132 *Law Quarterly Review*, 120 (2016).

[224] See Lord Denning in *Combe* v *Combe* (1951) 2 KB 215, 218-219.

[225] See *Crabb* v *Arun DC* (1976) Ch 179, 187; *Guest* v *Guest* n 219 above, para 138 ('estoppel is a negative and essentially defensive legal principle'); M. Barnes, 'Estoppels as Swords' *Lloyd's Maritime & Commercial Law Quarterly*, 380 (2011).

of the judicial process and its outcomes. So, for example, in the area of covenants not-to-compete, a company brings a claim against an ex-employee and her new employer for breaching a covenant not-to-compete. The new employer argues that the covenant is invalid because it is overly restrictive. The new employer may be estopped from making the argument if it is shown that it uses the same or more stricter covenants.[226] Otherwise the integrity of the judicial system would be compromised if a clause is enforced in one case and the same clause is invalidated in another. The principle of consistency in the civilian legal tradition is called *venire contra factum proprium* ('to come against one's own act'), which holds one prevented from contradicting their previous actions or statements, similar to estoppel by representation or promissory estoppel.[227] However, in Anglo-American case law, the emphasis on consistency as a function of estoppel is rare.[228]

c) Duty of Good Faith

The impetus for the open recognition of an implied duty of good faith was the adoption of the UCC in the 1960s. Section 1-304 states that: 'Every contract or duty imposes an obligation of good faith in its performance and enforcement.' Thus, parties operate under a good faith obligation in enforcing their contractual rights. Subsequently, the drafters of the *Restatement Second* adopted the UCC's recognition of an implied duty of good faith in all common law contracts.[229] Although undefinable, a number of factors have been associated with the exercise of good faith, including faithfulness to an agreed common purpose, consistency with the justified expectations of the other party, honesty in fact, and observance of reasonable commercial standards.[230]

The duty of good faith and abuse of right, both found in civil law, are different principles in that they are sometimes applied to different fact scenarios. But, in fact,

[226] T. Anenson, 'The Role of Equity in Noncompetition Cases' 42 *American Business Law Journal*, 1 (2005).

[227] H. Beale et al, *Contract Law* (Oxford; New York: Hart Publishing, 2019), 366 (estoppel by representation); W. Dajczak, 'Venire contra factum proprium nemini licet – Changing Fortunes of the Maxim Demanding Constancy in Conduct' *Forum Prawnicze*, (3), 33 (2019); D. Snyder, 'Comparative Law in Action: Promissory Estoppel, the Civil Law, and the Mixed Jurisdiction' 15 *Arizona Journal of International and Comparative Law*, 705 (1998) (estoppel by representation); Court of Appeal in Warsaw 18 March 2014, I ACa 1463/13.

[228] T. Anenson, 'The Triumph of Equity' n 207 above, 384 (the US law); E. Cooke, *The Modern Law of Estoppel* (Oxford; New York: Oxford University Press, 2000), 32, 107 (English law).

[229] Section 205 states: 'Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.' In Louisiana, the duty of good faith in the law of obligations is expressed in Art 1759 of the Louisiana Civil Code, available at https://lcco.law.lsu.edu/ (last visited 31 January 2026).

[230] UCC § 1-201 defines good faith as 'honesty in fact and the observance of reasonable commercial standards of fair dealing.' See *Northwest, Inc* v *Ginsberg* 572 US 273 (2014) (federal statute did not pre-empt application of duty of good faith); E.A. Farnsworth, *Contracts* (Boston: Little, Brown, 1990), 580; Id, 'Good Faith in Contract Performance', in J. Beatson and D. Friedmann eds, n 91 above, 155.

they overlap in most cases since an act of abuse of one's right can be considered as a bad faith act. The lack of recognition of the abuse of right in American common law is likely due to its recognition of the doctrines of good faith and unconscionability, which are used to achieve the same outcomes. This argument cannot be used in relation to English common law which rejects broad principles such as good faith and unconscionability.

Abuse of right and good faith can be used to scrutinize acts related to the exercise of contractual discretion as discussed above such as when a contract gives one party the right to make a unilateral decision affecting other party.[231] In such instances, what are the limits, if any, on the exercise of such contractual right or discretion? Initially, the courts seek the answer by interpreting the language of the specific provision. The path to a just outcome in civil law is simpler through the application of abuse of right. The terminology in common law is more attenuated. The court in *Socimer International Bank Ltd* v *Standard Bank London Ltd* simply stated that 'discretion should not be abused.'[232] However, while good faith is an objective determination (reasonable person's standard), abuse of right expands the use of good faith to include subjective bad faith. In this way, an exercise of a clear contractual right may be voided based on a subjective state of mind, purpose, or motive to do harm.

In the end, the common law, especially in England, takes a piecemeal approach to ensuring contractual justice. It does not recognize a general principle of good faith, yet uses the language of good faith in its decisions.[233] It does not recognize the principle of unconscionability, yet uses the phraseology of unreasonable and unconscionable bargain or conduct in its decisions. The difference between recognition as a general principle and its use in judicial decisions is a matter of degree. Put simply, 'equitable intervention is much narrower and targeted in English law.'[234] Chen-Wishart and Dixon describe the current status of good faith in English law as follows:

> Good faith obligation is given concrete form in more specific doctrines, imposing greater obligations of disclosure during negotiations or performance, and greater *restrictions on the exercise of contractual rights* in performance or enforcement, such as discretionary powers or the election to terminate or affirm a contract on breach. For example, there is an implied-in-fact duty to cooperate, implied limits on the exercise of discretionary powers and the

[231] See above Section IV.2.a).

[232] [2008] EWCA Civ 116.

[233] 'English decisions apply gradually escalating obligations of honesty, fair dealing, and respect for the contractual purpose' depending on the type of contract. M. Kumar and M. Heidemann, 'Contract Law in Common Law Countries: A Study in Divergence' 43 *Liverpool Law Review*, 133, 139 (2022). See M. Chen-Wishart and V. Dixon, 'Good Faith' n 132 above.

[234] Y.K. Liew and D. Yu, 'The Unconscionable Bargains Doctrine in England and Australia: Cousins or Siblings?' 45 *Melbourne University Law Review*, 1, 35 (2021).

requirement of reasonable notice to incorporate onerous or unusual terms in unsigned documents.[235]

Much of this covert movement towards recognizing abuse of right is to respond to the contract law paradigm that assumes the context of relative equal parties negotiating at arm's-length.[236] This is an outdated paradigm in an age where power and informational asymmetries are more pronounced. Chen-Wishart and Dixon further argue that good faith is needed to protect the institution of contract law because it is 'mechanism of contract to cannibalize its own constitutive rules; restraining the freedom to engage in opportunistic and exploitative conduct protects the institution of contract.' Unconstrained freedom of contract allows parties to write one-sided contracts filled with abusive terms. It is essential that contract law regulates such behavior through general principles. Common law's recognition of the abuse of right doctrine would provide a better ability to manage the abuse of contract rights in the age of digital contracting.[237]

V. Formality and Fairness

The other scenario, in which abuse of right and equitable principles are used, is in the area of contractual formalities. Contract law prescribes the use of formalities[238] to caution and alert parties to the seriousness of their undertakings.[239] Formalities evidence the entry into legally binding obligations. Ignorance of required formalities results in a promisee losing otherwise meritorious claim for damages due to the other party's breach of its promises. Over the centuries, the role of formalities has diminished in importance as their function has been questioned. The common law 'seal' provided that a promise could be made enforceable by simply placing a seal on the document. The power of the seal was eliminated as an alternative means to contract formation in the 20th century.[240]

[235] M. Chen-Wishart and V. Dixon, 'Good Faith', in M. Chen-Wishart and P. Saprai eds, *Research Handbook on the Philosophy of Contract Law* (Cheltenham: Edward Elgar Publishing, 2025) (emphasis added).

[236] See H. Beale, *Chitty on Contracts* (London: Sweet & Maxwell, 33rd ed, 2020) 1-053-54A, 2-123, 2-146; M. Arden, n 132 above, 29.

[237] See S. Becher and U. Benoliel, 'Sneak in Contracts' 55 *Georgia Law Review*, 657 (2021) (problem of ex post consent to unilateral modifications); Eidem, 'Hidden Contracts' 49 *Brigham Young University Law Review*, 307 (2023) (hidden contracts as consumer form contracts that corporations unilaterally modify); Eidem, 'Dark Contracts' 64 *Boston College Law Review*, 55 (2023).

[238] E. Allen Farnsworth explains formalities as things that concern the form in which contracts are made and not to the substance of the actual agreement. E.A. Farnsworth, *Farnsworth on Contracts* (New York: Aspen Publishers, 2004) vol 2, para 2.16.

[239] See L. Fuller, 'Consideration and Form' 41 *Columbia Law Review*, 799 (1941) (asserting that formalities serve three functions: cautionary, channeling, and evidentiary).

[240] The seal in the Middle Ages consisted of wax with the imprint designating the party. The actual document need not be signed. In modern times all that was required was marking the document with L.S. for the Latin term *locus sigilli* or place of the seal. The seal requirement was

Formality requirements aim to provide security and certainty for legal transactions. They aim to caution and alert parties when they are about to incur binding obligations.[241] For example, the statute of frauds provides that certain types of legal transactions need to be in written form. Perhaps the most important group of transactions requiring a writing are those involving real estate.[242] On the other hand, non-compliance with a required formality may be used opportunistically by the promisor. Well into the performance of their agreement, a party may renege on its promises by asserting that there never was a binding contract due to lack of a formality. Anglo-American law developed various doctrines of estoppel to prevent such unjust acts.

1. Role of Formality in Civil Law

In Poland, the principle of freedom of contract is recognized as the cornerstone of contract law. This includes the freedom to choose the form in which a contract is concluded. Numerous exceptions are provided for by legislation that requires certain contracts to be in written form. In this respect, Polish law distinguishes three possible schemes: a relevant formality may be required by the statute under pain of nullity of the contract (*ad solemnitatem*),[243] not producing additional effects which parties intended to achieve (*ad eventum*),[244] or inadmissibility of evidence (*ad probationem*).[245] These formalities may be extended by parties such as in case of excluding oral modifications (NOM clause).[246]

Under the first category (*ad solemnitatem*), all transactions dealing with real property require a notarial deed.[247] If the statute requires a notarial form as in the case of deed or a mere notarial certification of a personal signature, then the transaction is null and void for failing to conform to an *ad solemnitatem* requirement. Under *ad eventum*, a legal act, usually a contract, that is missing a relevant formality is deemed valid as a whole, but a particular clause, for the sake of which a statute requires formality, is invalid.[248] In the case of *ad probationem*,

discarded in the UCC. See UCC § 2-203 Comment.

[241] *Farrar* v *Miller* (2018) EWCA Civ 172, para 43 ('it is comprehensible for Parliament to have intended to increase certainty in contractual dealings by imposing formalities requirements'); Lord Leggatt in *Guest* v *Guest* n 219 above, para 107 ('reason for requiring such formality is to make sure that the consent was genuine and intended to create a legal obligation.').

[242] See PCC Arts 158 & 245(2); The Law of Property (Miscellaneous Provisions) Act 1989 chapter 34, section 2(1) (England); Restatement Second § 110(1)(d) (the US law).

[243] PCC Art 73 (2).

[244] ibid

[245] PCC Arts 73(1) & 74.

[246] PCC Arts 76 & 77(1).

[247] PCC Arts 158 & 245(2). A notarial deed in continental Europe is drawn up by a specialized lawyer-notary who acts as a public officer unlike the common law where a deed can be given privately. In Poland notarial deed is also required for an act of donation (PCC Art 890). In England, since a donation lacks consideration, a donative deed is recognized.

[248] A lease of a real property for duration of one year or more if not concluded in writing is deemed to last for an unspecified period, which allows termination without cause (PCC Arts 660 &

a non-compliance with a formality results in inadmissibility of evidence from the examination of parties themselves or witnesses. If the statute prescribes a written, documentary, or electronic form[249] then a non-compliance is penalized by *ad probationem* sanction. In such cases, the contract in question is valid but a claimant might face obstacles to prove their rights if a defendant raises a defense of statute of frauds to exclude relevant extrinsic evidence.[250]

a) Abuse of Right and Invalidity

In Poland, the use of abuse of right to prevent injustice in land sales that were null and void for not conforming to the statute of frauds has a volatile history. During the communist era (until 1989), many people did not have the documents necessary to formally transfer real estate and, therefore, were unable to meet formality requirements. Above all, many people were afraid of the communist authorities. These deemed entering into a contract for a sale of real estate as a proof that a seller and a buyer were wealthy, which could cause a lot of problems. Under such conditions, informal agreements were often concluded, the consequence of which any transfer was considered as only passing a factual possession but not an ownership title. Still, it was not known how long individual ownership would be maintained in Poland and that ambiguity resulted in a decrease of land's value.[251] When individual ownership was subsequently validated by communist party, previous owners reclaimed their titles since the transfer by informal agreements was not a transfer of ownership. Courts applied the principles of community life to protect informal buyers against sellers abusing their right. However, in the early 1960s, the law changed to further restrict the sale of agricultural property. Only farmers having particular agricultural certifications could be buyers.[252] Since then, informal buyers could be protected only temporarily – they kept possession so long until they harvested crops.[253] This was rectified by a 1971 law, by means of which land in their possession was *ex lege* (by virtue of law) transformed into legal ownership.[254] As a result, the cases where informal buyers prevailed over sellers

673). Under English law lease of premises for more than three years needs to be in written form (deed) under The Law of Property Act 1925 chapter 20, paras 52(1), 52(2)d, 54(2)). However, equitable doctrine of *Walsh* v *Lonsdale* (1882) 21 Ch.D. 9 remains applicable. It allows for the creation of an equitable lease.

[249] PCC Arts 77(2)-78(1).

[250] This *ad probationem* regime is not applicable in case of commercial dealings between businessmen (Art 74, para 4). The inadmissibility of proof is excluded if a contract's conclusion is made plausible by means of another document (Art 74, para 2), such as an e-mail or chat.

[251] A. Rudzinski, 'Sovietization of Civil Law in Poland' 15 *The American Slavic and East European Review*, 214, 235-243 (1956); W. Wagner, 'Equity and its Socialist Equivalent in the Polish Legal System' *The Polish Rev*iew, (3-4), 106, 110-122 (1974).

[252] The Restriction on Division of Agricultural Holdings Act 1963 (Journal of Laws of 1963, no 28, item 168).

[253] The Supreme Court 11 September 1961, I CR 693/61, *Orzecznictwo Sądów Powszechnych i Komisji Arbitrażowych*, item 290 (1962).

[254] The Regulation of Ownership of Agricultural Holdings Act 1971 (Journal of Laws of 1971,

on the basis of doctrine of abuse of right became a rarity and then vanished.[255]

Today, resorting to the doctrine of abuse of right when another party pleads non-compliance with statute of frauds depends on the applicable formality. A court may hold a contract null and void by the operation of law if it fails to comply with the statute of frauds (ad solemnitatem scheme) or find a contract merely not provable. In the former case, where invalidity is involved, the reference to Art 5 of the Civil Code, and thus resort to the doctrine of abuse of right, is excluded. It is pointed out that the other party, while drawing attention to the statute of frauds, is not exercising its right at all, and therefore he or she cannot abuse it. The contract is void by force of law and not invalidated (voided) in result of a party's exercising a right.[256]

The raising a plea of nullity as a result of non-compliance with the statute of frauds has been rejected in certain types of cases including when the party making the assertion had previously assured the other that the required formality had been complied with, that it would be implemented in future, or that it would not evoke the statute of frauds as a defense.[257] This is the field of application of the principle of *venire contra factum proprium*[258] that prevents inconsistent conduct.

Where the contract is affected by *ad probationem* non-compliance, so evidence is barred due to statute of frauds, courts allow pleas under Art 5.[259] Where the contract is not invalidated, the defense of statute of frauds is deemed to be an exercise of a right which, in turn, allow courts to evaluate whether its exercise is consistent with principles of community life or considered an abuse of right.

b) Abuse of Right and No-Oral Modification Clauses

Contracts containing a 'no oral modification' (NOM) clause can only be amended in writing, and not orally. Nevertheless, in exceptional cases, claiming the ineffectiveness of an amendment may be regarded as an abuse of right. In one case, an agent was delivering services to a corporation on the basis of commission

no 27, item 250); the Supreme Court 23 June 1980, III CRN 97/80.

[255] The Supreme Court 22 May 1970, III CRN 122/70.

[256] The Constitutional Tribunal 17 October 2000, n 42 above, 1218; the Supreme Court 15 December 2022, II CSKP 335/22 (though not the invalidity itself, the invocation of particular rights that arise as a consequence of statutory invalidity might be analyzed from the perspective of Art 5).

[257] It should be noted that earlier court decisions made in Germany in cases where these were buyers who seek a transfer title were rejected in favor of a payment of damages on the basis of § 826 BGB and doctrine of *culpa in contrahendo* (bad faith negotiations). In later cases, the ownership of the real property was granted on the basis of § 242 BGB (good faith), if the buyer would be unduly harmed. See K. Zweigert and H. Kotz, *An Introduction to Comparative Law* (Oxford: Clarendon Press, 2011), 375-376.

[258] M. Grochowski, 'Venire contra factum proprium a zaufanie i 'słabość sytuacyjna' ' ('Venire contra factum proprium, reliance and 'situational weakness'') in M. Boratyńska ed, *Ochrona strony słabszej stosunku prawnego. Księga jubileuszowa ofiarowana profesorowi Adamowi Zielińskiemu* (*Protection of the Weaker Party in a Legal Relationship. Book dedicated to professor Adam Zieliński*) (Warszawa: Wolters Kluwer, 2016), 179-180.

[259] The Court of Appeal in Cracow 2 December 2016, I ACa 977/16.

payments.[260] When a corporation announced that the agent commission's rate had to be reduced, the agent did not contest that change and had been issuing invoices with the new reduced rate for more than a year. Notwithstanding a NOM clause in their contract, the amendment was not put in writing. After the contract was later terminated by the corporation, the agent sued for the higher remuneration specified in the contract. The court asserted reduction of the fee in the amendment was ineffective due to non-compliance with the NOM clause. However, it dismissed the claim since the agent received the reduced payments during a considerable period of time and held that the corporation could rely on the agent's silence without formalizing the amendment in a writing. Therefore, the agent's seeking the higher remuneration was an abuse of right.

2. Formality under Anglo-American Law

As discussed above, in the Anglo-American law, the requirement of formalizing oral agreements into writing is referred to as the statute of frauds. It was codified in English statutory law in 1677,[261] requiring certain agreements to be made in writing for them to be enforceable.[262] Part of the original statute – concerning promise made by a surety – is still applicable in contemporary England, while remaining provisions were gradually eliminated. Contracts related to real estate transfers also need to be in writing. The statute of frauds' scope in American law is broader. Most states have statutes that list the type of contracts that need to be in written form. For example, the New York statute requires writing for contracts not enforceable within one-year, guarantees and suretyships, prenuptial agreements, real estate transactions, and wills and trusts.[263] Where the US and English law diverge is that Art 2 of the American Uniform Commercial Code requires a writing in sale of goods contracts in excess of $5,000. English sales law does not require such a writing.[264]

The availability of equitable doctrines is rooted in legal history. In the 17th century England, the Statute of Frauds was intended to prevent jurors from being misled by unscrupulous parties through false testimony. Trial by jury was only

[260] The Supreme Court 26 January 2023, II CSKP 817/22.

[261] Statute of Frauds: An Act for Prevention of Frauds and Perjuryes (1677; 29 Car. II c. 3). See *Farnsworth on Contracts*, chapter 6; E. Rabel, 'The Statute of Frauds and Comparative Legal History' 63 *Law Quarterly Review*, 174-178 (1947) (traces the sources of 1677 statute in French Ordonnance de Moulins of 1566, which excluded parole testimony to prove oral agreements). This ordinance was the source of Arts 1341-1348 of the French Code Civil and Polish provisions requiring written form *ad probationem* as found in the PCC Art 74.

[262] These included promises: (a) made by administrator of an estate or executor of a will to pay estate's debts out of their own resources; (b) relating payment of debts of a third party out of promisor's own resources (surety); (c) made in consideration of marriage; (d) concerning interest in real estate; and (e) those to be performed after lapse of a year.

[263] See, eg New York Consolidated Laws, General Obligations Law § 5-701 ('Agreements Required to be in Writing').

[264] UCC § 2-201; The Sale of Goods Act 1979, chapter 54, section 4(1).

available in proceedings conducted by the Westminster courts deciding cases based on common law. The Court of Chancery, applying equity law, did not convene juries. A belief was established that formalities should not obstruct the operation of legal institutions derived from equity, such as the part performance doctrine, constructive trust, or estoppel.

Estoppel is sometimes used in cases where an assertion that required formality was missing results in an injustice. The leading opinion on the availability of estoppel is Viscount Radcliffe in *Kok Hoong* v *Leong Cheong Kweng Mines Ltd*.[265] His Lordship reasoned that it was necessary to examine what the purpose of a statutory provision was and, therefore, whether a general public interest excluded estoppel's application to override the statute. In *Actionstrength Ltd* v *International Glass Engineering SpA*,[266] the court considered whether promissory estoppel[267] could be used to require a surety to pay remuneration on a claim. The claimant was a temporary employment agency providing a workforce to a construction company which subsequently became insolvent. The claimant relied on the surety's promise to satisfy the contractor's debts. The surety asserted a statute of frauds defense as their promise was only made orally. The claimant attempted to neutralize this allegation by asking for promissory estoppel due to its reliance on the defendant's assurances. The court held for the surety reasoning that, although it had promised to pay, it had never promised to refrain from invoking the statute of frauds.[268]

American and English courts in similar scenarios used promissory estoppel where a promisor assured the other party that the formal requirements would be fulfilled in the future. In *Monarco* v *Lo Greco*,[269] a mother and stepfather promised their son who worked on their farm that he would inherit the farm but then willed it to someone else. Judge Traynor avoided the statute of frauds by arguing that this was a situation for the use of promissory estoppel and reasoned that the son had received an equitable right to the property.

The *Restatement Second* provides examples in which equitable principles can be used to overcome formal requirements such as in *Monarco* (promise that formality would be performed in future), assurances that formal requirements have been complied with, where the parties' prior dealings ignored formality requirements,[270] and when part performance is given on the assumption of a

[265] *Kok Hoong* v *Leong Cheong Kweng Mines Ltd* [1964] AC 993 PC; K. Handley, *Estoppel by Conduct and Election* (London: Sweet & Maxwell, 2006), 296.

[266] (2003) 2 AC 541.

[267] The term estoppel, used in this case, can be assumed to refer to promissory estoppel.

[268] *Actionstrength Ltd* v *International Glass Engineering SpA* n 266 above, 557 (explicit assurance that a party would not plead that the statute of frauds was missing); E. Cooke, 'Guarantees, Estoppel and Statute of Frauds' 62 *Cambridge Law Journal*, 551 (2003); M. Dixon, 'Confining and Defining Proprietary Estoppel: The Role of Unconscionability' 30 *Legal Studies*, 417-419 (2010).

[269] *Monarco* v *Lo Greco* 35 Cal. 2d 621, 220 P2d 737 (1950). See E.A. Farnsworth et al, *Contracts: Cases and Materials* (New York: Foundation Press, 6th ed, 2001), 291-293; M. Metzger and M. Phillips, n 201 above, 175-178. For its English counterpart see *Thorner* v *Major* n 202 above.

[270] *Warder & Lee Elevator Inc* v *Britten* 274 NW2d 339 (Iowa 1979).

valid contract. In such cases, promissory estoppel and the equitable doctrine of waiver have been applied to overcome the statute of frauds. American states vary on the frequency where courts resort to equity in such cases.[271]

The abovementioned doctrine of part performance is an equitable principle developed in the Court of Chancery to avoid injustice resulting from strict compliance with the statute of frauds. If either party performed its promise in part, a court could treat the invalid contract as effective in equity. In the 1862 English case of *Dillwyn* v *Llewelyn*, a son built a home on his father's property that was promised to him without a necessary deed. The father's estate administrators claimed the property was still owned by the estate. Lord Westbury resorted to what was later labelled proprietary estoppel to award the property to the son.[272] The differences between proprietary and promissory estoppel have become blurred over time. Today, a distinction can be made in which promissory estoppel is used to enforce defective promises, while proprietary estoppel is used to police unconscionable conduct.[273]

Proprietary estoppel is essentially used to convey equitable title in real estate that preempts the exercise of legal titled vested in another party. In *Yaxley* v *Gotts*,[274] the court used proprietary estoppel in favor of a partner in a real estate development who had been deprived of legal ownership. The court decided the claimant had a choice between an ownership interest in the property or payment of money. The court noted the similarities between proprietary estoppel and constructive trust.[275]

In *Yeoman's Row* v *Cobbe*[276] two parties agreed on a framework to cooperate on a real estate development. After commencement of the project, the party in control of the real estate proposed new terms. The other party sued to enforce the preliminary agreement. The House of Lords found that such agreement 'binding

[271] See Restatement Second §§ 129, 139. New York and Texas favour a conservative view that limits the use of promissory estoppel in cases of breach of the rules on the formality, pointing to the value of legal certainty and predictability of adjudication. *D & N Boening, Inc* v *Kirsch Beverages, Inc* 99 AD 2d 522, 471 NYS2d 299 (N.Y. 1984); *Southmark Corp* v *Life Investors, Inc* 851 F2d 763 (Texas 1988); D. Baird, 'Unlikely Resurrection: Richard Posner, Promissory Estoppel, and The Death of Contract' 86 *University of Chicago Law Review*, 1051-1055 (2019); J. Feinman, 'Promissory Estoppel and Judicial Method' 97 *Harvard Law Review*, 695-696 (1984); M. Metzger and M. Phillips, 'The Emergence of Promissory Estoppel as an Independent Theory of Recovery' 35 *Rutgers Law Review*, 472, 487-491 (1983). Compare, P. Pham, 'The Waning of Promissory Estoppel' 79 *Cornell Law Review*, 1263 (1993).

[272] (1862) 45 ER 1285, 1287.

[273] *Stack* v *Dowden* [2007] UKHL 17, para 37; *Thorner* v *Major* n 202 above, 804 ('a straightforward estoppel claim without any contractual connection'); *Farrar* v *Miller* n 241 above, paras 56-58.

[274] *Yaxley* v *Gotts* n 198 above, 173-174; I. Moore, 'Proprietary Estoppel, Constructive Trusts and Section 2 of the Law of Property (Miscellaneous Provisions) Act 1989' 63 *Modern Law Review*, 912-917 (2000); R. Smith, 'Oral Contracts for the Sale of Land: Estoppels and Constructive Trusts' 116 *Law Quarterly Review*, 11-14 (2000).

[275] Note that while English law recognizes institutional constructive trust, in the US law its remedial version has been developed. See L. Carlson, 'Constructive Trusts – In General' 3 *Southwestern Law Journal*, 175 (1949); P. Golden, *Litigating Constructive Trusts* (Chicago: American Bar Association, 2022).

[276] *Yeoman's Row* v *Cobbe* [2008] 1 WLR 1752.

in honour only' was not a ground for proprietary estoppel. It also did not meet the requirements of a constructive trust since the defendant already owned the property at the time the parties reached their agreement.[277] Lord Walker noted that the claimant was a professional who acted with full knowledge of the assumed risk that the contract with the defendant would not come to fruition.[278]

3. Future of Abuse of Right and Equity

Patrick S. Atiyah noted that the evolution of contract law in the 20th century was impacted by the 'huge growth of statutory interventions in contract law designed to ensure substantive fairness in the exchange.'[279] Many of these interventions were avoidable if the courts more aggressively used the tools that were existing in contract law. For the common law, courts often failed to recognize that equitable principles exist in the general body of contract law and not as some separate body of law to be used only in the most extreme situations. In isolated instances, such as in the area of no-oral modification and satisfaction clauses,[280] the courts have broached the mantra of freedom to prevent the abuse of such freedom.

Two contract trends, in theory and practice, call for the expansion of the use of abuse of right and equitable principles. First, relational contract theory has been around since the 1970s and recognizes that the world is populated by long-term, more flexible types of contracts.[281] It is based on the simple idea that many contracts are relational in nature and, as such, not conducive to the strict application of rules or the strict enforcement of contract rights. Joseph Perillo has asserted that 'a relational perspective is a sufficient basis' for a theory of abuse of right.[282] For the parties, the maintaining of the contractual relationship is far more important than enforcing the formal contract. This requires more flexibility in contract rules in order to recognize the true intent and reasonable expectations of parties in a long-term contractual relationship. General principles, such as the good faith, duty to cooperate, estoppel, and abuse of right, already exist and are relevant to such contract types.

Since the 19th century when contract law developed, contracts have become more complex, due to their length, relational bent, the rise of the information age

[277] ibid 1769-1772; J. Getzler, 'Quantum Meruit, Estoppel and the Primacy of Contract' 125 *Law Quarterly Review*, 200 (2009).

[278] *Yeoman's Row* v *Cobbe* n 276 above, 1757, 1788.

[279] P. Atiyah, n 21 above.

[280] See above Section IV.2.b).

[281] The father of relational contract theory is Ian Macneil. See I. Macneil, *The New Social Contract: an Inquiry into Modern Contractual Relations* (New Haven: Yale University Press, 1980) (contract norms include solidarity, flexibility, and trust); Id, 'Contracts: Adjustment of Long-Term Economic Relations under Classical, Neoclassical and Relational Contract Law' 72 *Northwestern University Law Review*, 854 (1978) (contract law's evolution from classical to relational contract law); Id, 'The Many Futures of Contract' 47 *Southern California Law Review*, 691 (1974) (transactional-relational spectrum).

[282] J. Perillo, n 6 above, 50.

and the Internet, and the acceleration of technology. Henry Smith sees equity as 'law's response to the world's inevitable complexity.'[283] Over one-hundred years ago, the US Supreme Court in *Union Pacific Railway Company* v *Chicago, Rock Island & Pacific Railway Company*[284] stated that:

> 'It must not be forgotten that in the increasing complexities of modern business relations equitable remedies have necessarily and steadily been expanded, and no inflexible rule has been permitted to circumscribe them.'[285]

In the end, the flexibility of principles will continue to be needed as contract law balances freedom and corrective justice concerns.

The major reason to support a renaissance of equitable principles is to regulate standard term contracts where often consumers, whether online or in person, consent to a litany of abusive terms. In a recent empirical survey Andrea J. Boyack concluded that:

> Entrusting the content of consumer contracts to companies creates a fertile legal habitat for abuse through boilerplate design. (…) [T]he overwhelming majority of consumer contracts contain multiple categories of abusive terms (...) And as long as companies can craft terms without adverse consequences, boilerplate content, which is controlled by companies and their legal advisors, will likely be tailored primarily for their benefit.[286]

The acceleration of technology and the development of advanced artificial intelligence has increased the level of informational asymmetry between online platforms and consumer-users. The recognition of the abuse of right doctrine would help discourage companies from including overly abusive terms in their contracts. The common law's recognition of abuse of right would be a return to the very beginning of equitable defenses.[287]

Abuse of right should be viewed as a supplement to the duty of good faith, with the abuse of right discussion being conducted under a different framework. Good faith is determined by asking whether an objective reasonable person would view an exercise of a right as an act of bad faith. On the other hand, abuse of right looks at the purpose for including the right in the contract and the parties' reasonable expectations as to its exercise. The discussion is not whether the exercise was objectively correct (plain interpretation of the contract) but whether under the

[283] H. Smith, n 15 above, 1057.

[284] 163 US 564 (1896).

[285] ibid 600-601.

[286] A. Boyack, 'Abuse of Contract: Boilerplate Erasure of Consumer Counterparty Rights' 110 *Iowa Law Review* 497, 499, 501, 503 (2025).

[287] T. Anenson, 'Equitable Defenses in the Age of Statutes' 36 *The Review of Litigation*, 659, 679 (2018) ('The defenses developed largely from the idea of equitable fraud designed to remedy the abuse of legal rights or other unfair advantage-taking where elasticity was necessary to capture conduct that is hard to predict in advance.').

particular circumstances of its exercise it was surprising and harmful to the other party. The strongest case being that the exercise was of little or no benefit to the exercising party and caused considerable harm to the other party.

VI. Conclusion

Principles of contract wedded to notions of corrective justice will continue to be needed in order to maintain the relevancy of contract law in the era of complex contracts, long-term relational contracts, and due to the acceleration of technology. Contractual justice or fairness will remain, often covertly, a core ingredient of contract law. This article shows the workings of this part of contract law, whether common or civil. It brings the use of general justice-based principles out into the open to show that contract law not only provides the tools that facilitate the formation of contracts (freedom) but that it also has something to say about the content of contracts through the exercise of contractual rights in a just or fair way.

A basic understanding of contract law consists of the principle that parties should be free to determine their own rights and obligations. At the same time, this simple proposition has always been restrained by the idea that contracts' terms and the rights they bestow should not be abusive. American law's acceptance of the principles of good faith and unconscionability is testament to the courts willingness to at time forego the strict enforcement of contractual rights in favor of corrective justice. English law has continued to openly reject these principles but has found other, more covert means, such as developing a complicated array of estoppel doctrines, to prevent injustice. This approach has created much confusion and increased the uncertainty of contract law that strict enforcement of rights was intended to diminish. The recognition of justice or fairness as core of contract norms advances the certainty of law by making it more transparent to those that use it.[288]

In the end, this article shows that, in practice, the civil law is not more paternalistic in action than the common law. However, there are substantive differences. One of these differences is that the civil law's abuse of right doctrine has been found and rejected, at least in name, in the common law.

The thesis of this article is that justice or fairness should be more openly recognized and used. Furthermore, the common law should acknowledge the prohibition against abuse of right found in the civil law to prevent injustice currently not captured by the existing catalogue of equitable doctrines. The Polish Civil Code's Art 5 provides a broad scope for applying the abuse of right doctrine: 'One cannot exercise one's right in a manner contradictory to its social and economic purpose or the principles of community life.' The concept of principles of community life is a broader version of the notions of good faith and fair dealing.

[288] J. Mallor, 'Unconscionability in Contracts Between Merchants' 40 *Southwestern Law Journal*, 1065, 1085 (1986) ('The administrative justification of permitting courts to evaluate the fairness of contracts directly discourages them from twisting other doctrines to avoid unfairness.').

The recognition of abuse of right is crucial in a marketplace increasingly subject to manipulation by digital platforms and artificial intelligence. The abuse of right doctrine reflects a rejection of formalism. That strict application of rules must give way to prevent an injustice in the increasingly one-sided world of the modern economy. The civil law's abuse of right doctrine is simpler to understand and apply. The common law's reverence for fixed rules quickly results in detachment from real world developments. Principles of justice and equity are needed to maintain contract law's effectiveness.