

Toward a General Concept of Conformity in the Performance of Contracts

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I. INTRODUCTION

A bought a car from B, and it subsequently became evident that the car had not belonged to the seller, or that there was a valid charge upon it; A leased from B a commercial building in order to operate an industrial enterprise, and then found that the applicable zoning laws preclude such use of the property; A made a contract for the purchase of two hundred tons of wheat, and the seller supplied her two hundred and thirty tons; B performed electrical work in A's house, and because the work was carried out improperly, a fire broke out soon after, resulting in personal and other injuries; B undertook to supply A with a car of a certain make, and delivered a car of different manufacture. Should the promisor ("B") bear liability in all of these cases?

Approaching this question requires a two step investigation. The first step concerns the possibility and desirability of dealing with all of these situations (and other similar situations) within the same analytical framework. Do all of these cases share a common denominator, so that a single, unified set of rules could apply to all of them? Once we answer that question affirmatively, the second question is whether, and under what circumstances, should liability be imposed on the promisor.

In one sense, the first question is one of form while the second is one of substance. The first has to do with the choice between a system of various specific rules, each of which applies to a narrowly defined situation, and between a system of a few broad rules, based on a unified conceptual framework. The second question deals with the justifications for imposing liability. Yet, as is also the case in many other contexts, form and substance are interdependent. If we accept that all the cases are similar, then the same substantive considerations must apply to them, and they should all be governed by basically the same rules. At the same time, one cannot treat all the cases as similar unless the same justifications are indeed applicable to all of them.

The objective of this article is, therefore, twofold. First, we shall try to show that from the point of view of contract law,¹ a sufficient resemblance exists between the various situations previously discussed, so as to make a unified treatment of them both attainable and worthwhile. We shall suggest that such a unified set of rules can be based on a general concept: *the conformity of the performance of the contract*. The main task will not be to indicate the similarities between the cases

1. Some studies focus on a typical factual situation and examine all the possible rules applicable to it (contractual, tortious, regulatory, etc.). See, e.g., Bearman, *Caveat Emptor in Sales of Realty—Recent Assaults Upon the Rule*, 14 Vand. L. Rev. 541 (1961). This study instead concentrates on one legal concept that may apply to a great variety of scenarios. It views the various situations from a contractual perspective only.

(which are quite patent); rather, it will be to delimit the applicability of the suggested concept so that it will not be too broad or abstract, and therefore practically meaningless. The second goal is to show that the introduction of obligations based on the principle of conformity is justified in light of various views about the role of contract law.

In order to demonstrate the real need for a general concept of conformity, Part II of this study comprises a short survey of the main features of conformity rules (i.e., the rules dealing with the quality, quantity, and other aspects of the contract's object—the goods, the leased property, etc.) in several legal systems. This comparative study reveals that most systems (both Anglo-American and Civil Law) do not recognize a general concept of conformity. There are a few exceptions, such as Austrian law and Israeli law, in which the principle of conformity may be revealed with relative ease. In most other systems, however, the principle is concealed behind a web of historically charged doctrines and rules. However, since the rules established in almost all legal systems reflect the reasons and justifications for recognizing the concept of conformity, it seems desirable to "import" it into them as well. In that sense, the proposed concept has both explanatory and critical aims.

In Part III an attempt is made to describe the principle of conformity, from which specific rules can be derived for the conformity of the object in different contracts. This part will discuss the concept's scope of applicability, its legal structure, and the main issues with which the rules derived from the basic principle must cope.

Finally, Part IV is dedicated to the "substantive" question of the justifications for imposing conformity obligations on the promisor. The question will be dealt with in light of various theories about the role of contract law, and the role of contractual default rules in particular.

II. COMPARATIVE PERSPECTIVE

A. *General*

This is not an appropriate framework for a full description of the conformity rules in a comparative and historical perspective. For our purpose, it suffices to state some central characteristics of the conformity rules in several legal systems. A general review of the conformity rules in Civil Law systems (mainly the French and the German) will be given first, and a short description of Anglo-American law will follow. Finally, a brief account of the present issue in Austrian and Israeli laws will be given, in order to demonstrate that the complex sets of rules found in most legal systems may be replaced by organized, relatively simple provisions.

B. Absence of Coherent Guidelines in Most Legal Systems

1. Civil Law Systems

a. Roman Law

To a large extent, Roman law still forms the basis of most of the continental legal systems, especially regarding the conformity of property in sales. In this field, Roman law evolved gradually in the direction of extending the seller's liability.² This development coincided with changes in the Roman economy, which grew from a primitive, agricultural economy to a commercial power by the standards of the ancient world. Already in the old Roman law, the seller bore responsibility for fraud (*dolus*) or breach of express warranty. Fraud included non-disclosure of known defects in the object. Liability for express warranty arose not only out of an actual promise, but also from any representation or even description of the object, provided they were not mere puff. There are grounds to believe that even a tacit representation could give rise to such liability.

Alongside these bases of liability, the *aedilitian* reliefs, originating in the edicts of the *aediles*, gradually evolved. At the height of their development, these reliefs applied to every severe defect that precluded the possibility of using the property for its ordinary purpose, or which significantly impaired its usefulness ("redhibitory" defects). The seller's liability for these defects was not conditioned upon his knowledge of the defect. The redhibitory remedies were two: an action for the rescission of the contract (*actio redhibitoria*), and an action for a reduction of the price (*actio quanti minoris*). During the first six months after delivery, the buyer had the option of either rescission or reduction. For the second six months following delivery, the buyer was entitled to reduction only. The advantage of the *aedilitian* remedies was that the seller's liability was not contingent upon any actual undertaking or fault. The disadvantages, in comparison to ordinary liability for an express undertaking or fault, were the short periods of applicability, the limitation to severe defects, and the restriction of relief to the

2. See generally Morrow, Warranty of Quality: A Comparative Survey, 14 Tul. L. Rev. 327, 347-360 (1940), 14 Tul. L. Rev. 529 (1940); Mackeurtan's Sale of Goods in South Africa § 336, at 238-243 (B. O'Donovan 4th ed. 1972); A. Watson, The Law of Obligations in the Later Roman Republic 86-91 (1965); Hamilton, The Ancient Maxim Caveat Emptor, 40 Yale L.J. 1133, 1156-58 (1931); A. Rogerson, Implied Warranty Against Latent Defects in Roman and English Law, in Studies in the Roman Law of Sale, Dedicated in memory of F. de Zulueta 112 (D. Daube ed. 1959); F. de Zulueta, The Roman Law of Sale 46-51 (1945); J. Moyle, The Contract of Sale in the Civil Law 195-220 (1892).

protection of the restitution interest (with no right to reliance or expectancy damages). It should be noted that Roman rules of nonconformity referred only to hidden defects. Thus, the seller bore no responsibility for defects of which the buyer was aware, or which were so patent that the buyer should have been aware.

Whereas the information we have on the Roman law of sale is quite comprehensive, our knowledge concerning the Roman law of leases and contracts for services is more limited.³ According to one source, dealing with a lease of a rural farm, if at the time of the delivery, the leased object suffered from a defect of which even the lessor was unaware, the remedy of the lessee was not to pay the rent.⁴ Only if the lessor knew about the defect and did not disclose it, was the lessee entitled to damages as well. Though it is not clear whether this rule applied to residential leases, the prevailing view is that the lessor was indeed obligated to deliver a property which was fit for the contemplated purpose.⁵ However, even if Roman law imposed an *ex lege* responsibility for the conformity of the property at the commencement of the lease (in the absence of an actual undertaking or the lessor's knowledge of the defect), it appears that a breach did not entitle the lessee to remedies that would protect his expectation or reliance interests, but only his restitution interest. As for the lessor's obligation regarding the condition of the property during the lease period, the lessee was exempt from paying the rent for the period in which his enjoyment of the property was precluded due to a factor unrelated to him, whether caused by *force majeure* or by the lessor.⁶ Where the lessor affected the lessee's use deliberately and unjustifiably, the lessee was also entitled to full damages for his losses. Otherwise, the lessee was entitled to damages only if the lessor had expressly or impliedly accepted responsibility for the condition of the property. Despite the clear inequality between the socio-economic status of lessors and lessees, the Roman law did not prohibit the contracting out of these responsibilities by lessors.

With regard to contracts for services (*locatio conductio*, hire of work), it seems that liability of the contractor was based on fault. Lack of suitable skill, however, was also deemed to constitute fault.⁷

3. The development of any legal field is largely determined by the extent of litigation within the field. Considering leases, and lessees' rights in dwelling leases in particular, various factors have led to the result that there is almost no recourse to courts for the realization of rights. See B. Frier, *Landlords and Tenants in Imperial Rome* 48 (1980).

4. *Corpus Juris Civilis*, D.19.2.19.1 (Ulpian/Serv., Lab., Sabin.).

5. See B. Frier, *supra* note 3, at 153-54; M. Kaser, *Roman Private Law* 221 (3d ed. 1980 trans. from Germ.); A. Watson, *supra* note 2, at 115.

6. A. Watson, *supra* note 2, at 116; M. Kaser, *supra* note 5, at 184; B. Frier, *supra* note 3, at 150-53.

7. *Corpus Juris Civilis*, *supra* note 4, G. 3.205 and Ulp. D. 19.2.9.5. See also M.

b. German Law

The salient feature of the conformity rules in German law is the existence of a special set of rules regarding the seller's responsibility for the quality of the object in sales contracts. These rules are different from the ordinary rules applicable to other contractual obligations (such as the obligation to deliver the object), both in terms of the scope of the seller's liability and the remedies available to the buyer. As for the conformity of the sale object in every other respect except its quality, and as for the conformity of the object in any other transaction (in all respects), the ordinary rules of contractual liability apply.

i. Sales Transactions

The warranty against defects in the sale object in German law (*Gewährleistung für Sachmängel*) is very similar to the rules of redhibitory defects in Roman law. This warranty relates to two kinds of cases. The first includes any defect in the object of the sale that destroys or significantly diminishes its value or fitness for ordinary use or for the purpose provided in the contract. The other kind of case has to do with the absence of any quality that the seller promised the object would have (Section 459 of the BGB). The seller is not responsible for defects of which the buyer was aware at the time of the formation of the contract. With regard to defects of the first kind, the seller is also exempt from responsibility if the buyer remained unaware of them due to gross negligence, unless the seller had knowingly concealed them or had undertaken that the object would be free of defects (Section 460 of the BGB).

The seller's liability is not conditioned upon her fault or even her knowledge of the defect.⁸ However, the law restricts the buyer's remedies and augments the burdens imposed on her. Several provisions in the BGB and in the Commercial Code (*Handelgesetzbuch—HGB*) impose on the buyer burdens directed to prevent a delay in the realization of her remedies. The period in which the buyer must realize her rights is quite short (Section 477 of the BGB), and in commercial transactions

Kaser, *supra* note 5, at 224; S. Martin, *The Roman Jurists and the Organization of Private Building in the Late Republic and Early Empire* 38, 89-113 (1989).

8. See Daniels, *The German Law of Sales: Some Rules and Some Comparisons*, 6 *Am. J. Comp. L.* 470, 490 (1957); N. Horn, H. Kötz & H. Leser, *German Private and Commercial Law: An Introduction* 125 (1982). This is an exception to the basic approach of German Law, according to which contractual liability requires fault. See Riegert, *The West German Civil Code, Its Origin and Its Contract Provisions*, 45 *Tul. L. Rev.* 48, 75-78 (1970); N. Horn, H. Kötz & H. Leser, *supra* at 112-15; E. Cohn, *Manual of German Law*, Vol. 1, § 221, at 118-19 (2d ed. 1968-1971).

there are also special burdens of examination and notice (Section 377 of the HGB).

According to Section 462 of the BGB, the buyer is entitled to choose between reciprocal restitution of the sale object and the price paid, that is, a rescission of the contract (*Wandlung*), and proportional reduction of the price (*Minderung*). Under the law of warranty, the buyer is entitled to damages (in lieu of rescission or reduction) only if the seller has promised that the object possessed a certain quality, or if the seller deliberately concealed a defect of which she knew at the time of contracting (Section 463 of the BGB).⁹ The buyer is entitled to demand a substitute for the defective property only if the object of the sale is a fungible good (Section 480 of the BGB). In no other case is the buyer entitled to enforcement, either by way of rectification of the defect or by replacement of the property.¹⁰ The buyer's remedies under the rules of warranty are considered *lex specialis*, and therefore exclude recourse to any other cause of action, such as defects in the formation of the contract, or the ordinary rules relating to the impossibility of performance (*Unmöglichkeit*).¹¹ A buyer who is not satisfied with these special remedies (which ordinarily protect only her restitution and reliance interests) may try to rely on the judge-made doctrine of positive breach.¹² It is not easy to determine the borders and inter-relationships between the rules of warranty and the rules concerning liability for positive breach. Assuming the prerequisites for positive breach have been met—including proof that the breach involved fault—it seems that the proper remedy would coexist with the remedy for the defect, though not with regard to the defect itself. In many instances, the buyer can thus obtain damages for the harm that the breach caused to her other interests, while the loss arising out of the very existence of the defect is remedied under the rules of warranty.

As previously mentioned, in German law the rules applicable to defects in the sale object are different from those that apply to other

9. See K. Larenz, *Lehrbuch des Schuldrechts*, Bd. II: Besonderer Teil, 64 (12 Aufl. 1981).

10. Unless the parties agree otherwise, as is usually done by referring to general conditions applying to commercial contracts. See N. Horn, H. Kötz & H. Leser, *supra* note 8, at 127.

11. See E. Cohn, *supra* note 8, § 258, at 133; Daniels, *supra* note 8, at 494.

12. In German contract law there is no general, unified concept of breach. The general concept *Leistungsstörungen* (irregularities in performance) evolved only in the 1920's. The BGB is based on the theory that all incidents of breach may be classified under one of two headings: delay of performance (*Verzug*) or impossibility (*Unmöglichkeit*). Only after the enactment of the BGB, was the residuary category of positive breach (*positive Vertragsverletzung*) developed by the courts. This category includes all other cases of breach. See generally N. Horn, H. Kötz & H. Leser, *supra* note 8, at 90-115; 2 K. Zweigert & H. Kötz, *An Introduction to Comparative Law*, 179-86 (2d ed. T. Weir transl. 1987); A. von Mehren & J. Gordley, *The Civil Law System* 1104-23 (2d ed. 1977).

types of nonconformity of the sale object. This division requires difficult decisions in various border-line cases, especially between the delivery of a defective object (*peius*) and the delivery of a different one (*aliud*), and between qualitative and quantitative nonconformity. The general law of contract applies to the delivery of a different object and to quantitative nonconformities. Thus, the buyer is entitled to the full scope of remedies for breach, including enforcement and damages as routine relief.

The two aforementioned distinctions raise many difficulties. Does the delivery of a metal desk instead of wooden one constitute a qualitative defect, or a delivery of a different object? Is the excessive length of timbers delivered a nonconformity of quality or of quantity?¹³ The German law has not yet succeeded in doing away with these delicate distinctions, though it limits their effects. With regard to the burdens of examination and notice imposed on the buyer in commercial transactions, the HGB applies the special burdens also to the case of a different object (*aliud*), provided that the delivered merchandise is not so obviously different from that ordered that the seller must have understood that the buyer's approval could not be forthcoming (Sections 377, 378 of the HGB). The difficulty in this rule is that it implements a new distinction between different types of *aliud* property. The disparity between the rules has further been reduced by the courts that have determined that the shortened period of limitation under the warranty rules applies to the case of *aliud* property as well.¹⁴ The rule provided by Section 378 of the HGB and the case law regarding the period of limitation also apply to quantitative nonconformity. Nevertheless, the basic distinctions between defective and different property, and between qualitative and quantitative nonconformity are still in force in German law. Not only are these distinctions difficult to operate and their very justification dubious, in certain situations they actually render the position of the seller who supplies a wholly different object preferable to that of the seller who supplies a defective one.¹⁵

Legal defects in the sale object (*Rechtsmängel*, Section 434) are another kind of nonconformity not regulated by the warranty rules. The buyer's primary remedy is to claim performance of the obligation, to demand that the title be transferred to her or that any third party right be removed. Additionally, she is entitled to all the ordinary

13. For an analysis of these fine distinctions in a comparative perspective, see E. Rabel, *Das Recht des Warenkaufs*, Bd. 2, 124-28 (1967).

14. See *id.*

15. The rule by which the injured party must give the party in breach an additional period to perform his or her obligation, as a pre-condition for obtaining the remedies of rescission and damages (§ 326 of the BGB), does not apply to the case of defects in the sale object. See E. Rabel, *supra* note 13, at 126.

remedies available in the case of non-performance of a mutual contract (Section 440), including damages and rescission (Sections 323 to 326).

To complete the patchwork of different rules applicable to non-conformity of the sale object in German law, it should be added that the special warranty rules apply only from the time of the passing of risk. If the buyer discovers the defects before delivery to her, she may reject the object. Though it is not clear, it appears that in such a case the buyer may also require that a conforming object be delivered to her.¹⁶ Also worth mentioning is Section 493 of the BGB, which applies the special rules concerning the quality of the sale object to other contracts for alienating or for giving a charge upon a thing for value.

ii. Leases

The rules of conformity in leases under German law are free of the difficulties resulting from the existence of a separate set of rules on quality defects, as is the case in the German law of sales. The lessor's obligations of conformity are subject to special provisions, but they are considered ordinary obligations. In sharp contradiction to sales, legal and physical defects in leases are treated under the same rules. However, here too the situation is not entirely simple. The conformity obligations in leases are divided into two categories. The first category includes obligations relating to the usefulness and maintenance of the object. The second category regulates the issue of defects in the leased object. The distinction between these two types of obligations is not chronological; both apply with regard to the condition of the property at the beginning of the lease as well as during its term. The distinction is not very clear, and even its justification is questionable.

Section 536 of the BGB deals with the usefulness and maintenance of the object. The lessor is bound to hand over the property in a condition appropriate to the stipulated use, and she must keep it in such condition during the period of the lease. *Inter alia*, the lessor is required to refrain from disturbing the lessee's use, and may also be subject to accessory obligations of doing (*facere*).¹⁷ Although in principle the lessor's obligation may be contractually waived, in residential leases the lessee's remedy of rescission may not be excluded (Section 543 end). As for defects, Sections 537-540 lay down the lessor's obligations regarding defects in the leased object, and Section 541 applies these provisions *mutatis mutandis* to defects of title. The definition of a defect in leases is basically the same as in sales, yet the lessee's remedies, unlike those of the buyer, ordinarily include specific performance and damages (Section 538) as well.

16. N. Horn, H. Kötz & H. Leser, *supra* note 8, at 129.

17. See K. Larenz, *supra* note 9, at 186.

iii. *Contracts for Services*

In contracts for services (*Werkvertrag*)—like the rule in leases and unlike the rule in sale—the obligations of conformity are considered as ordinary contractual obligations.¹⁸ The definition of defect in Section 633(1) of the BGB adopts the elements of the definition of defect in sale (Section 459). Usually, the object in a contract for services does not exist at the time of the formation of the contract, therefore the proviso concerning defects of which the promisee knew or must have known is usually irrelevant. Instead, special provisions refer to cases in which the orderer does not cooperate with the contractor.¹⁹ As in sale, the orderer's remedies are subject to short periods of limitation (Section 638). However, no special burdens of examination or notice (the kind that Section 377 of the HGB provides with regard to commercial sales) are imposed on the orderer. The orderer, like the lessee and unlike the buyer, is entitled to the full scope of remedies. However, the provisions of the BGB regarding the orderer's relief—particularly the rule according to which the orderer's remedies (rescission, reduction and damages) are mutually exclusive and the short periods of limitation—give rise to considerable difficulties. These are conspicuous mainly where a defect, discovered after the short period of limitation, causes personal and pecuniary damages beyond the mere decrease in the work's value. These difficulties have been solved for the most part by the "positive breach" doctrine and by a ruling that in a claim for damages the aggrieved party may return the defective object and demand damages for the complete failure of the contract.²⁰

c. *French Law*

As in German law, the point of departure of French law is that the seller, the lessor and the contractor bear responsibility for the conformity of the object. This responsibility is not conditioned upon fault, and the aggrieved party is generally entitled to the full scope of remedies for a breach. Yet, the French law, as laid down in the Code Civil and as developed in doctrine and case law, includes even more classifications and distinctions between different aspects of the conformity of the object in every kind of contract. We shall briefly refer to some of the features of conformity rules in sales and leases.

Sales—The definition of latent defects in sale (Section 1641 of the Code) adopts the definition of redhibitory defects in Roman law. The

18. *Id.* at 280, 284-85. See also T. Süss, *Wesen und Rechtsgrund der Gewährleistung für Sachmängel* § 18, 186-88 (1931).

19. See §§ 642-643 of the BGB; W. Lorenz, *Contracts for Work on Goods and Building Contracts*, in VIII Int. Encyc. Comp. L., Ch. 8, § 121, at 118 (1980).

20. W. Lorenz, *supra* note 19, § 79, at 79-80.

buyer is bound to inspect the property prior to purchase, and the seller bears no responsibility for defects which were detectable by such inspection.²¹

Under French law, the seller's knowledge of a defect has three important implications: first, a seller who knew of a defect and concealed it cannot argue that the buyer could have discovered the defect by herself prior to the conclusion of the contract; second, any agreement designed to exclude the seller's liability for latent defects has no effect; and, third, the buyer is entitled not only to protection of her negative interests, but also to positive damages for a concealment of the defect.²² In light of these effects, one can appreciate the great significance of French case law, according to which professional and commercial sellers are considered as knowing the defects of the things they sell, and cannot prove that they did not or could not know thereof.²³ This holding creates a sharp distinction between the rules applicable to the occasional seller and those that apply to commercial dealers. As to the latter, the burden of previous inspection imposed on the buyer is not as significant, the buyer is entitled to damages as a matter of course, and the seller's liability cannot be contractually waived.

If the buyer sells the object to another, and even if it is resold more than once, the seller continues to bear responsibility for hidden defects towards the sub-purchasers. According to French case law, every buyer is entitled to institute an action based on the guaranty for latent vices against her direct seller as well as against all prior sellers, including the manufacturer.²⁴

21. The courts distinguish between the severity of the burden imposed on a layman, as opposed to a professional buyer. See *Encyclopédie Dalloz, Droit Civil 2e ed, T. VIII, Vente (Obligation du vendeur)* arts. 473-481, at 26-27 [hereinafter *Dalloz*]; P. Le Tourneau, *Conformités et garanties en droit français de la vente, in Les ventes internationales de marchandises* 232, at 255 (1981). On the scope of the examination burden placed on the buyer, see also Durnford, *What is an Apparent Defect in the Contract of Sale?*, 10 *McGill L.J.* 60 (1964); Gow, *A Comment on the Warranty in Sale Against Latent Defects*, 10 *McGill L.J.* 243 (1964); Durnford, *Apparent Defects in Sale Revisited*, 10 *McGill L.J.* 341 (1964); Gow, *A Further Comment on Warranty in Sale*, 11 *McGill L.J.* 35 (1965).

22. On the first rule, see *Dalloz*, supra note 21, § 480, at 27. On the second rule, see *Planiol & Ripert, Treatise on the Civil Law, Vol. 2, Part 1, § 1468*, at 822 (11th ed. 1939, La. St. L. Inst. trans. 1959); *Morrow*, supra note 2, at 534. On the third rule, see *infra*.

23. *Juris-Classeur, Civil, Vente, arts. 1641-1649, Fasc. X-3 § 197 et seq.*, at 37 (11, 1986) [hereinafter *J.C.C.*]; Malinvaud, *Redhibitory Defects and their Importance in Contemporary Society*, 50 *Tul. L. Rev.* 517, 519-23 (1976). On the distinction between professional and non-professional sellers, see generally J. Ghestin, *Conformité et garanties dans la vente (produits mobiliers)* 243 et seq. (1983).

24. See *Dalloz*, supra note 21, §§ 522-528, at 29; Malinvaud, supra note 23, at 523-24; G. Berlioz, *Remedies for Breach in Contractual Chains of Sales: A French Perspective*, in *Survey of the International Sale of Goods* 287, 294 (L. Lafili, F. Gevurtz & D.

As is the case under German law, various aspects of the conformity of the sale object are regulated in French law by rules external to those of guaranty against hidden defects (*garantie des vices cachés*). These external rules are connected primarily to the obligation of delivery and to the rules concerning the object of the contract—the property sold. The cases of delivery of a different (*aliud*) object, and the conformity of the object in terms of its described quality²⁵ or quantity are dealt with within this framework. The courts are not very particular about the distinction between defective and different things, and they tend to extend the incidence of the liability for redhibitory defects to cases that *prima facie* fall under the delivery of a different thing.²⁶ Contrarily, the tendency is to preserve the distinction between defects and non-conformity of quantity, in spite of its difficulties, and to apply the rules of guaranty in border-line cases.²⁷

Another category of rules, which are neither part of the rules of guaranty nor of the rules relating to the object of the sale or its delivery, includes instances of nonconformity resulting from deficient user instructions, from damage caused to the object due to mishandling, or from faulty packaging.²⁸ Yet another set of rules applies to legal defects in the sale object, according to Sections 1626 et seq. of the Code (*garantie d'éviction*). The seller's responsibility is regulated as a warranty derived from the seller's obligation to provide the buyer with quiet possession and to prevent her dispossession, and not as a derivative of a rule concerning the conformity of the title. The guaranty relates both to disturbance by third parties (*garantie du fait des tiers*), and to disturbance by the seller herself (*garantie du fait personnel*).²⁹ The Code provides detailed provisions regarding the circumstances in which the seller bears responsibility and regarding the burdens imposed on the buyer who wishes to rely on the breach.

Campbell, eds. 1986). On the different justifications suggested for this doctrine, see also Barham, *Redhibition: A Comparative Comment*, 49 Tul. L. Rev. 376, 379-84 (1975).

25. Suppose that a bicycle of a different color than that agreed upon is supplied, and this nonconformity is significant in the circumstances, e.g., the color reduces the chances of marketing it to the public. This is not a defect diminishing the usefulness of the object, thus the guaranty relating to hidden defects does not apply to it. It is considered a breach of the seller's central obligation: delivery of the object. See J.C.C., *supra* note 23, arts. 1641-1649, Fasc. X-1, §§ 26-27, at 10; P. Le Tourneau, *supra* note 21, at 254.

26. R. Zérah, *La garantie des vices cachés, Théorie généralé du vice rédhibitoire dans les ventes de marchandises*, in Hamel, *La Vente Commerciale de Marchandises* 339, 365 (1951); M. Amaudruz, *La Garantie des Défauts de la Chose Vendue et la Non-conformité de la Chose Vendue* 24-25 (1968); E. Rabel, *supra* note 13, at 126.

27. M. Amaudruz, *supra* note 26, at 38-39.

28. Malinvaud, *supra* note 23, at 524-26.

29. As will be explained in Part III.C.1 *infra*, only the first type is relevant when considering conformity obligations. The second type is a *non-facere* obligation imposed on the seller, and not a case of defect or nonconformity in the object.

Additionally, the special difficulties concerning defects in buildings, particularly in transactions relating to buildings under construction, have led to specific legislation in this field. The Code was amended in 1967 and 1978, and a special set of rules was introduced regarding defects in contracts for the construction of buildings, the sale of buildings under construction, and the sale of erected buildings where the seller is also the contractor or the promoter.³⁰

Moreover, there are difficulties concerning the relationship between the rules of guaranty against hidden defects and the rules on mistake in the formation of the contract,³¹ the rules of tortious liability,³² the obligation to provide information regarding dangerous products,³³ and more.

Leases—Like the conformity rules in sale, the conformity rules in leases are characterized by doubtful distinctions. The obligations of “*garantie*” include various types of obligations, beginning with liability for hidden defects and ending with the obligation not to disturb the lessee (by the lessor, as well as by third parties). The common denominator of these obligations is not always clear.³⁴ Alongside the obligations of *garantie*, there are the obligations of maintenance (*obligation d’entretien*), which also impose continuous responsibility on the lessor.³⁵ The distinction between the two sets of rules is not very clear, and in many cases they may overlap. It is not very clear how those rules may be reconciled with the rule prohibiting the lessor from effecting changes

30. C. civ. Loi n° 67-3, 3 janv. 1967; C. civ. Loi n° 67-547, 7 juill. 1967; C. civ. Loi n° 78-12, 4 janv. 1978. The main features of the new arrangement are: unification of the nature and scope of responsibility regarding the construction (contracts for services) and the sale of new houses; imposing full, no-fault contractual liability; negating the possibility of exculpating statutory responsibility; extension of the liability towards subsequent purchasers; introduction of distinctions among different kinds of defects in the building, its installations and accessories, and providing different periods of responsibility for each kind (from one month up to ten years); enumerating some of the purchaser's remedies, while giving preference to the rectification of the flaws by the contractors. Regarding the determination of no-fault liability, its compulsory character, and its application towards subsequent purchasers, the legislative amendments follow the developments already established in the case law (since the responsibility under discussion is imposed on professionals). For a critical survey of the legislative reform of 1978, see Malinvaud & Jestaz, *La loi n° 78-12 du Janvier 1978 Relative à la Responsabilité et à L'assurance dans le Domaine de la Construction*, J.C.P. 1978, I, 2900.

31. See J.C.C., *supra* note 23, arts. 1641-1649, Fasc. X-1, §§ 21-25, at 9-10; J. Ghestin, *supra* note 23, at 52-75; J. Huet, *Responsabilité du vendeur et garantie contre les vices cachés* 38-39 (1987); E. Rabel, *supra* note 13, at 116-18.

32. J.C.C., *supra* note 23, arts. 1641-1649, Fasc. X-1, §§ 92-102, at 25-27; J. Huet, *supra* note 31, at 87.

33. J.C.C., *supra* note 23, arts. 1641-1649, Fasc. X-1, §§ 46-59, at 16-19.

34. See generally Dalloz, *supra* note 21, T. I, Bail, §§ 217-311, at 16-22.

35. Section 1720. See generally Dalloz, *supra* note 21, arts. 169-216, at 12-16.

in the leased property (Section 1723), or with the rule concerning the termination of the lease in the event of the property's destruction (Section 1722). Indeed, there are basic principles common to all of the conformity rules, such as the imposition of full responsibility on the lessor, unconditioned upon her knowledge of the nonconformity, and the principle of good faith, which increases the liability imposed on a lessor who knows about a defect and conceals it from the lessee. Yet, there are substantial differences in the details of the rules.

In sum, the conformity rules in French law are still largely based on legislation from the beginning of the nineteenth century (the Code Civil), which has not been significantly altered (except for in the field of construction and sale of buildings). The adaptation of the rules to the changing reality has been achieved primarily by the courts and in scholarly writings, which have developed new rules and doctrines.³⁶ These case law rules cope remarkably well with the variety and complexity of modern commerce, the introduction of sophisticated and dangerous products, and the difficulties of consumer protection. The combination of these doctrines with the provisions of the Code, the starting point for the imposition of liability for latent defects, results in a comprehensive system of liability for the conformity of the object.

d. Conclusion

Though there are differences between the French, German, and other Civil Law systems in the field of conformity rules, the basic features are very much alike in all of these systems. All systems rooted in the Roman law tradition do impose conformity obligations on the suppliers of goods, land, services or any other objects. As a rule, these obligations apply wherever there is no contrary agreement between the parties. They require no promise, expressed or implied in the circumstances, nor do they require fault. The rules contain requirements of conformity to ordinary use and expected (medium) quality, absence of hidden defects, clear title and so on. The rules take into account the different characteristics of professional and non-professional suppliers, as well as the difference between expert and lay customers, yet they apply to all cases.

The main weakness of the conformity rules in most Civil Law countries lies in the fact that there is no concentrated body of rules

36. Among those rules one may mention the viewing of tradesmen as being aware of every defect in the things they sell; imposing successive contractual liability in cases of re-sale of the object; extending remedies and developing new ones; and taking into account the distress of landlords and the problems of the deterioration of old buildings. On the last two issues, see generally Morrow, *supra* note 2, at 537-50 and Dalloz, *supra* note 21, arts. 187-196, at 14.

which merits the title "conformity rules."³⁷ There are the "obligations of guaranty," which include some of the main obligations of conformity, but also obligations of other types, such as the lessor's and the seller's obligation to refrain from disturbing the lessee or the buyer. On the other hand, many conformity obligations are dealt with under other headings as, for example, part of the obligations concerning delivery of the object (matters of quantity, description), within the framework of obligations concerning the object itself (as opposed to the guaranties relating to it) and so on. These legal systems deal separately with cases of latent defects, delivery of different object, incorrect quantity, defects of title, maintenance obligations (in leases), faulty use-instructions, etc. These distinctions result in many practical differences among the rules, especially regarding the promisee's remedies and the burdens imposed on her. These distinctions create both theoretical and practical difficulties, and their advantages are usually questionable.

2. Anglo-American Law

a. Sale of Goods

The English Sale of Goods Act of 1979 states (in Section 14(2)) that, subject to statutory exceptions, "[t]here is no implied condition or warranty about the quality or fitness for any particular purpose of goods supplied under a contract of sale." This statement reflects the doctrinal starting point of English law in the last centuries: *caveat emptor*. This concept, and the ideological-legal attitude behind it, evolved from approximately the seventeenth to the mid-nineteenth century along with the flourishing of individualistic philosophy.³⁸ Towards the end of the nineteenth century, with the decline of individualism, a parallel erosion of the *caveat emptor* attitude occurred, a process which has continued to this day.³⁹ The central concept that evolved during the nineteenth century was *merchantability*, i.e., the requirement that even in the absence of fraud, the seller would be responsible at least for

37. As a matter of fact, in the French law of sales, the rules relating to "nonconformity of the thing sold" (*Non-conformité de la chose*), do not refer to the guaranty against hidden defects, but to other aspects of the object's conformity. See J.C.C., supra note 23, arts. 1641-1649, Fasc. X-1, §§ 26-45, at 10-15.

38. Sale of Goods Act, 1979, ch. 54. Professor Atiyah argues that "the doctrine of caveat emptor can be said to represent the apotheosis of nineteenth-century individualism." P. Atiyah, *The Rise and Fall of Freedom of Contract* 464 (1979). For an analysis of the development of the Common Law in this field during that era, see also Hamilton, supra note 2, at 1136-41; Morrow, supra note 2, at 328-38; A. Rogerson, supra note 2.

39. See generally P. Atiyah, supra note 38, at 571 et seq., and especially at 774-75; Kessler & Fine, *Culpa in Contrahendo, Bargaining in Good Faith, and Freedom of Contract: A Comparative Study*, 77 Harv. L. Rev. 401, 439-44 (1964).

the merchantable character of the goods. At present, the rules of conformity in sales of goods are embodied in England in the Sale of Goods Act of 1979, which replaced the prior Act of 1893, and incorporated its later amendments.⁴⁰ In the United States, the central piece of legislation is the Uniform Commercial Code, Chapter 2 of which deals with the sale of goods.

The current English law derives its concepts and rules from the Common Law, as was developed during the last centuries. The old distinction between Conditions and Warranties still exists in the law, as do many other distinctions and limitations. As for the conformity to description (Section 13 of the Act), English law still struggles with the distinctions among different representations: conditions, warranties and terms.⁴¹ These distinctions are mainly relevant to the existence or denial of the right to reject the goods. In the Supply of Goods (Implied Terms) Act of 1973, as merged in the provisions of the 1979 Act, a statutory definition of merchantability was introduced for the first time. Section 14(6) states that goods are of merchantable quality, "if they are as fit for the purpose or purposes for which goods of that kind are commonly bought as it is reasonable to expect having regard to any description applied to them, the price (if relevant) and all the other relevant circumstances."⁴² Both with regard to conformity to description and in the matter of merchantability, the Unfair Contract Terms Act of 1977 (Section 6) limits the seller's power to contract out of her responsibility. Section 14(3) of the 1979 Act deals with conformity to particular purpose. Like the "implied condition" of merchantability, this "condition" applies only to the sale of goods made in the seller's course of business. The liability exists only if the buyer advised the seller of the particular purpose for which the goods were bought. It is also conditioned on the absence of circumstances indicating that the buyer did not rely on the skill or judgment of the seller, or that such a reliance would not be reasonable.⁴³

40. The main amendments were introduced by the Supply of Goods (Implied Terms) Act, 1973, ch. 13 and the Unfair Contract Terms Act, 1977, ch. 50.

41. Benjamin's Sale of Goods, § 715 et seq., at 409 and § 735 et seq., at 435 (3d ed. 1987); P. Atiyah, *The Sale of Goods* 61-63, 126-35 (8th ed. 1990).

42. On this definition and its relation to criteria provided for in previous judgments, see Benjamin's Sale of Goods, *supra* note 41, § 779 et seq.; P. Atiyah, *supra* note 41, at 142. On the proposals to reformulate this definition, or even to replace the concept of "merchantability" with another term, not so historically loaded, see the Law Commission's Working Paper No. 85 on Sale and Supply of Goods §§ 4.1-4.25, at 56-67 (1983); P. Atiyah, *supra* note 41, at 145-46, 167 et seq.; Benjamin's Sale of Goods, *supra* note 41, § 800, at 461-62.

43. According to the Sale of Goods Act, 1893, ch. 71, § 14(1), the buyer had to prove that he had made known to the seller the particular purpose for which the goods

Sale by sample (Section 15) does not include every case in which a sample or model has been presented to the buyer; rather, an express or implied indication is required that the sample or model constituted part of the contract. In such a case, three obligations are imposed on the seller: the goods must correspond to the sample; the goods must be free of any defect rendering them unmerchantable that would not be apparent on reasonable examination of the sample; and the buyer must be given a reasonable opportunity to compare the goods with the sample.

The matter of quantity is not dealt with in the framework of "Conditions and Warranties," but rather in the chapter dedicated to the performance of the contract, in Section 30. Here, the law takes a strict attitude towards the seller. The seller must deliver precisely the agreed quantity, and if she delivers a smaller or a larger quantity, the buyer is entitled to accept the delivered goods or to reject the whole.

Where conformity obligations are not implied by the law as aforesaid, but are based on the parties' agreement, the question arises whether their breach entitles the buyer to rescind the contract, or allows her only damages. In the absence of an answer in the agreement itself, it is decided as a matter of the contract's construction and the severity of the breach. Conversely, where the Act defines an obligation as a "condition," any breach thereof entitles the buyer to treat the contract as repudiated.⁴⁴ This difference is hardly justifiable.

The American Uniform Commercial Code (U.C.C.) is also closely linked to the Common Law tradition as to the conformity of the sale object. Its main relevant provisions are found in Sections 2-312 to 2-318. The obligations relating to the quality of the goods are divided into *Express Warranties* and *Implied Warranties*. Express warranties are those which derive from affirmation of facts by the seller, her promises to the buyer, description of the sale object, or the use of samples or models—all on the condition that the affirmations, promises, descriptions, samples or models constitute "part of the basis of the bargain" (Section 2-313). The implied warranties are those of merchantability

were required, so as to show that he had relied on the seller's skill or judgment. The new rule shifts the burden of proof, and places on the seller who wishes to rebut the assumption of possible reliance a heavy burden. In practice, even under the previous rule, the courts were willing to infer the buyer's reliance from the mere fact that he went to a shop of a retailer (*Grant v. Australian Knitting Mills, Ltd.* [1936] A.C. 85, 99 (P.C.)). This is a fine example of the interrelations between the legislature and the judiciary in the gradual development of English law in this field (and in others). Another difference between the new provision and the previous provision is the omission of the proviso relating to sales under a patent or trade name.

44. See section 11(3) of the Sale of Goods Act, 1979, *supra* note 38; Benjamin's Sale of Goods, *supra* note 41, §§ 738 et seq., at 424-34, §§ 872 et seq., at 500-02, and especially § 876, at 503; P. Atiyah, *supra* note 41, at 125-26.

and fitness for particular purpose (Sections 2-314 and 2-315, respectively). The first applies only to a sale by a merchant. Section 2-314(2) provides a detailed definition of merchantability. It refers *inter alia* to the fitness of the goods for ordinary purposes, their quality, uniformity of units, and adequacy of packaging and labels. The goods must also "pass without objection in the trade under the contract description."⁴⁵ A special development in the U.C.C., which does not exist in the Common Law tradition, is a certain extension of the liability towards people who have no contractual privity with the seller.⁴⁶

In many respects, the U.C.C. is an improvement on the previous law. Yet, it preserves limitations and distinctions that can hardly be justified. Even the very classification of warranties into express and implied categories is justifiable almost solely on historical grounds.⁴⁷ The same applies to the limited application of the requirement of merchantability to sales by merchants.

An important development in both the English and American systems is the enactment of statutes regulating consumer transactions. This legislation grants the consumer-buyer special privileges, though in many cases it deals with other aspects of the matter, and not necessarily with the content of the seller's *contractual* responsibility.⁴⁸ One should also note the development of the tort doctrine of strict liability in American law, which in the sphere of consumer transactions constitutes a central device for the protection of buyers.

b. Sale of Real Property

As in the sale of goods, the point of departure of Anglo-American law regarding the object's conformity in the sale of real property is

45. For a general discussion of the warranties of quality under the U.C.C., see R. Nordstrom, *Law of Sales* §§ 63-92, at 198-289 (1970); R. Anderson, *Uniform Commercial Code*, Vol. 3, at 1-322 (3d ed. 1983); Article Two Warranties in Commercial Transactions: An Update (Special Project), 72 *Cornell L. Rev.* 1159 (1987); Williston on Sales, Vol. 3, chs. 17-22, at 1 to 320 (1974, 4th ed. updated to 1991).

46. Section 2-318 of the U.C.C.; R. Nordstrom, *supra* note 45, §§ 90-92, at 278-89; R. Anderson, *supra* note 45, at 398-418.

47. For a recent attack on this distinction, see Herbert, *Toward a Unified Theory of Warranty Creation under Articles 2 and 2A of the Uniform Commercial Code*, 1990 *Colum. Bus. L. Rev.* 265. Compare also R. Nordstrom, *supra* note 45, § 74, at 228-30.

48. The central English statutes dealing with the issue in the contractual sphere are the Supply of Goods (Implied Terms) Act 1973, *supra* note 40, and the Unfair Contract Terms Act of 1977, *supra* note 40. The American federal act in this respect is the Magnuson-Moss Warranty Act, 15 U.S.C. § 45 (1978). On the latter, see C. Reitz, *Consumer Product Warranties under Federal and State Laws* (2d ed. 1987). On consumer legislation generally in England, see R. Cranston, *Consumers and the Law* (2d ed. 1984); Benjamin's *Sale of Goods*, *supra* note 41, §§ 1020-1093, at 609-56; P. Atiyah, *supra* note 41, at 205-71. On American law, see D. Pridgen, *Consumer Protection and the Law* (1986, updated to 1990); Y. Rosmarin & J. Sheldon, *Sales of Goods and Services* (2d ed. 1989).

caveat emptor.⁴⁹ There are also similarities between the exceptions to this principle in the two fields. Yet, one of the striking features of English and American sales laws is the sharp separation between the treatment of sale of goods and the rules relating to "vendor and purchaser."

Within the sphere of real property, there is a strict distinction between conformity of the object and conformity of the rights therein. Unlike the *caveat emptor* doctrine governing in the first case, in the latter the attitude is the opposite. In the absence of agreement to the contrary, the vendor is obliged to convey full and complete title to the property, free of any charge or other third party right.⁵⁰ As for the conformity of the object, the prominent distinction in England is between the sale of existing realty and the sale of future realty, especially buildings which have not yet been erected or that are still in the process of construction. With regard to the sale of existing real property, in the absence of fraud or express undertaking, the seller bears no responsibility for patent or latent defects.⁵¹ As for buildings under construction, the constructor-seller is responsible for carrying out the construction with reasonable care and skill, and for the building's fitness for use.⁵² However, this responsibility is of delictual nature, based on negligence, rather than contractual liability.⁵³

In the United States, the tendency is to extend the conformity obligations in the sale of realty beyond what was reached in England.⁵⁴

49. R. Walton, *The Law of Sales of Land* 159 (1969); R. Annand & B. Cain, *Modern Conveyancing* 194 (1984); Powell on Real Property, Vol. 6A, § 938.2[1], at 84A-5 to 84A-6 (1949, updated to 1990).

50. J. Farrand, *Contract and Conveyance* 83-166 (4th ed. 1983); R. Annand & B. Cain, *supra* note 49, at 199 et seq.; Williston on Contracts, Vol. 7, § 923, at 666-704 (3d ed. 1963, updated to 1990).

51. See, e.g., *Perry v. Sharon Development Co. Ltd.*, [1937] 4 All E.R. 390 (C.A.); *Turner v. Green*, [1895] 2 Ch 205; A. Speaight & G. Stone, *The Law of Defective Premises* 20-25 (1982).

52. The case that formed the basis for the development of case law in this regard was *Miller v. Cannon Hill Estates Ltd.*, [1931] 2 K.B. 113. See also *Perry v. Sharon Development Co. Ltd.*, [1937] 4 All E.R. 390 (C.A.); R. Walton, *supra* note 49, at 161; A. Speaight & G. Stone, *supra* note 51, at 1-19.

53. See also *Lynch v. Thorne*, [1956] 1 W.L.R. 303 (C.A.); V. Di Castri, *Law of Vendor and Purchaser*, § 215, at 175-77 (2d ed. 1976). This tortious liability was extended considerably by The Defective Premises Act, 1972, ch. 35. See E. George & A. George, *The Sale of Flats 196-99* (4th ed. 1978); A. Speaight & G. Stone, *supra* note 51, at 13-19.

54. As for the sale of new houses, a development similar to the English one had occurred already in the late fifties. See Bixby, *Let the Seller Beware: Remedies for the Purchase of a Defective Home*, 49 J. Urban L. 533, 556 (1971). Moreover, in contrast to the English rule, American case law does not distinguish between buildings that are in the process of construction and those which have already been completed. This distinction

Generally, with regard to the sale of new houses, the disparity between goods and realty has been eliminated. However, the social, consumer justifications given to that responsibility, alongside the reliance on delictual bases of responsibility (negligence, fraud and strict liability)⁵⁵ have affected the incidence of the implied warranty doctrine. The development is confined to the sector of dwellings, and the liability is imposed only on firms dealing with the construction or sale of new buildings. The slow progress concerning the seller's responsibility in the sale of real property other than dwellings and as to sale of second-hand dwellings has been criticized more than once. The critiques' view is that the seller's responsibility in the sale of realty in general should be equated with that imposed on sellers of new dwellings or goods, or lessors of realty for the purpose of habitation.⁵⁶ This view was accepted by the American Law Institute, which in 1975 approved the Uniform Land Transactions Act (ULTA). Generally, the Act's provisions impose conformity obligations similar to those applied by the U.C.C. to the sale of goods, subject to modifications resulting from the difference between the objects. Regrettably, the proposed Act has not yet been enacted by any of the states.

c. *Lease of Movables*

Since the litigation concerning the lease of movables is relatively scarce, the conclusions one can draw from the cases are not very clear. In general, the development of English and American case law as to the lessor's liability for the object's conformity resembles the development that occurred in the sale of goods.⁵⁷ Inasmuch as there were

was penetratingly criticized by American scholars, Bearman, *supra* note 1, at 543; Kessler & Fine, *supra* note 39, at 443; Note, Implied Warranties in the Sale of New Homes, 26 U. Pitt. L. Rev. 862, 864 (1965); Wells, Implied Warranties in the Sale of New Homes, 23 U. Fla. L. Rev. 626 (1971); Bixby, *supra*. Inspired by these (and other) articles, American courts abandoned the English distinction. See, e.g., *Carpenter v. Donohoe*, 154 Colo. 78, 83, 388 P.2d 399, 402 (1964).

55. On the various ways for imposing tortious liability on the builder-seller, see Zipser, *Builders' Liability for Latent Defects in Used Homes*, 32 Stan. L. Rev. 607, at 610-21 (1980); Powell on Real Property, *supra* note 49, § 938.3[2] et seq., at 84A-26 et seq.

56. See, e.g., Bearman, *supra* note 1; Haskell, *The Case for an Implied Warranty of Quality in Sales of Real Property*, 53 Geo. L.J. 633 (1965); Bixby, *supra* note 54. On the development of American case law in dwelling leases, see Part II.B.2.d *infra*.

57. In England, see Law Commission's Report No. 95 on Implied Terms in Contracts for the Supply of Goods, §§ 79-92, at 25-29 (1979) [hereinafter *The Report*]; Working Paper No. 71 on Implied Terms in Contracts for the Supply of Goods, §§ 46-68, at 25-42 (1977) [hereinafter *Working Paper*]; Palmer, *Conditions and Warranties in English Contracts of Hire*, 4 Anglo-Am. L. Rev. 207 (1975). In the United States, see generally Williston on Contracts, *supra* note 50, Vol. 9 (1967, updated to 1990), § 1041, at 919-24. For a review of the case law on this issue, see *Warranties in Connection with Leasing or Hiring of Chattels*, 68 A.L.R.2d 850 (1959).

doubts about the exact scope of the lessor's liability, they largely disappeared in England by 1982, with the enactment of the Supply of Goods and Services Act. The Act applies the provisions of the Sale of Goods Act concerning the quality of goods to contracts of barter, to hire of movables, and to the component of the supply of goods in contracts for services ("work and materials").⁵⁸ Thus, in all respects except for the title and rights to the property, the "implied terms" of quality in hire have been assimilated to those applicable to sale of goods. As for title, the 1982 Act follows the law of sale subject to modifications resulting from the limited scope of rights the lessee obtains and from the continuous nature of the lease (Section 7). Except for the matter of title, the Act does not concern itself with the continuous nature of the lease, and, as in sale, it imposes one-time obligations of conformity.⁵⁹

In the United States, courts and scholars have dealt extensively with the question of whether the U.C.C.'s warranties of sale are also applicable to the hire of goods.⁶⁰ Hopefully, in a few years these discussions will no longer be necessary. In 1987, a new chapter of the U.C.C. was introduced: Chapter 2A, dealing with leases of goods. As for the conformity of the leased object, the new chapter lays down provisions similar to those of Chapter 2. When this chapter is adopted by the states that previously adopted the other chapters of the Code, a clarification and unification of the conformity rules in sales and leases of goods will be achieved, similar to the progress made in England by the 1982 Act.⁶¹ Yet, neither in England nor in the United States can

58. The Supply of Goods and Services Act, 1982, ch. 29, §§ 3-5, 8-11.

59. See generally The Report, *supra* note 57, §§ 100 et seq., at 32; Benjamin's Sale of Goods, *supra* note 41, § 810, at 467-69.

60. The prevailing view is that the warranty provisions are not directly applicable to leases, though many attempts were made to apply them by way of analogy. The issue was discussed in dozens of cases and articles. See, e.g., Boss, *Panacea or Nightmare? Leases in Article 2*, 64 B.U.L. Rev. 39 (1984); Note, *Disengaging Sales Law From the Sale Construct: A Proposal to Extend The Scope of Article 2 of the UCC*, 96 Harv. L. Rev. 470 (1982). For a review of the case law, see *Application of Warranty Provisions of Uniform Commercial Code to Bailments*, 48 A.L.R.3d 668 (1973); Note, *The Extension of Article 2 of the Uniform Commercial Code to Leases of Goods*, 12 Tulsa L.J. 556, at 561 (1977). In fact, this issue is part of a wider problem, namely the scope of the possible application of chapter two's warranties to non-sale transactions, whether directly or by analogy. See official comment no. 2 to § 2-313 of the U.C.C.; Farnsworth, *Implied Warranties of Quality in Non-Sales Cases*, 57 Colum. L. Rev. 653 (1957); Murray, *Under the Spreading Analogy of Article 2 of the Uniform Commercial Code*, 39 Fordham L. Rev. 447 (1971); J. White & R. Summers, *Uniform Commercial Code*, § 9-2, at 389-93 (3d ed. 1988).

61. To the best of my knowledge, eight states (including California) have already adopted the new chapter, and the legislative process has begun in others.

this unification overcome the shortcomings of the conformity rules applicable to the contract of sale itself.

d. Landlord-and-Tenant Law

The starting point of landlord and tenant law under Anglo-American law is identical to that of the law of sales. In the absence of express obligation or obligation based on specific legislation, the landlord bears no responsibility towards the tenant regarding the condition of the leased property at the commencement of the tenancy or during its term.⁶² Even today, English law basically adheres to the principle of "caveat tenant," though some exceptions to the principle have evolved. The two general exceptions are express undertaking and fraud, though their scope is quite limited.⁶³ Other exceptions were developed by the courts with regard to dwelling tenancies of furnished apartments, dwelling tenancies in which the contract was made while the building was still under construction, and the maintenance of the common areas of apartment houses.⁶⁴

More significant exceptions were introduced by legislation, particularly in the Landlord and Tenant Act of 1985, which combines provisions previously found in other Acts.⁶⁵ Sections 8-10 of the Act provide implied terms as to fitness for human habitation, and they apply mainly

62. This rule evolved against the background of a reality in which the typical tenancy related to rural land. The typical tenant, staying on the property, had the tools and skills needed for the evaluation of the property's condition and for keeping it in repair. On the other hand, the landlord usually was not a resident, so it was not reasonable to expect him to look after the property and see to its repair and conformity. Obviously, the characteristics of modern tenancies are quite different. See Friedman on Leases, Vol. 1, § 10.101, at 556-75 (3d ed. 1990). See also D. Yates & A. Hawkins, *Landlord and Tenant Law* 239 (2d ed. 1986); Woodfall's *Law of Landlord and Tenant*, Vol. 1, § 1-1465, at 618/3-619 (28th ed. 1978, Updated to 1990); R. Schoshinski, *American Law of Landlord and Tenant*, § 3:10, at 109 (1980).

63. *Board of Governors of the London Hospital v. Jacobs*, [1956] 2 All E.R. 603, 609, 610 (C.A.). Even where the law is ready to infer an undertaking concerning the condition of the property out of a landlord's representation, only a representation made with the intention of becoming part of the basis of the transaction will suffice. See, e.g., *De Lassalle v. Guildford*, [1901] 2 K.B. 215, 222. The attitude toward the other exception ("fraud") is also very restrictive. The mere non-disclosure of defects known to the landlord is not necessarily considered to be fraud. See Halsbury's *Laws of England*, Vol. 27 (4th ed. 1981), *Landlord and Tenant*, § 270, at 210-11.

64. *Smith v. Marrable*, (1843), 152 Eng. Rep. 693, 11 M & W (5) (1843); *Wilson v. Finch Hatton*, [1877] 2 Ex. D. 336; *Sarson v. Roberts*, [1895] 2 Q.B. 395 (C.A.) (first exception); *Perry v. Sharon Development Co. Ltd.*, [1937] 4 All E.R. 390 (C.A.) (second exception); *Liverpool City Council v. Irwin*, [1977] A.C. 239 (third exception).

65. Particularly §§ 4 and 6 of *The Housing Act, 1957*, 5-6 Eliz. 2, ch. 56, §§ 32, 33 of *The Housing Act, 1961*, 9-10 Eliz. 2, ch. 65, and § 125 of *The Housing Act 1974*, ch. 44.

to the letting of dwellings at low rents. The Act lays down minimal standards for compliance with this compulsory duty. Sections 11-17 are located in the chapter headed Repairing Obligations, and apply to leases of dwelling houses for a term of less than seven years. They detail the maintenance and repair obligations imposed on the landlord, and their scope and limits, taking into account the property's condition, age and location. These provisions further reinforce the tenant's rights by limiting the possibility of contracting around them and by extending her right to specific performance.

As previously mentioned, there is no difference between English and American laws regarding their starting point in this issue. As for commercial leases, the attitude of *caveat emptor* largely prevails in the United States even today. With regard to the relations between the parties in dwelling leases, however, numerous changes have been made. These changes are part of broad trends in American law, which have evolved against the background of the socio-economic reality in many urban poverty neighborhoods. This development, beginning in the late sixties, occurred both in case law and in statutes, and is characterized by consistent extension of the tenant's rights and parallel limitation of the landlord's rights and immunities in numerous contexts.⁶⁶

The central concept that has evolved with regard to the landlord's responsibility for the conformity of the property leased is the "Implied Warranty of Habitability." The leading case is *Javins v. First National Realty Corp.*,⁶⁷ decided in 1970, which included two fundamental innovations. The first innovation concerned the duties imposed on the landlord by the applicable Housing Code. The court allowed the tenants to rely on the landlord's breaches of these duties as if they were contractual relations, although no reference, express or implied, was made to them in the contract. Secondly, the court overruled the former rule which held that the tenant's obligation to pay the rent was independent of the fulfillment of the landlord's obligations. The court based the reform on social and consumer considerations, and on the

66. See Friedman on Leases, *supra* note 62; Abbott, Housing Policy, Housing Codes and Tenant Remedies: An Integration, 56 B.U.L. Rev. 1 (1976); Rabin, The Revolution in Residential Landlord-Tenant Law: Causes and Consequences, 69 Cornell L. Rev. 517 (1983/84). The last article is part of a symposium on the same subject: 69 Cornell L. Rev. 517-683 (1983/84).

67. 428 F.2d 1071 (D.C. Cir. 1970). For a partial list of the numerous notes and articles written following this case, see Abbott, *supra* note 66, at 13 n.56; Friedman on Leases, *supra* note 62, at 561-64 n.15. See especially Cunningham, The New Implied and Statutory Warranties of Habitability in Residential Leases: From Contract to Status, 16 Wash. U. Urban L. Ann. 3 (1979). See also R. Schoshinski, *supra* note 62, §§ 3:16-3:29, at 122-50.

argument that the imposition of these obligations is but a natural extension of the warranties implied in sales contracts.⁶⁸ The new ruling was shortly adopted in most of the states of the United States, and, following the case law, legislative reforms were carried out in many states, thereby crystallizing the new rule.⁶⁹

The implementation of the new doctrine as a contractual doctrine raised many problems.⁷⁰ As for its incidence, though sometimes the courts were willing to apply it to non-residential leases, it seems that at least for the time being the prevailing view limits its application to residential leases.⁷¹ Certain solutions to the various problems were found where the doctrine was regulated by statute. This legislation (including the Restatement) established general and independent criteria for the conformity of the leased property, without reliance on the Housing Codes, and it also mitigated the compulsory character of the Codes' duties.⁷² As for the application of the rules to commercial leases, there is still reluctance to such an extension even in the legislation.

Along with the line of cases based on the Housing Codes, the courts became increasingly willing to infer conformity obligations from the circumstances of the contract, even without any express agreement to that effect.⁷³ In fact, the expression "implied warranty" is more

68. *Javins*, 428 F.2d at 1075. See also *Green v. Superior Court of San Francisco*, 10 Cal. 3d 1616, 517 P.2d 1168, 111 Cal. Rptr. 704 (1974).

69. For a review of these enactments, see R. Schoshinski, *supra* note 62, §§ 3:30-3:34, at 150-59. In 1976, the implied warranty of habitability was absorbed into the Restatement. See Restatement (Second) of the Law of Property—Landlord and Tenant, Ch. 5 [hereinafter Restatement—Property].

70. Thus, since the Housing Codes are compulsory by their very nature, there is no way under the new doctrine to contract out of their obligations. These Housing Codes are detailed and complicated, and since it would be unreasonable to view any non-fulfillment thereof as a breach of the lease, one must determine the scope of non-fulfillment that would also constitute a breach of the contract. Finally, since the standard applied by the courts is not based on the parties' actual agreement, many problems also arise with regard to the appropriate remedies for breach, particularly the quantification of damages. See Rabin, *supra* note 66, at 524; R. Schoshinski, *supra* note 62, §§ 3:19-3:23, at 132-40.

71. See Friedman on Leases, *supra* note 62, at 561-66; R. Schoshinski, *supra* note 62, § 3:29, at 147. This approach was criticized. See, e.g., Levinson & Silver, *Do Commercial Property Tenants Possess Warranties of Habitability?*, 14 Real Est. L.J. 59 (1985); Bopp, *The Unwarranted Implication of a Warranty of Fitness in Commercial Leases—An Alternative Approach*, 41 Vand. L. Rev. 1057 (1988).

72. See, e.g., § 5.6 of the Restatement—Property, *supra* note 69, which, subject to qualifications of unconscionability and public policy, recognizes the possibility of contractually waiving the lessor's liability. See also the review of state legislation on the subject at the beginning of the same chapter of the Restatement.

73. A leading case in this connection is *Lemle v. Breeden*, 51 Haw. 426, 462 P.2d 470 (1969).

appropriate for these cases, where the liability is not derived from external statutory standards.⁷⁴

From a comparative point of view, the "enthusiasm" accompanying the development of the implied warranty of habitability in American law is rather questionable. The limited incidence of the doctrine (at least for the time being), and its close linkage to compulsory statutory standards indicate that it is a consumer doctrine in nature and scope. Further, the content of the conformity requirements under the new doctrine does not seem to be so advanced or innovative. The warranty of habitability provides the tenant with rights which in other (Civil Law) systems she had obtained long ago. However, one might expect that in the future the development described above will bring about a broader reform in the law of landlord and tenant.

e. Contracts for Services

Until recently, there was no enactment in English law that regulated contracts for services. As for the conformity obligations, the courts distinguished between the component of work or service, existing in any contract of services, and the component of supply of materials or goods, which often accompanies it. Though the Sale of Goods Act did not apply to contracts for services, the conformity obligations developed by the courts with regard to the goods were very similar to those provided by the Sale of Goods Act.⁷⁵ Contrarily, as for the element of service or work, only reasonable care and skill were usually required.⁷⁶ The Supply of Goods and Services Act of 1982 (Sections 1-5, 13) restates these rules. The limited obligation to carry out work with reasonable care and skill applies only to services rendered in the contractor's course of business.

The scope of the contractor's liability for the conformity of work or service under American law is unclear. The U.C.C. does not deal with contracts for services, nor does any other general enactment. As in England, the prevailing view in the case law requires proof of negligence as a precondition to the imposition of liability on the contractor, though there are other views as well.⁷⁷ American courts exten-

74. On the importance of the distinction between these two types of doctrines, and on the difficulties resulting from overlooking it, see Rabin, *supra* note 66, at 521-27.

75. For a review of the English cases, see the Working Paper, *supra* note 57, §§ 25-32, at 15-18; N. Palmer, *Bailment* 531-37 (1979).

76. See, e.g., *Curtis v. Chemical Cleaning and Dyeing Co.*, [1951] K.B. 805 (C.A.); *Levison v. Patent Steam Carpet Cleaning Co.*, [1978] Q.B. 69 (C.A.). See also G. Treitel, *The Law of Contract*, 644-45 (7th ed. 1987).

77. Greenfield, *Consumer Protection in Service Transactions—Implied Warranties and Strict Liability in Tort*, 1974 *Utah L. Rev.* 661, 663-68; Comment; *Guidelines for Extending Implied Warranties to Service Markets*, 125 *U. Pa. L. Rev.* 365, 393 (1976).

sively dealt with the question of whether the U.C.C.'s warranties can be applied to contracts for services, either directly or by way of analogy. As for clear contracts for services, the general tendency is not to apply the provisions of the U.C.C., either directly or by analogy.⁷⁸ The main struggle in the case law relates to contracts in which there are both elements of work or services and elements of supplying goods, such as medical treatment that includes blood transfusion, repair contracts, and the like. There are contradictory views regarding such combined transactions.⁷⁹

f. Conclusion

Although the socio-economic views that gave birth to the *caveat emptor* attitude in the previous centuries have lost much of their force, the Anglo-American law still encounters difficulties when trying to free itself from the chains of old precedents and doctrines. Indeed, in several fields the exceptions to the promisor's non-liability rule are gradually forcing out the rule itself. However, the pace of this development varies greatly with different kinds of transactions. Even regarding the transactions in which the greatest progress has been attained (sale of goods), the non-liability rule has not yet been formally replaced by a liability rule. In real property transactions in particular, the non-liability rule is still predominant, and as far as there are exceptions to it, they are usually limited to the sphere of consumer transactions. Thus, except for the majority of dwelling leases, the conformity rules in the lease of realty under English law are still about two hundred years behind the progress reached in sale and hire of movables. As for *obligations to do*, the prevailing view is that the promisor's liability is conditioned upon the existence of negligence on her part. The distinction between

78. Singal, *Extending Implied Warranties Beyond Goods: Equal Protection for Consumers of Services*, 12 *New Eng. L. Rev.* 859, 885-91 (1977); Greenfield, *supra* note 77, at 668-677; Comment, *supra* note 77.

79. Farnsworth, *supra* note 60, at 660-65; J. White & R. Summers, *supra* note 60; Singal, *supra* note 78. For an analysis of the cases on blood transfusions, see R. Nordstrom, *supra* note 45, § 22, at 44-46, § 80, at 247-50; Dugas, *Sales—Implied Warranty in Sale of Blood*, 17 *Loy. L. Rev.* 229 (1970). The prevailing view among the authors supports the extension of the warranty provisions to non-sale transactions. See also A., *Contracts for Goods and Services and Article 2 of the Uniform Commercial Code*, 9 *Rut.-Cam. L.J.* 303 (1977). Part of the confusion results from the fact that sometimes the courts express themselves in terms of "implied warranty"—a phrase apparently indicating full contractual responsibility—while in fact referring to a responsibility based only on reasonable diligence (e.g., *Garcia v. Color Tile Distributing Co.*, 408 P.2d 145, 148, 75 N.M. 570, 573 (N.M. 1965)). Of course, providing an "implied warranty" of reasonable care and skill in the performance of the work is nothing but a liability rule based on negligence, under a cover of "implied warranty." See Greenfield, *supra* note 77, at 663-68; Comment, *supra* note 77, at 393.

obligations of diligence or means (*obligations de moyens*) and obligations of result (*obligations de résultat*) has not been utilized in the Anglo-American legal system. Even with regard to *obligations to do* which belong to the latter category, Anglo-American law usually does not impose full contractual responsibility.⁸⁰

Indeed, at least for the last hundred years, the tendency in Common Law countries has always been towards the expansion of responsibility. However, this development is slow, partial, and in many cases involves disharmony and artificiality. This is due to the fact that the development is mainly judge-made, and the fact that even when made by the legislature, the legislation reflects the concepts and rules developed by case law. The drafters adhered to the judicial tradition, and preserved many of the distinctions of the previous case law. In the sphere of private law (apart from the field of consumer transactions), no legislative reforms were made. The legislation contributes to clarification of the rules and introduces some minor improvements into the existing law, but does not substantially further the developments made by the courts.

C. *The Exception—Coherent and Systematic Rules*

1. *Austrian Law*

In sharp contrast to other codes, the Austrian Civil Code of 1811 (*das Allgemeine Bürgerliche Gesetzbuch—ABGB*) is based on a general principle of conformity.⁸¹ The main provisions in this matter are to be found in Sections 922 et seq. of the Code, which are part of the chapter including the general rules on reciprocal contracts. In these provisions, the legislature concerned itself primarily with transactions for the supply of property for consideration, such as sales and exchange. However, subject to specific provisions, these provisions apply equally to any other mutual contract.⁸² In the same breath, the ABGB regulates the incidence of nonconformity in terms of quality, quantity, and defects of title. It does not distinguish between cases in which the criterion for the conformity is the parties' agreement, express or implied, and cases in which the criteria are derived from supplementary statutory provisions. The liability according to the law of warranty applies whether the contract refers to an identified object or to an unidentified one. In the context of remedies, Austrian law distinguishes between quali-

80. See Part III.C.2 *infra*.

81. The Austrian Code was not the first to adopt a unified system of liability for nonconformity. It was preceded by the approaches of canon law and the natural law school, and by the Prussian Code of 1794. See E. Rabel, *supra* note 13, at 107.

82. H. Koziol & R. Welsch, *Grundriss des bürgerlichen Rechts*, Bd. I: Allgemeiner Teil und Schuldrecht, 229 (7. Aufl. 1985).

tative and quantitative nonconformity, yet the two are treated within the framework of the rules of warranty. A distinction preserved in Austrian law is that between defects (qualitative, quantitative, or of title) and the delivery of an object different from that agreed upon.⁸³ The law of warranty does not apply to the latter case. Austrian law entitles the promisee to choose between relying on the rules of warranty and having recourse to the rules of mistake (where the two overlap). As for the general rules of breach, they apply only where the nonconformity is discovered prior to the delivery of the object, whereas after the delivery only the rules of warranty apply.⁸⁴

Section 922 states that a person who delivers property to another for consideration is responsible for ensuring that the property possesses the qualities that were expressly specified or that are ordinarily supposed to exist in it, and that it can be used according to the nature of the contract or its express specifications. Where there are no express undertakings regarding the object's qualities, they are deduced from the circumstances of the transaction. Section 923 further specifies types of conduct that lead to the imposition of damages. These acts are: expressly or impliedly attributing qualities to property which it does not have; concealing unusual defects or charges; alienating property which no longer exists or which belongs to another, while pretending that it is owned by the promisor; and pretending that the property is fit for a certain purpose, or that it is free from usual defects or charges. In the following provisions, the Code clarifies specific issues concerning the effect of the promisee's cognizance of the defect, the special burdens imposed on the aggrieved party who wishes to rely on nonconformity, nonconformity in sale of animals, and more.

As for the promisee's remedies, the ABGB distinguishes between negligible defects (those which bear no effect), secondary (non-substantial) defects, and essential (substantial) defects. This tripartite distinction is based on the scope and results of the defect. Another distinction is between rectifiable and unrectifiable defects. A defect is considered unrectifiable if its rectification involves unreasonable economic or other efforts. Generally, the available remedies are rescission, price reduction, rectification of the defect or completion of the missing part thereof.

If the nonconformity is essential and unrectifiable, the promisee is entitled to rescind the contract immediately. If the defect is essential but rectifiable, the promisee is entitled to demand the rectification of

83. *Id.* at 228. It should be noted, however, that § 378 of the Austrian Commercial Code (drafted after the German HGB) narrows the gap between the rules governing the two cases (see *supra* Part II.B.1.b.i). Apart from that, the results of this distinction in Austrian law are not very significant.

84. H. Koziol & R. Welsch, *supra* note 82, at 241-42.

the defect or the completion of the missing part, and she must grant the promisor an appropriate extension for that purpose. If the non-conformity is secondary and rectifiable, the promisee is entitled to grant an extension for its removal, but to the extent that it is not removed, she is only entitled to reduction of the remuneration. If the defect is secondary and cannot be removed, the promisee has to content herself with reduction as well. In all of the above cases, if the supplier's behavior involves fault, the promisee is entitled to damages in addition to any of the other remedies. Where the defect is rectifiable but the party in breach does not remove it during the extension given to her, the promisee may do so herself. Her costs are then taken into account in the calculation of her monetary relief. Where the contract refers to unidentified objects, the assumption is that the nonconformity may be cured by substituting the object or by completing the missing quantity. Therefore, in such cases the promisee is not entitled to immediate rescission, but is required first to grant an extension to remedy the breach.

Austrian law lays down specific provisions concerning the object's conformity in leases (Section 1096), contracts for services (Section 1167), assignment of rights (Section 1397) and commercial sales (Section 377 of the Commercial Code). Special rules also apply to consumer transactions.⁸⁵ Particularly noteworthy are the provisions regarding leases and contracts for services. As for leases, the need for a special arrangement derives from the continuous nature of the agreement. The Code imposes on the lessor three obligations: to deliver the property in serviceable condition, to maintain the property in such condition throughout the lease, and to refrain from disturbing the lessee's use and enjoyment of the property. Though it is not expressly stated in the provision, the lessor bears responsibility for disturbances caused by third parties as well.⁸⁶ If the leased property is not usable at the time of delivery, or becomes unusable afterwards without the fault of the lessee, the lessee is exempt from paying the rent for the period in which she cannot use the property as agreed. In a lease of real property, this exemption may not be contractually waived. Additionally, under the general rules the lessee is entitled to rescind the contract in appropriate circumstances, to require the performance of the lessor's obligations, and, in case of fault on the part of the lessor, to claim damages.⁸⁷

85. The special rules on the supplier's guaranty in consumer transactions are provided in §§ 8 et seq. of the Consumer Protection Law (*Konsumentenschutzgesetz*) of 1979. These provisions deal with the time limits for the consumer's right to rely on defects, the force of exemption clauses, etc.

86. Rummel-Würth, *Kommentar zum ABGB*, Bd. 2, Art. 1096, §§ 7-9, at 1574-75 (1984).

87. *Id.* § 2, at 1572.

The lessee may also carry out repairs that the lessor should have executed, and her right of indemnification is regulated by reference to the general rules on management of another's property.

As for contracts for services, the rule stated in Section 1167 differs from the ordinary rules of remedies for nonconformity. The section provides that in the case of essential defects which render the outcome of the work useless or which constitute a breach of an express condition (*ausdrücklichen Bedingung*), the orderer is entitled to rescind the contract. In contrast to the general law, which requires the promisee to grant an extension for the removal of the defects before having recourse to other remedies, here there is apparently no such requirement. This rule has been severely criticized.⁸⁸ In fact, the disparity between the general law and the rule provided by Section 1167 has been considerably diminished by the courts. In this context, the courts strictly construed the phrase "essential defects," and tended to recognize the orderer's right to immediate rescission only when the defect was so severe that it was actually unrectifiable. The practical outcome is, as under the general rule, that the orderer should first require the removal of the defect if this is possible. Neither is the additional provision of Section 1167, under which the right to demand correction of the defect does not apply to cases that would involve disproportionate expenses, a deviation from the general law. As has already been mentioned, according to the general law, the criteria for the distinction between rectifiable and unrectifiable defects are based on the reasonableness of the expenses incurred by the supplier. It is indeed remarkable that precisely in those cases where the Code deviated from the ordinary rules the courts have found it necessary to assimilate the special law into the general one.

2. *The Conventions on the International Sale of Goods and Israeli Law*

a. *The International Conventions*

In 1964, following preparatory works that lasted for some decades, a convention relating to a Uniform Law on the International Sale of Goods (ULIS) was approved in The Hague.⁸⁹ In spite of its modern

88. W. Lorenz, *supra* note 19, § 76, at 76-77.

89. On the preparatory work and on the Hague conference itself, see Rabel, *A Draft of an International Law of Sales*, 5 U. Chi. L. Rev. 543 (1938); Rabel, *The Hague Conference on the Unification of Sales Law*, 1 Am. J. Comp. L. 58 (1952); Nadelmann, *The United States and Plans for a Uniform (World) Law on International Sales of Goods*, 112 U. Pa. L. Rev. 697 (1964); *Diplomatic Conference on the Unification of Law Governing the International Sale of Goods, The Hague, 2-25 April 1964, 2 Vol's* (1966); Honnold, *Documents, The 1964 Hague Convention and Uniform Laws on the International Sale of Goods*, 13 Am. J. Comp. L. 451 (1964).

provisions and fine drafting, the convention did not achieve much practical success, mainly due to non-legal reasons.⁹⁰ With the initiation of the United Nations Commission on International Trade Law (UNCITRAL), another conference was held in 1980 (the Vienna Conference), in which the United Nations Convention on Contracts for the International Sale of Goods was accepted.⁹¹ This convention is largely based on the provisions of ULIS.

One of ULIS's great achievements is the removal of the distinctions among different types of conformity obligations, which as seen above, prevail in most legal systems throughout the world. In Section 33(1), ULIS establishes a single, unified concept of nonconformity, which encompasses any divergence between the agreed upon goods and the goods actually delivered. Along with the general principle, the provision specifies five categories of nonconformity: quantitative nonconformity (including the delivery of a larger quantity than agreed upon) or delivery of only part of the goods, goods different in identity or kind from those to which the contract related, nonconformity in a sale by sample or model, conformity to ordinary use, and conformity to particular purpose. The Uniform Law provides that the seller is not responsible for nonconformity of which the buyer knew, or could not have been unaware (Section 36).

ULIS includes detailed provisions concerning the burdens of examination and notice imposed on the buyer as a precondition to her reliance on nonconformity (Sections 38 and 39).⁹² Section 40 precludes the seller's reliance on the non-fulfillment of the buyer's burdens if she knew of the defect (or could not have been unaware of it), and did not disclose it to the buyer. Where nonconforming goods were delivered, and the buyer complied with the burdens imposed on her, a variety of remedies are available to her, including specific perform-

90. P. Schlechtriem, *Uniform Sales Law—The UN-Convention on Contracts for the International Sale of Goods* 18 (1986).

91. On UNCITRAL's activity, on the Vienna conference and on the convention, see generally Symposium on Unification of International Trade Law: UNCITRAL's First Decade, in 27 *Am. J. Comp. L.* 201 (1979); J. Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention* (1982); Eörsi, Comment, *A Propos the 1980 Vienna Convention on Contracts for the International Sale of Goods*, 31 *Am. J. Comp. L.* 333 (1983); *International Sales: The United Nations Convention on Contracts for the International Sale of Goods* (N. Galston & H. Smit eds. 1984); P. Schlechtriem, *supra* note 90; *Commentary on the International Sales Law—The 1980 Vienna Sales Convention* (C. Bianca & M. Bonell eds. 1987) [hereinafter C. Bianca & M. Bonell].

92. The buyer is required to examine the goods within as short a period as possible after their arrival at their destination, and to give the seller a notice of the nonconformity as soon as possible. Where the defects are not detectable in such examination, the buyer may still rely on them after their discovery, provided that he promptly gives notice thereof, and that he does so within two years from the date of delivery.

ance, rescission, damages and price reduction (Sections 41 et seq.). ULIS also contains special provisions with regard to the seller's obligation to supply goods which are free of third-party rights or claims (Sections 52, 53).

Another noteworthy point regarding the conformity obligations in ULIS relates to the definition of the delivery obligation. This obligation is defined as an obligation to deliver "goods which conform with the contract" (Section 19(1)). Therefore, at least *prima facie*, one of the important results of a breach of the conformity obligations is that the seller is viewed as if she had not delivered the goods at all.

Essentially, the 1980 UN Convention did not alter the rules provided by ULIS. Most of the changes in the new convention are stylistic or changes of details. The basic provision, parallel to Section 33 of ULIS, is found in Section 35. It adds the conformity of package to the aspects of conformity established in ULIS. The new law eases to some extent the promptness required of the buyer in examining the goods and giving notice of the nonconformity.⁹³ Instead of separate regulation of the remedies for each kind of breach, the new law contains a unified regulation of the remedies for various types of breach.⁹⁴ Under the influence of Anglo-American law, the availability of the remedy of specific performance was qualified to some extent (Section 46), and the relevant time for the calculation of the amount of reduction was changed (Section 50). The difficulty which resulted from the definition of delivery as a delivery of conforming goods was removed in the new law, and the matter of conformity was severed from the fulfillment or breach of the delivery obligation.⁹⁵

b. *Israeli Law*

The process of codifying legislation of private law began in Israel in the mid-60's. The method adopted was one of legislation by stages, with the intention that eventually the separate laws would be integrated

93. According to Article 39 of the 1980 U.N. Convention, the buyer has to give notice specifying the nonconformity "within a reasonable time after he has discovered it or ought to have discovered it," whereas according to ULIS he is required to give notice "within as short a period as possible in the circumstances" (arts. 39 and 11). For a critical survey of these rules, see Reitz, *A History of Cutoff Rules as a Form of Caveat Emptor: Part I—The 1980 U.N. Convention on the International Sale of Goods*, 36 *Am. J. Comp. L.* 437 (1988).

94. Compare Articles 45-52 of the 1980 U.N. Convention to Articles 26-29, 30-32 and 41-49 of ULIS. The 1980 U.N. Convention retains the separation between the provisions on the seller's remedies and those on the buyer's.

95. Compare Article 31 of the 1980 U.N. Convention to Article 19(1) of ULIS. See also Part III.E *infra*.

into a comprehensive civil code.⁹⁶ This legislation has been influenced by various legal systems, mainly continental but also Anglo-American. One of the central sources of inspiration in the field of contract law was ULIS, which was also adopted into Israeli law, and applies in the sphere of international trade.

The Israeli Law of Sale of 1968 applies to the sale of goods and *mutatis mutandis* to the sale of real property, obligatory rights and intellectual property.⁹⁷ It applies in the spheres of commercial, private and consumer transactions. The Law's provisions on nonconformity are based on the provisions of ULIS. It adopts the concept of nonconformity in its broad incidence (Section 11). Following ULIS, the Israeli Law excludes the buyer's reliance on defects of which she actually knew at the time of the conclusion of the contract. Yet, it does not impose on the buyer any obligation or burden of examination prior to entering into the contract or prior to taking delivery. The Law lays down detailed provisions regarding the burdens imposed on a buyer who wishes to rely on nonconformity (Sections 13-17). It also states the seller's obligation regarding the supply of an object free of third-party rights (Section 18). As for the main remedies for nonconformity, they are to be found in the Contracts (Remedies for Breach of Contract) Law of 1970.⁹⁸ This Law contains general provisions which apply to every kind of breach in any kind of contract, including nonconformity of the object in sales contracts. In addition, the Law of Sale provides special remedies for nonconformity, the most important of which is the proportional reduction of price. The principal rules regarding the different remedies (specific performance, rescission, reduction and damages) and their interrelation are very similar to the rules of ULIS, save for the abstraction and generalization of the remedies to all types of breaches in all contracts.

Following the Law of Sale, the Hire and Loan Law was enacted in 1971. The Hire and Loan Law governs lease transactions of real property, movables and rights.⁹⁹ The Law's provisions on the conformity

96. G. Tedeschi & Y. Zemach, Codification and Case Law in Israel, in *The Role of Judicial Decisions and Doctrines in Civil Law and Mixed Jurisdictions* 272, 287. (J. Dainow ed. 1974); Friedmann, *Independent Development of Israeli Law*, 10 *Is. L. Rev.* 515, 536-62 (1975); Shalev & Herman, *A Source Study of Israel's Contract Codification*, 35 *La. L. Rev.* 1091 (1975).

97. 22 L.S.I. 107. For a general review of the law, see Aronovsky, *Comments on the New Law of Sales*, 4 *Is. L. Rev.* 141 (1969) (to which the full text of the law is annexed); U. Yadin, *The Uniform Sales Law of the 1964 Hague Convention and the Israeli Sales Law of 1968*, in *Ius Privatum Gentium, Festschrift für Max Rheinstein*, Bd. I, 455 (1969).

98. 25 L.S.I. 11. The full text of the law is appended to Professor Shalev's article: Shalev, *Remedies on Anticipatory Breach*, 8 *Is. L. Rev.* 123, 135 (1973). See also Friedmann, *Remedies for Breach of Contracts*, 1 *T.A. Stud. L.* 170 (1975).

99. 25 L.S.I. 152.

of the leased object are based to a large extent on the Law of Sale's provisions. As for the conformity of the object at the time of its delivery to the hirer, Section 6 provides a conformity rule resembling the rule that applies to sales. Apparently, during the lease period the lessor's obligation is confined to the repair of substantial defects within a reasonable time after receiving a demand from the lessee (Section 7). In addition to her ordinary relief under the general remedies Law, the lessee is entitled to proportional reduction of the rent in case of breach of the lessor's obligation of repair, and in certain circumstances she may also repair the object herself and claim reimbursement (Section 9).

The Contract for Services Law, which was enacted in 1974, applies to every contract for the performance of any work and the rendering of any service for remuneration (provided that the contractor is not the orderer's employee).¹⁰⁰ Sections 3 and 4 of the Law regulate the matter of nonconformity in the object of the work by providing rules resembling those of the Law of Sale. The main flaw of these provisions is their extreme brevity, which leaves considerable gaps. However, in light of the close linkage between this law and the Law of Sale, as is indicated both by its history and by its content, it seems that these gaps should be filled by analogy to the relatively detailed provisions of the Law of Sale.

Additional provisions on the conformity of the object in general are provided in the Contracts (General Part) Law of 1973,¹⁰¹ especially in Section 45 therein. This section states the rule of medium performance in cases in which the object's quality has not been agreed upon. Special conformity provisions may also be found in the specific legislation dealing with the sale of new flats by builders and contractors.¹⁰² These are consumer-oriented, compulsory provisions. They broaden the definition of nonconformity by incorporating every official standard applicable to building construction, and ease the burdens of examination and notice imposed on the buyer.

D. Conclusion

From the above survey two central conclusions may be drawn. First, there is great similarity among the problems that have arisen in the various legal systems regarding conformity of the object in different

100. 28 L.S.I. 115. For a general review of the law, see Yadin, *The Contract for Services Law, 1974*, 10 *Is. L. Rev.* 569, 580 (1975) (full text of the law is annexed).

101. 27 L.S.I. 117. The full text of the law is appended to Shalev, *General Comments on Contracts (General Part) Law, 1973*, 9 *Is. L. Rev.* 274, 282 (1974), and to Shalev & Herman, *supra* note 96.

102. *The Sale (Housing) Law, 1973* (27 L.S.I. 213), sections 2-5.

contracts. This parallel development is found not only in regard to the challenges faced by the various systems, but also in the basic approaches to the development of solutions to those problems. In all of the systems, the importance of conformity obligations grew as the market economy developed and as commerce became more important in society. In all the systems, there was a gradual shift from liability based upon fraud or upon express undertaking to a readiness to infer liability from the circumstances of the contractual relationship, and later, to establish liability as an obligation under law (in the absence of agreement to the contrary). The problem of nonconformity has always come into primary focus in regard to contracts of sale, and it was in that context that the solutions, later applied to other transactions, developed. The course of development is in the direction of full liability which is not conditioned upon the fault or negligence of the promisor. However, the pace of development among the various systems is not identical. Generally, the Civil Law systems preceded the Anglo-American developments in this area, but the primary tendencies are similar.

The second conclusion to be drawn from this comparative survey is that nearly all of the systems remain rooted in a myriad of classifications and distinctions involving situations that, on their face, are not vastly different. In most of the legal systems, there are substantial differences among the laws applicable to different contracts (sale, rental, services, etc.), different obligations under the same contract (for example, the obligation of delivery as opposed to the obligation to transfer rights in the object of the sale), and even among different forms of breach in regard to the same obligation (e.g., delivery of goods that are of inferior quality, in partial quantity or different from the agreed upon object). One even finds that similar flaws and obligations in similar contracts may be subject to different rules where the object is different (such as the difference between the conformity requirements in a sale of goods and a sale of real property in Anglo-American law). At times, these fine distinctions may entail far-reaching effects in terms of the scope of liability, the relief available to the promisee, and the burdens placed upon her. For the most part, these distinctions are deeply rooted in history, and despite their progressive erosion, they can be abolished only with great difficulty.

Austrian law is exceptional in this regard, establishing broad provisions regarding conformity of object in synallagmatic contracts in general. These provisions deal with nonconformity in all its aspects, including those of quality, quantity, and legal defects, with the exception of supplying an object different from that agreed upon. Together with these general provisions, we find several specific provisions treating unique aspects of nonconformity in special contracts. Insofar as the sale of goods is concerned, the international treaties, also are based upon a uniform concept of nonconformity, at least with regard to the

physical aspects of conformity of the object (quality, quantity, fitness for description, fitness for ordinary uses or particular purposes, etc.). Following this line, in Israeli legislation the concept of nonconformity was broadened to other contracts, such as leases and contracts for services.

The examination of Austrian and Israeli law, international treaties, and English and American legislation that extends the conformity obligations relating to the sale of goods to other contracts relating to goods, shows that there is no inherent obstacle to the unification of the laws; both unification in terms of the various aspects relating to conformity in any particular contract and (as in Austria and Israel) unification in regard to the performance of contracts in general. The next chapter will introduce a concept that will serve as a framework for such unification.

III. TOWARD A GENERAL PRINCIPLE OF CONFORMITY IN THE PERFORMANCE OF CONTRACTS

A. *General*

Unification of the treatment of conformity problems is both attainable and desirable. The experience of the legal systems discussed above shows that the application of many different rules to closely related situations causes practical and theoretical confusion. This confusion often results in both unfairness and inefficiency. It is unfair that substantively similar situations are treated differently.¹⁰³ It is inefficient because it imposes on the parties and on the courts the costs involved in uncertainty—uncertainty which is the result of delicate classification problems.

Admittedly, there is a trade-off between the generality of a rule or a standard and its preciseness. The more general a rule or a standard is, the more likely it is to be over and under-inclusive.¹⁰⁴ However, this drawback of generality does not seem to impair the suggested concept of conformity. The conformity principle suggested is neither a single general rule, nor a general standard. Rather, it is a unified conceptual framework within which different rules and standards may be elaborated. The advantage of such a framework is that its formulation is

103. Compare Levin & McDowell, *The Balance Theory of Contracts: Seeking Justice in Voluntary Obligations*, 29 *McGill L. Rev.* 24, 35-40 (1983). The authors discuss the justifications for the introduction of general theories, emphasizing the "imperative to treat like persons and like cases alike." *Id.* at 36.

104. Kennedy, *Form and Substance in Private Law Adjudication*, 89 *Harv. L. Rev.* 1685, 1689-90 (1976).

based on substantive analysis, whereas the existing rules in most legal systems are the outcome of peculiar historical developments. It is not contended that rules and standards based on such a general concept will forever meet the ever-changing needs of society. The belief is, however, that this framework will serve in creating a more harmonic and manageable system of rules in that sphere. Such a framework would allow for future developments of the rules and standards of conformity, while preserving a comprehensive grasp of the different situations.

The recognition of a general concept of conformity does not mean that different transactions, or different situations within each transaction, will be governed by exactly the same rules. For example, a distinction may be drawn between obligations that call for instantaneous performance and those that involve extended performance. Yet, this does mean that the analysis will start from the same general idea, and only inasmuch as there are substantive differences between the situations will the rules differ. Once the concept of conformity is recognized, it may be used to explain the rules in force in certain legal systems. It may further be used as a yardstick for critical evaluation of existing rules, and insofar as needed, as a basis for legislative reforms.

In what follows, the concept of conformity and the limits of its incidence will be described. Then, its relation to the content of the contract will be indicated, and the possible structures of conformity obligations will be discussed. This part will conclude with a brief reference to the content of the rules to be developed within the proposed framework.

B. The Concept of Conformity

The concept of "conformity" or "nonconformity" has various meanings in contract law, at different levels of abstraction. In the most abstract sense, it can be viewed as synonymous with the term "breach." Contracts are to be performed (*pacta sunt servanda*), and performance must conform to the agreement. In this sense, it is possible to describe every act or omission contrary to a contract in terms of conformity or nonconformity. For example, where a promisor is obliged to act with due care and skill, and she acts negligently, her conduct does not conform to her obligation. Similarly, when the U.C.C. defines (in Section 2-106(2)) goods or conduct as "conforming" to the contract wherever they are "in accordance with the obligations under the contract," it may have that same broad meaning. On the other hand, the term "nonconformity" can be used in a more narrow sense to specify one of the obligations imposed by certain contracts. Thus, in ULIS and in the 1980 UN Convention, one of the obligations of the seller, along with others, is the obligation of conformity (Sections 33 and 35,

respectively).¹⁰⁵ The two conventions provide for many obligations, such as delivery, payment, preservation of the goods, and so on. *Inter alia*, they impose on the seller an obligation of conformity. French law also indicates *non-conformité* as one possible breach by the seller.¹⁰⁶

The first, abstract meaning of nonconformity does not concern us in this paper, as we are not examining the rules of breach under the heading of nonconformity. The second, narrow meaning does not reflect the full scope of the concept. Nonconformity substantively differs from the other obligations which have been mentioned in that it may relate to different kinds of obligations. Whether we speak of an obligation to supply an object, to transfer a right, or to perform some work, in each case we may inquire whether or not the object, right, or work conformed to the agreement. In other words, *conformity is one aspect of the performance of an obligation, along with such other aspects as time and place of performance*. For example, when A agrees to supply an object to B, she undertakes to supply the object at an agreed time and place, and to supply an object conforming with the agreement in terms of size, quality, etc. The same would be true were the agreed object the performance of work or the transfer of a right. Thus, conformity may be classified in the same group as date and place of performance, identity of the performer, etc. Conformity is an element common to many different obligations and not in itself an obligation of specific content. Although we may speak of the "conformity obligation," as we may speak of the timely-performance obligation or the obligation to perform a duty personally, we must not allow such linguistic portrayals to cloud the true nature of conformity as a concept that differs from any defined obligation. One should not speak of conformity or nonconformity as an independent and disconnected thing, but only with regard to the performance of another obligation: to deliver goods, to convey ownership, and the like. Thus, it is like the obligations of timely performance or performance in the right place, which have meaning only in the context of the performance of another defined obligation.

One may also describe conformity in a negative way: nonconformity is a possible type of breach with regard to various obligations, along with other types of breach. For instance, in the case of an obligation to provide certain services, the following breaches, *inter alia*, may occur:

- * complete non-performance of the obligation;
- * rendering the services too late or too early;
- * rendering the services in a place different than that agreed upon;

105. See Part II.C.2.a *supra*.

106. See J.C.C., *supra* note 23, arts. 1641-1649, Fasc. X-1, §§ 26-45.

- * performance of the obligation by a different person (in cases where personal performance is required);
- * rendering the services to the wrong person;
- * rendering defective services, that do not conform to the agreement though provided by the right person, to the correct promisee, at the agreed time and place

From among these breaches, the concept of conformity relates only to the last. Conformity is, therefore, one aspect of the performance of obligations. Nonconformity is one of the typical breaches of various obligations.

As with most distinctions, the division between conformity and other aspects of performance has its penumbra of ambiguity. It is difficult at times to decide whether, for example, one is presented with performance that does not conform to the obligation or whether one is confronted with something so different from the obligation as not to constitute performance at all. Does delivering a motor scooter constitute a nonconforming performance of an obligation to supply a truck, or is it simply an instance of non-performance? Such examples should neither be discounted, nor should they cause us to discard the proposed distinction. Almost by definition, distinctions and classifications yield borderline cases, but that does not necessarily testify to the weakness of the distinction.

C. *The Applicability of the Concept*

The concept of conformity enjoys a wide scope of incidence in terms of the types of contracts and obligations to which it may apply. But this incidence is not general. As opposed to the abstract concept of nonconformity (that is, breach of contract), the concept of conformity of performance is meaningless in relation to many obligations. For instance, an agent must not use information obtained in the course of her agency in a manner contrary to the principal's interest. It would seem meaningless to speak of the performance of this obligation in terms of its "conformity." Therefore, we must delineate and classify those obligations to which the concept of conformity is relevant. Such delineation must be made in regard to obligations and not in terms of contracts, as in any contract there may be obligations to which conformity is relevant and others to which it is not. The necessary classification is that of the content of the obligations.

1. *Obligations To Do and Not To Do*

The ancient Roman distinction between obligations to give (*dare*) and obligations to do (*facere*) is not useful for our purposes, as conformity may be relevant to both types of obligation. Thus, we find conformity provisions both in laws regulating sales and in laws regu-

lating contracts for services.¹⁰⁷ However, the preliminary distinction between obligations *to do* (including giving) and obligations *not to do*—of refraining from acting—may be helpful.¹⁰⁸ When A undertakes to refrain from some action or conduct, the question of conformity of performance is not, as a rule, germane. While there may be varying degrees of conformity in obligations *to do*, an obligation not to do is either fulfilled or not, and, generally speaking, no question of conformity arises. Suppose that A undertakes not to sell a specific product within a certain geographical area for a fixed period of time. A may comply with the obligation or infringe it, but usually she cannot render nonconforming performance. If she sells other products or sells the same product in other places, she is not in breach. If she sells the product within the prohibited area, then she breaches her obligation whether she sells the product once or many times, whether she sells a flawless product or a defective one, and so on. Indeed, there may be disagreement as to whether the product sold is the one to which the obligation referred, or whether the sale was made within the prohibited area. But when these disagreements are settled, the conclusion must be either that the obligation was complied with or that it was breached. In any case, it would seem inappropriate to talk of defective performance in this respect. On the other hand, various modes of conduct may be regarded as performance of an obligation *to do*, though some would be considered to be defective performance thereof.

2. Result Obligations and Obligations of Means

Another distinction that is of great importance in delineating the scope of the conformity requirement is that between obligations to obtain some result (*obligations de résultat*) and obligations to adopt appropriate means for achieving the purpose (*obligations de moyens*).¹⁰⁹

107. See, e.g., §§ 459 and 633 of the BGB; arts. 1641 and 1792 et seq. of the French Civil Code.

108. See generally 2 S. Litvinoff, *Obligations* §§ 13 et seq. and 154 et seq., at 17 and 282, in 7 *Louisiana Civil Law Treatise*, (1975); Planiol & Ripert, *supra* note 22, § 999, at 576-77.

109. This modern distinction was developed primarily in French law. It first appeared in Demogue's treatise on the law of obligations (R. Demogue, *Traité des obligations en général*, T. 5, § 1237, at 536 et seq., T. 6, § 599, at 644 (1925)). Result obligations are the more common type in contracts. In result obligations, the promisor is liable for breach absent circumstances of force majeure or frustration. As opposed to this, in obligations of means the promisor is not obligated to achieve the result, but only to act with appropriate diligence and care to achieve the result. The former group includes such obligations as delivery by a seller or lessor and a common carrier's undertaking to deliver an object to its destination. Examples of obligations of means are a physician's undertaking to heal a patient and a lawyer's obligation regarding the desired outcome of a trial. This distinction

The distinction between result obligations and obligations of means yields several results, such as in the matter of the prerequisites for the materialization of the debtor's responsibility for a breach, and with regard to the burden of proof as to the existence of breach.¹¹⁰ For our purposes, the most important of these results is that the concept of conformity is only applicable to result obligations, as it cannot have effect in the context of obligations of means.

Where result obligations are concerned, nonconformity between the result promised and that achieved constitutes breach. A difference between the agreed upon result and the actual result is, in such obligations, a necessary and sufficient condition for the existence of a breach. As opposed to this, where the obligation can be met by adopting appropriate steps for achieving the result, then a difference between the hoped-for result and that actually attained is neither a sufficient condition nor a necessary one for the purpose of liability. On one hand, a patient's death after surgery does not make a conclusion of negligence ineluctable, and on the other hand, a patient may recuperate, negligence notwithstanding. At most, the difference (between the hoped-for result and that attained) may serve as evidence of the promisor's negligence where our experience tells us that, were there no negligence, the desired result would have usually followed. Moreover, the measure of damages in such cases is not the difference between the result achieved and that desired, but the difference between the actual result and that which would probably have followed in the absence of negligence. It is possible that even if there had been no fault on the part of the promisor, the desired result would not have been achieved. Although there is some similarity in establishing the scope of damages, only in the case of result obligations is nonconformity itself the breach remedied.

Support for this view can be found in the fact that the provisions regarding nonconformity are found in laws treating obligations of result (such as sales and leases), but are not found in laws regulating obligations of means, such as agency. Particularly instructive in this respect is the Draft Civil Code, prepared by the Civil Code Revision Office

is one between obligations, not contracts, as most contracts contain obligations of both types (and because it refers to non-contractual obligations as well). On this distinction, see generally J. Frossard, *La distinction des obligations de moyens et des obligations de résultat* (1965); Mazeaud, *Essai de classification des obligations: Obligations contractuelles et extra-contractuelles*, 35 *Rev. Trim. Droit Civ.* 1 (1936); Tunc, *La distinction des obligations de résultat et des obligations de diligence*, 1945 *J.C.P.* I, 449; H. et L. Mazeaud & A. Tunc, *Traité théorique et pratique de la responsabilité civile, délictuelle et contractuelle*, T. 1, §§ 103-2 to 103-10, at 113-30 (6th ed. 1965). For a comparable discussion in English law, see P. Atiyah, *An Introduction to the Law of Contracts*, 228-34 (4th ed. 1989).

110. See generally J. Frossard, *supra* note 109, §§ 169-199, at 90-109.

of Quebec.¹¹¹ The draft adopts the distinction between result obligations and obligations of means as a basis for the classification of contracts. Along with the traditional distinction between the contract of employment (*contrat de travail*) and the contract for work and labor (*contrat d'entreprise*), the draft subdivides the last category into contracts of enterprise (*contrat d'entreprise*) and contracts for services (*contrat de services*). The former sub-category refers to contracts in which the contractor is required to produce some result, such as the construction of a building or the repair of a property. The latter sub-category includes contracts in which the contractor is required to act with skill, prudence and diligence, but not necessarily to achieve any specified result. It comprises contracts with experts, professional consultants, lawyers, and others. The commissions that dealt with the preparation of the code came to the conclusion that the factual and legal differences between the two types of contract are significant enough to make their common regulation clearly unsatisfactory.¹¹² One of the significant effects of this classification is that only in contracts of enterprise is there an obligation of conformity, and detailed provisions are provided.¹¹³ In contracts for services, however, this obligation is missing. Instead, there are obligations to provide the services personally, with due prudence and diligence.¹¹⁴

The relationship between the conformity aspect of obligations and the classification of obligations into result obligations and obligations of means was dealt with in the French law from a special viewpoint. According to an accepted view, Demogue's dual division does not exhaust all obligations, and it should be supplemented by a third category,¹¹⁵ guaranty obligations (*obligations de garantie*), or *absolute obligations*. This category includes obligations such as the insurer's obligation to pay compensation when the risk insured against occurs, or the obligation of a bank issuing a letter of credit to pay the agreed amount against the tender of the stipulated documents. The common feature of these obligations is that even if, for example, the event insured against occurs in circumstances of force majeure, this does not exempt the insurer from her obligation to pay the agreed sum. The same applies to the bank's payment obligation in documentary credit,

111. Civil Code Revision Office, Report on The Quebec Civil Code (Quebec, 1977) [hereinafter Draft Code].

112. See Revision Commission, Committee Reports, Quebec Civil Code, Report on the Contract for Services, Introduction 2-4 (1971).

113. §§ 686-694 of the Draft Code, *supra* note 111, Vol. 1, at 444-46, and the commentary relating to these provisions, *id.*, Vol. 2, at 744-47.

114. See § 699 of the Draft Code, *supra* note 111, Vol. 1, at 447, and the commentary relating to this provision, *id.*, Vol. 2, at 749-50.

115. See H. et L. Mazeaud & A. Tunc, *supra* note 109, § 103-8, at 123-27.

when the seller presents the required documents, although she has breached her obligations towards the buyer and the latter has a good defence against the payment of the price. According to the view under discussion, the guaranty obligations imposed, for example, on the seller and lessor, are included in this category of *obligations de garantie*, as indicated by their name.¹¹⁶

Obviously, this view is not reconcilable with the thesis proposed above regarding the relationship between conformity obligations and the dual division into result obligations and obligations of means. According to our view, the aspect of conformity is a common aspect of various obligations. The distinction between this and other aspects of performance is of a different level than the distinction between result obligations and obligations of means. According to our view, it is, therefore, possible to "intersect" these two distinctions, and determine to which types of obligations the aspect of conformity is germane. In contrast, the view under discussion does not refer to the obligations of conformity as such, but only to specific regulations of the seller's and lessor's responsibility for latent defects under the Code Civil. The obligations of conformity laid down in those provisions create a third category of obligations (together with the insurer's obligations and other similar obligations), alongside the result obligations and the obligations of means. In other words, this view characterizes and delimits the guaranty obligations on the same level as the distinction between result obligations and obligations of means.

It seems that this view should not be accepted even within French law, and in any case it is baseless outside French law. As for the French law, in a treatise dedicated to the distinction between result obligations and obligations of means, Frossard explains in detail why this view should be rejected.¹¹⁷ Frossard distinguishes between the insurer's obligation to pay compensation, the bank's obligation under a letter of credit etc., on the one hand, and the obligations of the seller and lessor, on the other hand. As for the insurer, he points out that the obligation under the contract of insurance (like that of the bank in the case of documentary credit) is not different from any other result obligation. The event insured against (like the tender of documents in documentary credit) is a condition precedent to its effectiveness. From the start, the insurer assumes no obligation regarding the occurrence or non-occurrence of this condition, so that obviously one cannot inquire whether the "obligation" concerning the condition is one of result or of means. The only substance of her obligation is that if the agreed condition is met, she will pay the sum she undertook to pay. The same

116. *Id.* at 124-27.

117. J. Frossard, *supra* note 109, §§ 157-168, at 83-89.

applies *mutatis mutandis* to other instances of contracts of this kind.

As for the *garantie* obligations of the seller and the lessor, they are indeed unconditioned upon the promisor's cognizance of the defect. However, this does not make them more "absolute" than any other result obligation, since the liability for the breach of such obligations is in any case unconditioned upon fault or negligence. Indeed, there are differences between the contents and remedies laid down by the special provisions regarding *obligations de garantie* and those applicable to ordinary contractual obligations under the general law, but they cannot be taken to justify the conclusion that we are presented with a different category of obligations in terms of the nature of responsibility.¹¹⁸ At present, Frossard's view is also supported by the new statutory regulation concerning the liability of builders and sellers of new buildings, introduced in 1978.¹¹⁹ In these provisions the legislature employs the expression "*garantie*" (see, e.g., Sections 1646-1 and 1792-3 of the Code), and in the same breath expressly declares that the builder's responsibility does not apply to cases of "*cause étrangère*" (Section 1792). This qualification, which refers *inter alia* to cases of force majeure, is irreconcilable with the allegation that this *obligation de garantie* imposes an "absolute" responsibility, different from any other result obligation.

Frossard's arguments, only part of which were mentioned, seem quite convincing in relation to French law itself. Beyond that, in all systems where no distinction is made between conformity obligations and other obligations (such as the one of delivery) in terms of the nature of liability, there is clearly no basis for the view under discussion. In sum, the conformity aspect of obligations is relevant to result obligations, and is irrelevant to obligations of means.

3. *Employment Contracts*

In the French doctrine, doubts were raised as to the correct classification of the employee's obligations as result obligations or obligations of means. A view was expressed that the contract of employment does not fit into either of these categories. The alleged ground for this proposition is that the object of this contract is the mere performance of the employee's work, while there is no obligation, either definite or relative, to achieve any result.¹²⁰ However, the opposite view, according to which the employee's obligations do fit into either category, seems more convincing. Indeed, showing up for work and performing the job

118. *Id.* §§ 160-161, at 84-85.

119. See Loi n° 78-12 du 4 janv. 1978, *supra* note 30.

120. H. et L. Mazeaud & A. Tunc, *supra* note 109, at 123.

assigned are obligations of result.¹²¹ But these obligations are intertwined with obligations of means that require professional, skillful, dedicated, and devoted performance.¹²² It would seem, therefore, that obligations under a labor contract would best be classified as obligations of means, as was indeed held by the French *cour de cassation*.¹²³ Be that as it may, the contract of employment does not generally impose on the employee an obligation to achieve any specific result. Flaws in the outcome of the employee's work may be evidence of her negligence or lack of skill. But inasmuch as it constitutes a breach on her part, the breach is not in the nonconformity of the result, but in the negligence or lack of skill. Therefore, the concept of nonconformity is not applicable to the worker's obligation, just as it is inapplicable to all other obligations which are not result obligations.

4. Standards of Conduct

Another type of obligation that should not be measured in terms of conformity is that involving standards of conduct, such as the duty to act in good faith, reasonably or fairly. Here, too, we can find no defined obligation, the performance of which can be measured in terms of conformity to the agreed upon standard. Rather, these are flexible standards of conduct that change in accordance with the circumstances in which they are applied.¹²⁴ They are standards of conduct, not result. This conclusion is consonant with our earlier finding regarding the inapplicability of the conformity principle to the obligations of workers (even according to the view that these obligations cannot be graded under the classification of obligations of result or means). There are indeed various links between conformity and the duties of reasonableness and fairness. *Inter alia*, when examining the conformity of the performance of a result obligation, the exact content of such obligation may be determined or altered in accordance with these standards.¹²⁵

121. J. Frossard, *supra* note 109, § 406, at 233-34.

122. See, e.g., Chitty on Contracts, Vol. II, Specific Contracts, §§ 3899-3913, at 751-63 (26th ed. 1989); Codice Civile (The Italian Civil Code), Title II, ch. I, Section III, §§ 2104-2105.

123. See J. Frossard, *supra* note 109, at 234-35.

124. See, e.g., Farnsworth, Good Faith Performance and Reasonableness under the Uniform Commercial Code, 30 U. Chi. L. Rev. 666 (1963); Summers, The General Duty of Good Faith—Its Recognition and Conceptualization, 67 Cornell L. Rev. 810, 816 (1982).

125. Thus, in determining the quantity of goods that a seller has to supply under "requirement" or "output" agreements, particular importance is paid to considerations of good faith. See Burton, Breach of Contract and the Common Law Duty to Perform in Good Faith, 94 Harv. L. Rev. 369, 394-97 (1980); R. Nordstrom, *supra* note 45, § 40, at 110-14.

However, in the present context it may be stated that the conformity of performance is not relevant when referring to the compliance with general standards of conduct.

5. *Monetary Obligations*

There is no inherent obstacle to applying the concept of conformity to a delivery obligation whose object is a sum of money, that is, an obligation of payment. One may say that the payment of a greater or lesser sum than the agreed amount is an instance of nonconformity of performance. However, the special characteristics of the monetary obligation make an analysis in terms of conformity somewhat superfluous. In this regard, there can be no instances of nonconformity other than those of quantity, as any other nonconformity would be considered non-performance. Performance in forged money, foreign currency or any other medium different from that agreed upon can be one of two things: payment or non-payment. The basic rule is that payment of a debt other than by the correct means is tantamount to non-performance of the obligation. Unless otherwise agreed expressly or impliedly, or established by usage of trade, a creditor may refuse any payment that is not made in legal tender.¹²⁶ As a rule, there are no intermediate levels of conformity in this context. This consideration, together with the other specific rules applying to payment, make an analysis in terms of conformity devoid of much practical purpose. Yet, as was mentioned, in principle it is possible to include monetary obligations within the scope of the conformity concept.

6. *Bailment Obligations*

As was demonstrated earlier, the concept of conformity is not relevant to obligations of means. Therefore, whenever the obligation to preserve property is one of due care only, it would be inappropriate to examine its performance in terms of conformity. However, it would seem that even in those cases where the bailee's obligation is one of result, the conformity perspective is of almost no significance. As we shall see, the interest raised by the conformity obligation lies in its reference to conformity between agreement and actual result. As opposed to this, in the case of bailments, there is no externally agreed yardstick concerning the condition of the property at the termination of the bailment. The property is supposed to be in the same condition as it was when deposited with the bailee (subject to normal wear and tear). Damage or defect caused to the property during the bailment will ordinarily be regarded as a breach on the bailee's part, yet they

126. See F. Mann, *The Legal Aspect of Money*, 70 (4th ed. 1982).

shall be examined by comparison to the actual state of the property at the time of its delivery to the bailee, and not according to the parties' agreement. True, in a contract of sale, for example, the parties may express their agreement by means of sample or model, in which case the conformity would be examined mainly by comparing the sale object to the sample or model. However, the model or sample is but a means for expressing the criterion for conformity, which is still the parties' agreement. Thus, if the sample suffered from hidden defects, of which the buyer could not know, their presence in the sale object would be considered as a breach of the conformity obligation.¹²⁷ In the case of bailment, the rule is the opposite. For certain purposes it would be possible to draw an analogy between the rules and remedies relating to the concept of conformity and those applying to the safekeeping of a deposited property, but the central characteristic of conformity, conformity between the agreement and the performance, is missing. Therefore, with regard to the safekeeping obligations of the carrier, the lessee, the repairer, the creditor who receives a pledge, and any other bailee, the concept of conformity is inapplicable to the property's condition when returned to its owner.

The aforesaid applies also to a contract of loan for use (*commodatum*). In contrast, it seems that in a loan of fungible goods for consumption (*mutuum*) there is a conformity obligation regarding the goods which the borrower delivers to the lender (and of course, regarding the goods given by the lender as well). Assume that A agrees to lend B fifty sacks of cement, and B undertakes to return fifty (other) sacks in the future. Each of the parties is entitled to receive cement of the stipulated quality and quantity, suitable for its ordinary or agreed uses, etc. Should the lender deliver defective cement, it would be a breach of the contract and the borrower would be entitled to the appropriate remedies. Yet, it does not seem that the borrower is automatically entitled to deliver defective cement in return. If the condition of the goods delivered by the lender is the criterion for the quality of the goods which the borrower has to supply in return, then she can deliver goods of that same quality, but still the criterion is the agreement.

7. Summary

In summary, we may conclude that *the aspect of conformity of performance is relevant in obligations to do or to give (as opposed to obligations not to do or give), that are result obligations (as opposed to obligations of means), with the exception of bailment obligations,*

127. See supra note 38, Sale of Goods Act, 1979, § 15(2)(c).

standards of conduct between the parties, and perhaps monetary obligations. Thus, we may consider conformity in regard to such obligations as conveyance and delivery by a seller or exchanger, the obligations of a lessor as regards the object of the lease, those of the lender as regards the property lent, and those of builders, handymen, carpenters, and other contractors who promise particular results. Conformity is also relevant to contracts granting easements, assignments of rights, the bringing of property into a partnership by a partner, dissolution of partnerships, division of property, etc.¹²⁸

D. The Principle's Center of Gravity: Content of the Agreement

Now that we have defined the concept of conformity as an aspect of the performance of obligations and have delineated the types of obligations to which it is relevant, we can take another step in characterizing the concept. In speaking of conformity, we refer to the relationship between the results promised by a party to a contract and the results she actually achieved. Schematically speaking, the two central questions that may arise in this context are: what was the promise, and what was actually performed?¹²⁹ Occasionally, a third question may arise after the last two have been answered: Did the performance conform to the promise? Let us say that A sues B for breach of a contract of sale. A claims that the agreement called for delivery of 500 tons of wheat, but only 498 tons were delivered. B can adopt any of several defenses, among them:

A. Although only 498 tons were delivered, there was no non-conformity since the agreement stipulated delivery of "approximately 500 tons of wheat."

B. Indeed, the agreement called for the delivery of 500 tons, and exactly 500 tons were delivered.

C. Although the agreement was for 500 tons and only 498 tons were delivered, the disparity is so small as to be insignificant and should not, therefore, be viewed as nonconformity.

The first assertion focuses on the content of the agreement, the second on the content of the performance, and the third on the degree

128. The concept of conformity of performance is relevant also to gratuitous contracts, such as gifts or rendering of services without remuneration (in those legal systems that recognize the enforceability of such contracts, which are mainly the continental systems). However, special considerations apply to these contracts, and they are therefore subject to special rules of conformity. The meaning and substance of conformity in gratuitous contracts are beyond the scope of the present study.

129. Schematically, the examination of conformity is done in a quasi-syllogistic way:

- The promisor undertook to perform, give, or achieve a certain result;
- The promisor performed, gave, or achieved some result;
- Therefore the performance conforms/does not conform with the agreement.

of similarity required between the agreement and the performance. In examining the subject of conformity, the second type of claim is of little interest and the third is of limited significance. Primary interest is in the first assertion. The question of what was performed is exclusively factual. The question as to whether or not some particular performance conforms to a given agreement does not generally present any special difficulty. A problem may arise only when the promisor seeks to rely on principles such as good faith or upon claims resembling *de minimis* in order to mitigate the conformity requirement.¹³⁰ In the vast majority of cases, once the facts of what was agreed and what was performed are decided, the question of conformity answers itself.

The center-of-gravity of the "conformity rules" is, thus, to be found in the first assertion, which focuses upon the content of the agreement. The parties to a contract frequently fail to express themselves with regard to all of the matters related to the promised result. Must the leased premises be suitable for dwelling or is it sufficient that they be suitable for storage? Must the goods be of excellent quality, of ordinary quality, or of any quality at all? These are but a few examples of questions concerning the content of the agreement as it relates to the promised result. In the absence of agreement, expressed or implied by the contract, by the circumstances, or by usage, how shall we answer such questions? Here we may be aided by a number of rules—some suppletive and others compulsory—intended to supplement the parties' agreement or even to supersede it. These are the primary and most important rules of conformity. After addressing the question of the preferred structure of conformity obligations, we shall discuss some of the central rules of conformity.

E. Legal Structure of Conformity Obligations

Few legal systems initially considered or even now view conformity obligations as regular contractual obligations like a seller's duty to deliver the goods. When these obligations were gradually developed, it was by means of special legal tools, beginning with requiring that the seller retroactively guarantee that the goods were free of defects (in Roman law), and ending with such concepts as collateral agreement and implied conditions. Even the contractual nature of the liability was not always clear, as some legal systems relied upon tortious liability in this regard.¹³¹

130. See Zamir, *The Extent of Similarity Required Between the Content of the Contract and its Performance*, (to be published in 25 *Is. L. Rev.* 187 (1991)).

131. The origin of this confusion in Anglo-American law is that in its early stages, the Common Law did not recognize liability based on a promise. To the extent that

There are three central approaches to the legal nature of conformity obligations: the collateral agreement doctrine, nonconformity as non-fulfillment of the obligation, and nonconformity as an aspect of the fulfillment of the obligation.

The Collateral Agreement Doctrine—According to this approach, the obligations of conformity derive from a separate contract, collateral to the main contract in which the promisor undertakes to supply the object. This approach exists both in continental and in Anglo-American law.

German law distinguishes between regular contractual obligations that require the promisor to perform, give, or achieve some result (*Erfüllungspflicht*), and between the giving of a warranty, or an obligation to warrant (*Gewährleistungspflicht*). In the first case, if the promisor does not fulfil her obligation, its performance may be enforced. As opposed to this, a warranty does not include an obligation by the warrantor to achieve any result, but only an obligation that if the result is not achieved she stand liable and the promisee may rescind the contract or reduce the consideration.¹³² This concept of warranty sprung from the view that in a contract relating to an identified piece of property, the object of the contract is that specific property, with all its qualities and flaws. The promisor's obligation consists entirely of delivering that object.¹³³ Even where there is liability for its conformity, this liability is not construed as an obligation that the object be free of defects or be of a certain quality. Its sole outcome is that if the object is not free of defects or not of the agreed quality, the warrantor bear the consequences, which do not include the possibility of specific performance.¹³⁴ According to this view, the warranty for the quality of the object is not integral to the obligations of the supplier, but auxiliary or collateral to her normal contractual obligations.¹³⁵

This theory is gradually losing ground. The attempt to base the distinction between the cases on the unavailability of specific perform-

liability for the quality of goods was imposed on the seller, it was based on tortious causes of action. See Williston on Sales, supra note 45, Vol. 2, § 15-1, at 322-28; T. Street, *The Foundations of Legal Liability*, Vol. I, 389 (1906); Benjamin's Sale of Goods, supra note 41, § 729, at 418-19. In any case, today there is no real doubt about the contractual character of the liability in warranty. See T. Street, supra at 389-91; W. Holdsworth, 8 *A History of English Law*, 70 (1925); Rabel, *The Nature of Warranty of Quality*, 24 *Tul. L. Rev.* 273, 281 (1950).

132. T. Süß, supra note 18, at 12-20.

133. See E. Rabel, supra note 13, at 104-06; Rabel, supra note 131, at 277-80.

134. E. Rabel, supra note 13, at 105; Rabel, supra note 131, at 277. For a comparable view in American law, see Corbin on Contracts Vol. 1, § 14, at 31 (1963, updated to 1990).

135. On the special rules applicable to this warranty under the German and French systems, see Parts II.B.1.b.i and II.B.1.c supra and the references cited therein.

ance does not stand up to criticism from a comparative point of view, nor does it fall into line with the modern trends in German law itself.¹³⁶ Nevertheless, German and French law still preserve a separate, distinct arrangement for nonconformity based upon the promisor's warranty, alongside the normal contractual obligations.

In Anglo-American law as well, the view was that the basis for the warranty lay in a collateral contract that was not part of the primary contract.¹³⁷ However, regardless of perplexing statutory formulations,¹³⁸ the currently accepted view is that the collateral nature of the warranty refers only to the transfer of title and delivery, and that it does not require the requisites for establishing a separate contract. English and American law view warranty as a contractual obligation integral to the contract of sale.¹³⁹

Nonconformity as Non-Fulfillment of the Obligation—Some approaches have not been satisfied with abolishing the auxiliary, extra-contractual character of conformity obligations, adopting instead the view that the conformity obligation is integral to the obligation to supply the object. The most extreme position in this direction defines performance of an obligation as the conforming fulfillment of that obligation. One widespread approach in German case law viewed the nonconformity of the object of sale as totally precluding fulfillment of

136. As to the comparative point of view, there are legal systems (such as the Common Law) in which even a breach of ordinary obligations does not usually give rise to specific performance, while some systems grant this remedy in the case of quality defects as well. As for Israeli law, see § 3 of the Contracts (Remedies for Breach of Contract) Law, 1970, *supra* note 98. As for the use of the remedy *astreinte* by French courts, see Morrow, *supra* note 2, at 537. Therefore, one cannot say that there is an inherent difference between the cases. See also Rabel, *supra* note 131, at 277. As for German law, the modern trend is toward blurring the borders and narrowing the differences between the rules governing warranty and those applying to ordinary contractual obligations. The courts tend to expand the scope of relief available for breach of warranty to include protection of positive interests, including specific performance. On these developments in the French and German systems, see Parts II.B.1.b.i and II.B.1.c *supra*.

137. See Stoljar, *Conditions, Warranties and Descriptions of Quality in Sale of Goods I*, 15 *Mod. L. Rev.* 425, 431-32 (1952). Even in Street's book of 1906 (T. Street, *supra* note 131, at 389) it was argued: "Nowadays the warranty is looked upon almost exclusively as a separate contract subsidiary to the contract of sale . . ."

138. § 61 of the English Sale of Goods Act 1979, defines the term "warranty" as: "[A]n agreement with reference to goods which are the subject of a contract of sale, but collateral to the main purpose of such contract . . ." The term "agreement" alludes, so to speak, to the existence of a separate and distinct contract that accompanies the primary contract. The term "collateral," as well, can lead to the same conclusion. See Stoljar, *supra* note 137, at 430-32.

139. Benjamin's *Sale of Goods*, *supra* note 41, § 736, at 423-24; P. Atiyah, *supra* note 41, at 68-69; Rabel, *supra* note 131, at 279; S. Williston, *The Law Governing Sales of Goods*, Vol. 3, § 608, at 343 (rev'd ed. 1948).

the seller's obligation.¹⁴⁰ According to this view, the seller's liability for the quality of the object is but a specific incidence of impossibility (*Unmöglichkeit*) of delivery (which is one of two types of breach recognized under the BGB).¹⁴¹

A similar view was adopted in ULIS. Section 19(1) of the Uniform Law establishes: "Delivery consists in the handing over of goods which conform with the contract." Section 33(1), which enumerates the conformity obligations of the seller, begins: "The seller shall not have fulfilled his obligations *to deliver the goods* where he has handed over:" This absorption of conformity requirements into the delivery obligation raised substantial practical difficulties and was widely criticized.¹⁴² Since, by definition, delivery is contingent upon the handing over of goods that conform with the contract, it would appear that even if the buyer chooses to accept flawed goods (with the intention of sufficing with monetary relief), and even if she uses them for her purposes, still no delivery of the goods occurs. This definition of delivery was deleted from the 1980 Vienna Convention, and conformity is no longer established as a condition for delivery.

Nonconformity as an Aspect of the Fulfillment of the Obligation— Just as the former perception that a promisor could perform her obligations despite delivery of a nonconforming object is unsatisfactory, so too, one cannot accept the opposite view that a promisor can in no way fulfill her obligation by delivery of an object flawed by nonconformity. The conformity requirement is not something external to the contract, but neither is it the obligation itself. As defined above, conformity is one aspect of performance. This approach was adopted, for example, in the Israeli legislation and in the 1980 Vienna Convention.¹⁴³ This is the proper understanding of the principle of conformity in the performance of contracts.

Understanding the concept of conformity as one aspect of performance and not as identical with performance does not imply a

140. T. Süß, *supra* note 18, at 186-96; E. Rabel, *supra* note 13, at 106.

141. This view was severely criticized on the ground that the seller's liability for the conformity of the object under the BGB is different than ordinary contractual obligation. See T. Süß, *supra* note 18, at 158-62 and at 186-88. To the extent that there was any basis for that view under German law, it was with regard to the rules of liability in contracts other than sale.

142. In particular, the problems arose from the desire of the drafters to employ conformity as a means for solving a wide spectrum of legal questions related to contracts of sale, including such problems as transfer of risk and date of payment. See arts. 96-101, 59 and 71 of ULIS; "Delivery" in the Uniform Law on the International Sale of Goods (ULIS): Report of the Secretary-General, 3 UNCITRAL Y.B. 31, U.N. Doc. A/CN.9/Wg.2/WP.8 (1972); Honnold, *supra* note 91, § 210, at 238-39.

143. It is to the credit of the Israeli legislature that the Israeli Sale Law and other contract laws following it, which were greatly inspired by ULIS, did not follow ULIS in this regard.

distinction between the conditions for imputing liability for nonconformity and those applying to liability for non-performance (for example, concerning the requirement of fault). Just as there is equality in principle between the conditions and scope of liability in cases of non-performance, performance by the wrong person, and performance in a place other than that agreed upon, so should there be equivalence in principle in regard to the conditions and scope of liability in the case of nonconformity.

F. From the Principle of Conformity to Conformity Rules

After demonstrating the need for a unified treatment of the various aspects of conformity in Part II above, the foregoing sections of this part were dedicated to portraying the analytical framework within which such a treatment could and should be effected. Before dealing with the justifications for imposing conformity obligations on promisors (in Part IV below), we first have to indicate the main conformity obligations to be developed under the general principle. In fact, this is the central task facing any legal system.

The formulation of a coherent set of conformity rules (inasmuch as possible) requires not only a broad perception of the concept of conformity, but also a comprehensive understanding of other rules, principles, and doctrines in any given system. One cannot formulate conformity rules without paying attention to the existing arrangement of contractual remedies, to the role of such principles as good faith, and so forth. Therefore, we shall content ourselves with a brief review of some basic matters that must be addressed in any system. The comparative survey presented in Part II above illustrates these matters in greater detail.

First, it should be established that the contract's object must conform with the actual agreement in all respects: description, quantity, agreed purposes, etc. More importantly, default rules must be introduced, to provide criteria for the object's conformity in the absence of contrary agreement. As was mentioned above, this is the central role of conformity rules.¹⁴⁴ The default rules should apply to the performance of all obligations to which the concept of conformity applies.¹⁴⁵ Regardless of any fault or express undertaking,¹⁴⁶ the object tendered must

144. See *supra* Part III.D.

145. See *supra* Part III.C.

146. As was shown in *supra* Part III.C.2, the concept of conformity is applicable only to result obligations. Full implementation of the conformity principle requires that the requirement of conforming performance of these obligations will be considered as a full contractual obligation, unconditional upon fault. That, in fact, has been the trend of development both in Roman law and in the Common Law. In the Civil Law systems,

conform to its *ordinary use*,¹⁴⁷ be of *medium quality*,¹⁴⁸ and, in case of property, be *free of third party rights*.¹⁴⁹ Additional default rules may refer to the object's accessories, package, labels, and more.¹⁵⁰

There is no clear line between these default rules and the previously mentioned requirements of conformity with the "actual" agreement (e.g., the stipulated use of the object or its described characteristics). Hence, there is also a need for rules concerning the circumstances in which an undertaking is to be implied from the promisor's acts or omissions. Typical examples are the rules regarding the effect of using a model or a sample,¹⁵¹ and conformity to unusual purposes that the promisee mentioned to the promisor prior to contracting.¹⁵²

Regardless of their origin (expressed or implied intentions, usages of trade, statutory default rules), the conformity requirements should be understood as an aspect of the performance of the obligation.¹⁵³

The conformity rules must also state the pertinent time for the conformity of the object. This issue is connected with the issue of the

conformity obligations do in fact impose no-fault liability (see supra Parts II.B.1.ii and iii). The promisor's fault may have some relevance to the promisee's remedy of damages, but this is a general characteristic of those systems, and not a special feature of the conformity rules (see K. Zweigert & H. Kötz, supra note 12, at 189-91; N. Horn, H. Kötz & H. Leser, supra note 8, at 97-98, 112-15) In English law, this trend is plainly demonstrated in the expansion of conformity obligations from sale of goods to leases of goods and to services contracts. The seller's liability is clearly a full, contractual one. The no-fault nature of the lessor's liability was clarified only in The Supply of Goods and Services Act of 1982, and, as for services, the liability is still conditioned upon fault, even in result obligations (see supra Parts II.B.2.a, c and e). Parallel development has occurred in the American law.

147. This requirement is the heart of both the Anglo-American "merchantability" and the Civil Law "redhibitory defects." See supra Parts II.B.2.a, II.B.1.b and II.B.1.c.

148. Compare § 243 of the German BGB; § 360 of the German HGB; art. 1246 of the French Civil Code; art. 1178 of the Italian Civil Code; § 45 of the Israeli Contracts (General Part) Law.

149. See, e.g., §§ 434 and 541 of the German BGB; § 1626 et seq. of the French Civil Code; art. 923 of the Austrian ABGB; § 12 of the English Sale of Goods Act, 1979, and § 7 of The Supply of Goods and Services Act, 1982.

150. See § 2-314(2)(e) of the U.C.C. and § 35(2)(d) of the 1980 UN Convention on Contracts for the International Sale of Goods, U.N. Doc. A/Conf. 97/18 (1980). Problems of nonconforming packages or labels are relatively modern phenomena, so that one should not expect to find a treatment of them in older legislation.

151. See, e.g., §§ 2-313(1)(c) and 2A-210(1)(c) of the U.C.C.; § 494 of the German BGB; art. 222 of the Swiss Federal Code of Obligations; art. 1522 of the Italian Civil Code; § 15 of the English Sale of Goods Act 1979 and § 5 of The Supply of Goods and Services Act 1982; art. 33(1)(c) of ULIS and § 35(2)(c) of the 1980 UN Convention on International Sale of Goods; § 11(4) of the Israeli Law of Sale, 1968 (supra note 97).

152. See, e.g., §§ 2-315 and 2A-213 of the U.C.C.; § 14(3) of the English Sale of Goods Act 1979; §§ 4(4)-4(6) of The Supply of Goods and Services Act 1982; art. 33(1)(e) of ULIS and § 35(2)(b) of the 1980 UN Convention on Contracts for the International Sale of Goods.

153. See supra Part III.E.

passing of risk regarding injuries or loss of the object. Special attention should be given to the scope of conformity obligations in continuous contracts, such as leases—both at the commencement of the continuous relations and during its running.¹⁵⁴

A universal characteristic of conformity rules is the exclusion of the promisee's reliance on defects of which she actually knew at the time of contracting.¹⁵⁵ In this regard, a decision of paramount importance must be made regarding defects of which the promisee could reasonably have known: should the law impose on the promisee an obligation or a burden of inspection prior to the conclusion of the contract (if the object exists and is already identified at that time)? Evidently, the broader the burden of inspection before contracting is, the narrower the scope of the conformity obligations imposed on the supplier will be. The heavier the burden of examination before contracting is, the more the system is one of *caveat emptor*.

Once the prerequisites for, and the scope of, the promisor's liability are established, then the issue of the promisee's remedies arises. Yet, a preliminary question refers to the existence and the extent of burdens imposed on a promisee who wishes to rely on nonconformity. Unlike breaches such as complete non-performance, delayed performance or performance by the wrong person, in the case of nonconformity the promisor may be completely unaware of the nonconformity in the object that she supplied. This, and numerous other considerations, may lead to the requirement that the aggrieved party examine the object and give the other party notice of any nonconformity within a prescribed period of time as a prerequisite to her reliance on the nonconformity.¹⁵⁶ Such rules prevail in the Civil Law systems, following the Roman law tradition.¹⁵⁷ In prescribing such rules, one must determine the extent of examination required (if any), the period in which the notice should be given (which may be a fixed or flexible period), and the results of failing to comply with these requirements. In this regard, the law may take into consideration the patent or latent character of the nonconformity, the parties' expertise, and so on.

154. See also supra Parts II.B.1.b.ii, II.B.1.c and II.B.2.c and d.

155. See, e.g., arts. 1491 and 1578 of the Italian Civil Code; §§ 460 and 539 of the German BGB (but see § 544 thereof); art. 200 of the Swiss Federal Code of Obligations; § 14(2)(a) of the English Sale of Goods Act, 1979; art. 928 of the Austrian ABGB; art. 36 of ULIS; § 35(3) of the 1980 UN Convention on Contracts for the International Sale of Goods. See also supra Parts II.B.1.a, b and c, II.B.2 and II.C. See infra Part IV.A.2.

156. See generally, Reitz, supra note 93; Reitz, A History of Cutoff Rules as a Form of *Caveat Emptor*: Part II-From Roman Law to Modern Civil and Common Law, 37 Am. J. Comp. L. 247 (1989).

157. See, e.g., §§ 477 and 638 of the German BGB and §§ 377 and 378 of the German HGB; art. 1648 of the French Civil Code; art. 933 of the Austrian ABGB. See also supra Parts II.B.1 and II.C.

As to the aggrieved party's remedies, these would presumably be derived from the general conceptions of the law of remedies in any given system. The significant implication of the concept of conformity in this regard is that the same remedies available in any other breach should basically apply to nonconformity of the performance as well.¹⁵⁸ Special issues that must be addressed include: the promisee's right to demand the replacement of the object or its repair; the right of the aggrieved party to suspend her performance until the nonconformity is cured (dependency of obligations); protection of the restitution interest by providing a remedy of proportional reduction of the price, etc.

Finally, a central issue in the formulation of any set of conformity rules is whether and to what extent some of the rules should be regarded as compulsory. This issue is part of a much broader dilemma concerning the regulation of contractual relations by the state. It involves problems of market failures, consumer protection, paternalism and distributive justice in the law of contract, and generally the appropriate role of the state in economy and society. As a matter of fact, all modern legal systems include such compulsory regulation, especially with regard to housing (construction, sales and leases) and other consumer products.¹⁵⁹

An attempt to suggest an "ideal model" for a set of conformity rules is far beyond the scope of this article. However, it is hoped that the analytical framework of the conformity concept proposed above may assist in any reform aimed at improving and harmonizing existing conformity rules. The dissatisfaction with the existing situation in most legal systems that do not contain a general principle of conformity (as demonstrated in the comparative survey above) indicates that such reforms are indeed necessary.

IV. JUSTIFICATIONS FOR IMPOSING CONFORMITY OBLIGATIONS

The main significance of the conformity principle lies in the provision of rules that establish the criteria for the conformity of performance.¹⁶⁰ When the parties clearly stipulate the qualities that must be found in the object, the basic norm of *pacta sunt servanda* suffices

158. Unlike the present situation in many legal systems whose rules are not based on a general concept of conformity. See *supra* Part II.B. The 1980 UN Convention on Contracts for the International Sale of Goods and the Israeli legislation represent such uniformity of remedy rules. See *supra* Part II.C.2.

159. See, e.g., the French statutory reform concerning construction and sale of new buildings (*supra* note 30); the Israeli Sale (Housing) Law, 1973 (*supra* note 102); The English Unfair Contract Terms Act 1977 (*supra* note 40); the American Magnuson-Moss Warranty Act, 15 U.S.C. § 45 (1978), and the doctrine of "implied warranty of habitability" (*supra* Parts II.B.2.a and d); and the Austrian Consumer Protection Law (*supra* note 85).

160. See *supra* Part III.D.

to explain why the promisor should supply an object that conforms with the agreement. The question which then arises is this: what advantage is there in introducing rules to establish criteria for the conformity of performance? Why not be content with the principle that contractual obligations must be fulfilled? These questions will be dealt with in light of various theories about contracts and the role of contract law.

Some preliminary comments are necessary. First, we shall focus on justifications for conformity *default rules*, leaving aside compulsory standards of conformity. The reason for this is not that compulsory conformity rules are few or unimportant, but rather that they arouse too many questions concerning mandatory regulation of contractual obligations. A meaningful analysis of these general, extensively debated issues cannot be undertaken here. Second, it is not the purpose of the following discussion to give any general account of the various theories about contract law. The very attempt to implement the theories in regard to the present issue will, however, shed light on the theories themselves. This article addresses only those theories that seem most fruitful in the present context, and arranges them according to considerations of exposition. It will soon be realized that almost no satisfactory justification for the conformity obligations may be grounded on just one theory, and that, in fact, they are all interrelated.¹⁶¹

A. Individualistic Justifications—The Will Theory

1. General

This section focuses on attempts to explain default rules that impose conformity obligations as closely related to the will of the parties. Classical contract theory, inspired by the ideas of nineteenth century's liberalism and individualism, tended to ground all the consequences of contracts on the parties' will.¹⁶² *Inter alia*, it was proposed that the default rules of conformity are based on that will. However, the difficulty of reconciling these default rules with the will theory of contracts

161. Part of the discussion will be based on German law. Although the German scholars did not refer to the principle of conformity as such, but rather to the special provisions of the German BGB on quality defects in sales, it seems possible to deduce broader conclusions from their ideas. The same applies to the English and American scholars who dealt with the concept of warranty.

162. See K. Ryan, *An Introduction to the Civil Law* 38-42 (1962); A. von Mehren & J. Gordley, *supra* note 12, at 788-90; P. Atiyah, *supra* note 38, at 405; Pound, *The Role of the Will in Law*, 68 *Harv. L. Rev.* 1 (1954); M. Horowitz, *The Transformation of American Law, 1780-1860, 180-85* (1977); B. Nicholas, *French Law of Contract* 31-35 (1982).

is plain: the need for obligations implied in law arises precisely in those cases where it is impossible to found them on the parties intentions, expressed or implied in fact. We shall examine three methods (or categories of methods) of dealing with this difficulty.

2. *The Promisee's Ignorance or Mistake*

Several factors prompted scholars to try to justify liability for the conformity of the object by analogy to the rules of defects in the formation of contract, and of mistake in particular. The central reason stemmed from the universal rule according to which a promisee, who knows of a defect in the object at the time of the conclusion of the contract, cannot rely on it under the rules of conformity.¹⁶³ Another reason was the notion that transactions in which the object is existing and identified at the time of contracting are the paradigm to which "warranties" (in England and the United States) or "*Gewährleistung für Sachmängel*" (in Germany) apply.¹⁶⁴ Other causes were the existing rule in some systems, under which reliance on the rules of defect in the object excludes recourse to the rules of mistake, and the general trend, based on the will theory, to emphasize the subjective aspects of the parties' relations.

According to one view, the imposition of statutory liability for conformity is justified on grounds of the buyer's ignorance of the defect.¹⁶⁵ The mere existence of a flaw in the object, from an objective point of view, does not constitute a breach of the contract, as the parties may agree on a sale of flawed property. The alleged source of liability is, therefore, the gap between the buyer's knowledge and the actual facts. According to another view expressed in Germany, the provisions relating to the seller's liability for the quality of the thing sold are but a special regulation of mistake, which excludes the applicability of the general rules on mistake.¹⁶⁶ The buyer may be mistaken regarding various matters, and ordinarily her rights are determined by the general rules. But whenever her mistake relates to the characteristics of the thing sold, specific considerations of balancing between the interests of the seller and the buyer and between the fairness of com-

163. See the provisions referred to in *supra* note 155.

164. Rabel, *supra* note 131, at 276; K. Larenz, *supra* note 9, at 60-68. In Anglo-American law, the term "warranty" is occasionally used to indicate commitments regarding existing facts, that is commitments that refer to the condition of existing objects. See, e.g., P. Atiyah, *Promises, Morals, and Law* 161-64 (1981). Compare also Bayles, *Legally Enforceable Commitments*, 4 *Law and Phil.* 311, 311-12 (1985).

165. Haymann, *Fehler und Zusicherung beim Kauf*, in *Die Reichsgerichtspraxis im deutschen Rechtsleben*, III, 317, 328 (discussed in T. Süß, *supra* note 18, at 162-68).

166. See T. Süß, *supra* note 18, at 201-09.

merce and its security apply, which justify certain deviations from the general law.

Though capturing an important element of conformity rules, these views are open to severe criticism. The mere fact that the applicability of the special warranty rules excludes the buyer's reliance on the rules of mistake does not lead to the conclusion that the former constitute a particular instance of the latter.¹⁶⁷ Moreover, this argument is irrelevant in those systems (such as the American and the English) that do not recognize such a rule. Furthermore, in numerous cases the conformity obligation is breached while there is almost no basis for a claim of mistake. A typical case is that of the nonconformity in future goods or services. The mistake approach is relevant only (or almost only) to contracts referring to existing and identified objects. One cannot speak of mistake in the formation of contract with regard to future objects since at that time there is no object to which a mistake may refer.¹⁶⁸ The assumption that conformity rules ("warranties" or others) primarily apply to existing objects is anachronistic. Currently, conformity rules similarly (or even primarily) apply to executory contracts, in which the object is to be rendered, manufactured, purchased or identified by the promisor only in the future.

Other objections to the views under discussion may be based on the rules concerning the burden of proof and the remedies applicable to each of the cases. A promisor who wishes to exclude her liability for nonconformity on the ground of the promisee's knowledge thereof at the time of contracting has to prove that the promisee did in fact have that knowledge at that time. Contrarily, where a party claims that she has entered into a contract in consequence of a mistake, she is the one who has to prove this claim. This apparently technical difference points to the substantive difference between the rules.¹⁶⁹ A considerable disparity between the cases exists regarding remedies as well. In the case of nonconformity the aggrieved party is entitled, at least in some situations and in some systems, to positive damages and to specific performance as well, whereas the ordinary relief in cases of mistake

167. Thus, in some legal systems (such as French law), the existence of a contractual cause of action excludes recourse to a delictual cause in the same matter. It would be far-reaching to deduce from this alone that contract law is but a special regulation of tort law, and that there are necessarily like justifications for the rules in the two fields.

168. As a rule, one cannot speak of mistake in the legal sense with regard to future events. A mistake may refer either to the past or to the present. See Tedeschi, *Frustration of Purpose*, 10 *Is. L. Rev.* 1, 36-37 (1975); J. Calamari & J. Perillo, *The Law of Contracts* 385 (3d ed. 1987); G. Treitel, *supra* note 76, at 237-38.

169. In Rabel's opinion, this is decisive evidence for the rebuttal of the view that the buyer's mistake is the basis for the seller's liability. See Rabel, *supra* note 131, at 282.

or fraud is annulment of the contract and restitution.¹⁷⁰ Lack of information or a gap between the promisee's assumptions and the actual facts are not considered in themselves as justifying the grant of remedies designed to bring her to the position in which she expected to be. Only a party who can rely on additional causes besides mere mistake, and particularly on a breach of promise, may seek such remedies.

On a more abstract level, the present views resemble the philosophical theories that try to base the binding force of promises on the moral obligation to tell the truth. These theories interpret promises as representations about the promisor's future conduct.¹⁷¹ A central weakness of these theories is that an obligation to tell the truth usually limits what one is allowed to say—she must not lie—while promises limit what one is allowed to do—she must not do anything that contradicts her prior statements. "Rather than requiring people to conform their statements to reality, the misrepresentation theory of promising requires people to act in such a way that reality will conform to their prior statements."¹⁷² The promisee's claim is not that the promisor did not tell the truth, but that she did not carry out her promise. Similarly, in the case of conformity obligations, the thrust of the promisee's claim is not that she was mistaken about the object's condition, but that the object's condition does not conform to the promisor's obligation. Hence, the justification for statutory obligations of conformity cannot be found in the promisee's mistake. One cannot draw upon the negative role of the promisee's knowledge under the rules of conformity to conclude that the promisee's ignorance of the nonconformity is the basis for liability. The positive basis is to be found in the very existence of nonconformity, while the matter of knowledge plays only a secondary, negative role.¹⁷³

3. *The Parties' Presumed, Virtual or Hypothetical Intentions*

As was mentioned, the German scholars focused on transactions relating to existing and identified objects, in which the defect was discovered after the conclusion of the contract. The discovery of the defect was conceived as a sort of frustrating event that affects the basic assumptions of the parties, and especially those of the promisee. Con-

170. On the buyer's remedies according to German law, see *supra* Part II.B.1.b.i. On the Israeli law, which entitles the buyer to the full scope of remedies for the breach of contract (including enforcement and damages), see *supra* Part II.C.2.b.

171. See generally, Craswell, *Contract Law, Default Rules, and the Philosophy of Promising*, 88 Mich. L. Rev. 489, 501-03 (1989).

172. *Id.* at 502. For Craswell's general critique of attempts to derive default rules from the theory that connects the keeping of promises to the prevention of misrepresentation, see *id.*, at 511-14, 523-28.

173. See T. Süß, *supra* note 18, at 204-09.

sequently, the rules relating to the object's quality were frequently perceived as connected to the issue of frustration. Against the background of the will theory, the German scholars tried to base the rules of frustration on the parties' will.¹⁷⁴ In this context, well known theories were Windscheid's *Voraussetzung* ("Supposition"),¹⁷⁵ and the theories that followed it at the beginning of this century, such as the views of Oertmann ("basis of the transaction"), Locher ("the transaction's purpose") and Krückmann.¹⁷⁶ In the absence of an actual declaration of will concerning the frustrating event, the different theories tried to base the rules of frustration on a contractual reservation, which exists potentially and hypothetically, or virtually on the psychological level, or which is capable of being detected from the objective basis of the transaction (according to the different views). Some theories focused on the promisee's reservation, while others looked for the parties' common purpose.

In the special context of the seller's liability for the quality of the thing sold, the German scholars focused on the equivalence between the considerations in the synallagmatic transaction. In such a transaction, each party's wish to receive the counter-consideration, which she views as equivalent to the consideration given by her, is the *causa* of the reciprocal contract. Each of the parties assumes that there is an equivalence between the considerations given by the parties. The violation of this equivalence, as a result of the defect, undermines the basis of the transaction and leads to its collapse.¹⁷⁷ The equivalence is measured by subjective criteria.¹⁷⁸ However, the decision as to when the potential or psychological reservation of will is to be recognized is made according to an objective test of good faith.¹⁷⁹

174. The development of Common Law doctrines of impossibility and frustration was inspired by similar ideas. See *Taylor v. Caldwell*, 122 Eng. Rep. 309, 3 B. & S. 826 (K.B. 1863); Tedeschi, *supra* note 168, at 16-21.

175. B. Windscheid, *Die Lehre des römischen Rechts von der Voraussetzung* (Düsseldorf, 1850); Windscheid, *Die Voraussetzung*, 78 Arch. f. die civ. Praxis 161 (1892) (discussed in T. Süß, *supra* note 18, at 124-34); K. Larenz, *Geschäftsgrundlage und Vertragserfüllung* 5-11 (3 Auf. 1963); Tedeschi, *supra* note 168, at 18.

176. For an analysis of these different theories and particularly their application to the issue of quality defects in sales, see T. Süß, *supra* note 18, at 127-58. It should be noted that some of these theories (particularly Locher's theory) tend to be more objective than others. Yet, they are all based on the idea that the parties should not be subject to rules that cannot be connected to their will and consent (actual or hypothetical).

177. See also H. Capitant, *De la cause des obligations* § 14, at 30-32 (1923).

178. On the subjective equivalence (*subjektiven Äquivalenz*), see also K. Larenz, *supra* note 9, at 62-63; and in the Austrian law, H. Koziol & R. Welser, *supra* note 82, at 229-30.

179. The principle of good faith is a dominant principle in the German law. See generally N. Horn, H. Kötz & H. Leser, *supra* note 8, at 135-45. In the present context,

The concentration on the synallagmatic equivalence, and the justification of liability on grounds of its failure, are also common to views expressed in the French law regarding the seller's liability for hidden defects.¹⁸⁰ These views were subject to severe criticism,¹⁸¹ which is equally applicable to the German theories. The criticism focuses on the results which the law attributes to the breach of conformity obligations. The aggrieved party may be entitled to rescission of the contract, price reduction, restitution of the expenses incurred by her, and, in certain cases, even positive damages. These results are irreconcilable with the explanation that the defect leads to the nullification of the basis of the contract.

A basic weakness of the various German views that tie conformity with frustration lies in their concentration on contracts in which the object is already identified at the time of contracting.¹⁸² Since that specific thing was considered the object of the contract, a later detection of a defect therein was conceived as retroactively annulling the parties' suppositions or the purpose of the transaction. However, as indicated above, this contemplation does not suit the modern rules, which apply equally to the sale of existing things and to contracts for the sale of future property. In either case, the seller's liability for the quality of the object is an integral part of her obligations. This liability is part of the content of the contractual obligations. It is not a case in which the performance of contractual obligations ceases to meet the promisee's needs—a case of frustration of the contract's purpose.¹⁸³

Finally, in accordance with the will theory of contract, all of the above mentioned views strive to find the basis for the liability mainly in the parties' will (either unilateral or bilateral). As was already mentioned, the problem with this conception is that the need for default rules of conformity arises precisely in those cases where the inference of the promisor's liability from the contract is not possible.¹⁸⁴ In other words, the assumption is that the desired liability cannot be inferred

having recourse to this principle, the law allows the buyer to alter, qualify or even to release herself from her original obligation, although initially her obligation was unqualified and unconditional.

180. See J. Frossard, *supra* note 109, § 164, at 87. See also Esmein, *Le fondement de la responsabilité contractuelle rapprochée de la responsabilité délictuelle*, 32 *Rev. Trim. Droit Civ.* 627, 661-62 (1933); H. Capitant, *supra* note 177.

181. See J. Frossard, *supra* note 109, §§ 164-168, at 87-89.

182. See Rabel, *supra* note 131, at 276; K. Larenz, *supra* note 9, at 60-67.

183. See Tedeschi, *supra* note 168, at 15. Tedeschi also criticizes those theories (like Locher's purpose of the transaction) that refer to the parties' common purposes or assumptions. It is questionable whether in contracts such as sale or hire, where each of the parties is motivated by purposes that are in a sense contradictory, a common purpose is at all deducible (*id.*, at 19-21).

184. Compare Craswell, *supra* note 171, at 514-16.

from the parties' intention.¹⁸⁵ Yet, it should be noted that some of the theories also combine additional elements, such as the objective criterion of good faith. The combination of subjective and objective elements, and the emphasis put on the (subjective) equivalence of considerations, are important contributions of these theories. One can embrace these ideas while rejecting the problematic identification of nonconformity with frustration.

4. Giving Up

The attempts to justify the default rules of conformity on the basis of the parties' will have turned out to be rather unsatisfactory. In fact, these and numerous other difficulties of the will theory led to its decline in the past hundred years or so. However, a new version of this theory was introduced about ten years ago by Professor Fried.¹⁸⁶ Fried tries to overcome the prevalent postclassical criticism of the will theory by making substantial concessions to the opposing theories. He limits the incidence of the promise principle as an explanatory and justifying basis of contract law, and acknowledges the force of other principles beyond this limited incidence.

As for the content of contractual obligations, Fried readily admits that whenever the parties do not actually agree on something (whether expressly or impliedly), the court should sort out the difficulty on bases other than the agreement.¹⁸⁷ In such cases, one cannot rely on the parties' will. Furthermore, even if the parties "in all probability" would have agreed to a certain term had they thought of the issue, the court is not bound to that term. The presumed intention of the parties is

185. A reference to the parties' *hypothetical* will does not solve the problem either. In the absence of indications as to the parties' actual will, one may try to determine the content of the hypothetical will according to such reasoning as "the rule to which 'utility maximizing' parties would have agreed", or "the rule to which mutually considerate (or altruistic) parties would have agreed." However, enforcing an obligation to which the parties would have agreed is not based on their actual *ex ante* will. Therefore, the reliance on the parties' hypothetical will does not add much to a direct implementation of the principles or policies underlying these arguments (wealth maximization or altruism). For further discussion of the relationship between hypothetical consent and default rules, see Coleman, Heckathorn & Maser, A Bargaining Theory Approach to Default Provisions and Disclosure Rules in Contract Law, 12 Harv. J.L. & Pub. Pol'y 639, 640-50 (1989).

186. C. Fried, *Contract as Promise: A Theory of Contractual Obligation* (1981). For general comments and critique on his thesis, see Atiyah, Book Review, 95 Harv. L. Rev. 509 (1981) (reviewing C. Fried, *Contract as Promise: A Theory of Contractual Obligation* (1981)); Kronman, A New Champion for the Will Theory, 91 Yale L.J. 404 (1981); Johnson, The Idea of Autonomy and the Foundations of Contractual Liability, 2 Law and Phil. 271 (1983); Bayles, *supra* note 164, at 319-42; Craswell, *supra* note 171, at 514-23.

187. See C. Fried, *supra* note 186, at 60-61.

but one factor, alongside other considerations such as substantive standards of fairness, reliance and restitution (all of which Fried characterizes as non-contractual).

Hence, the role left to the parties' will in this context (as in others) is quite limited, and the difference between Fried's conception of the will theory and opposing theories is dramatically reduced.

B. Realization of the Parties' Reasonable Expectations

According to a view clearly articulated by Corbin, the central purpose of contract law is to realize the parties' reasonable expectations, expectations that are based on their promises.¹⁸⁸ This theory shifts the emphasis from each party's will to each party's responsibility for the reliance and expectations of the other party. A party is responsible for the reasonable expectations created by her declarations, actions or inactions. In this regard, one is not restricted to expectations actually expressed by the parties or that actually came to their minds; it suffices that the expectations are characteristic and reasonable. This theory requires a complex process of uncovering the typical expectations of each party and weighing them one against the other in order to determine which are reasonable and worthy of full or partial recognition. In this process, one has to consider the interests of the parties, characterize the risks inherent to the transaction and determine their reasonable allocation between the parties, examine the parties' expectations, and select those that should be protected.

According to this theory, conformity default rules are justified whenever the circumstances reasonably give rise to the promisee's expectations that the object be suitable for its ordinary use, be of medium quality, etc. In contracts such as sale or hire, realization of the promisee's reasonable expectations justifies the imposition of conformity obligations even where not contemplated by the parties.¹⁸⁹

This theory avoids the central difficulty of the will theory by not purporting to base the legal rules on the parties' inner will—a will that is either nonexistent or undetectable. It takes into account subjective factors—the parties' expectations, inasmuch as they are detectable—but it selects those expectations that merit the law's protection according to an objective criterion of reasonableness.¹⁹⁰

188. Corbin on Contracts Vol. 1, 1-2 (1963). See also Pollock's Principles of Contract 1 (12th ed. 1946), and the references cited therein; B. Reiter & J. Swan, Contracts and the Protection of Reasonable Expectations, in B. Reiter & J. Swan, Studies in Contract Law 1 (1980); Bayles, *supra* note 164, at 323-24.

189. See, e.g., Williston on Sales, *supra* note 45, Vol. 2, § 16-1, at 414 (regarding the warranties in sale of goods).

190. Compare to the German views that rely on the general, objective principle of good faith. These views were briefly discussed *supra* in Part IV.A.3, particularly the text accompanying notes 175-79.

The virtue of this theory lies in its flexibility, but there lies also its weakness. How does one identify reasonable expectations? A reference to social practices (such as usage of trade) is not a satisfactory answer for several reasons. Such practices do not always exist, and default rules are necessary precisely in those cases. There may also be a diversity of different and even conflicting practices, so that it becomes very difficult to decide which to apply to a specific case.¹⁹¹ Furthermore, the people's expectations and social practices are largely determined by the legal rules, so the reasoning becomes circular.¹⁹² And, most importantly, social investigation may provide information about prevalent expectations, but not about their desirability and reasonableness.¹⁹³ Thus, the inescapable question is not what the characteristic expectations are, but which expectations are justified. In that sense, Williston is very precise when asserting that, "what is bought extends beyond the actual physical object and includes what any purchaser might ordinarily have a right to expect when making a purchase."¹⁹⁴ The question is not one of expectations, but rather one of having a right to expect. Arguably, the "reasonable expectations" theory does not provide much assistance in resolving this issue. A possible, skeptical response would be to look for guidance from alternative theories (such as economic analysis or substantive ethical standards). A more positive reaction is to accept the indeterminacy of the present theory as an unavoidable characteristic of a fruitful analytical tool. Adopting this theory implies a rejection of some other theories (e.g., the will theory), and at the same time calls for the employment of various considerations, including efficiency, fairness and others. The complexity of pertinent values may well require such flexibility.

C. Consequentialist Justifications—Economic Analysis of Law

1. Efficiency and Will

Application of economic analysis to law, its normative basis and its critique all require little in the way of introduction.¹⁹⁵ Generally

191. Feinman, *Critical Approaches to Contract Law*, 30 *UCLA L. Rev.* 829, 836-39 (1983); Craswell, *supra* note 171, at 505-08.

192. See P. Atiyah, *supra* note 164, at 67-68; Bayles, *supra* note 164, at 323-24.

193. J. Feinman, *supra* note 191; Craswell, *supra* note 171, at 505-08.

194. Williston on Sales, *supra* note 45, Vol. 2, § 16-1, at 414 (emphasis added).

195. See generally, R. Posner, *Economic Analysis of Law* (3d ed. 1986) [hereinafter R. Posner, *Economic Analysis*]; R. Posner, *The Economics of Justice* (1981) [hereinafter R. Posner, *Economics*]; Dworkin, *Is Wealth a Value*, 9 *J. Legal Stud.* 191 (1980); Kronman, *Wealth Maximization as a Normative Principle*, 9 *J. Legal Stud.* 227 (1980); Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique*, 33 *Stan. L. Rev.* 387 (1981).

speaking, the economic approach evaluates legal rules according to the criterion of efficiency. A rule is efficient if the sum of the benefits it generates is greater than the sum of its costs.¹⁹⁶ This cost-benefit (or wealth maximization) analysis requires interpersonal comparisons of utility. The economic analysis measures one's utility against her willingness to pay for an entitlement (or against the sum for which she would be willing to part with the entitlement).¹⁹⁷

This sketch of economic analysis reveals its basic relationship to the will theory previously mentioned. Since the value of any entitlement is measured against *the individual's* willingness to pay, there is usually close similarity between the results reached by the two theories. As with the will theory, the economic analysis focuses on individuals (their total utilities), and not on any communitarian values. Yet, there are fundamental differences between these two views. While the will theory is a right-based theory, the economic analysis is distinctively consequentialist. Whereas the will theory concentrates on the individual, the economic analysis is interested in maximizing the aggregate sum of utilities. Occasionally, these differences induce conflicting answers to specific questions.¹⁹⁸

The relations between economic analysis and the "reasonable expectations" theory will be illuminated by considering the economic account of contractual default rules.

2. *Efficiency, Default Rules and the Parties' Expectations*

The standard efficiency justification for contractual default rules is as follows. Voluntary exchanges of resources facilitate the allocation of resources to their most valuable use, thereby enhancing economic efficiency.¹⁹⁹ However, exchange of resources by means of voluntary transactions involves considerable costs, including those of negotiating

196. This criterion, known as Kaldor-Hicks efficiency, is the common tool for policy analysis. Another criterion, known as Pareto efficiency, requires a situation in which the welfare of one individual cannot be improved without reducing the welfare of others (Pareto optimal). In that sense, a rule is efficient (Pareto superior) only if it improves the welfare of at least one member of society while reducing the welfare of none. Of course, this is a very restrictive requirement. See generally R. Posner, *Economic Analysis*, supra note 195, at 11-15; C. Veljanovski, *The New Law-and-Economics* 34-41 (1982).

197. This is a basic difference between the economic approach and utilitarianism. See R. Posner, *Economics*, supra note 195, ch. 3; Kronman, supra note 195; Dworkin, supra note 195. On the possible significance of the "asking/offer" distinction in evaluating people's utilities, see *infra* text accompanying note 251.

198. On the *instrumental* significance of the individual's will in economic analysis, see R. Posner, *Economics*, supra note 195, at 92-99; Bayles, supra note 164, at 321-23.

199. See generally, A. Kronman & R. Posner, *The Economics of Contract Law* (1979); R. Posner, *Economic Analysis*, supra note 195, at 11-15; F. Stephen, *The Economics of the Law* 11-63 (1988).

and drafting the contract.²⁰⁰ Maximization of the wealth of society requires the minimization of these costs so as to enable the execution of transactions that otherwise would not have been executed, or that would have involved high costs. One method of reducing contracting costs is to introduce default rules regarding the content of the contract. When such rules reflect the typical expectations of the parties, they save the need for negotiating and drafting them in the specific contract. In contrast, absence of rules, or the existence of rules that do not give effect to the parties' expectations, necessitate negotiations for the drafting of terms that realize these expectations. Such negotiations make the transaction more costly.²⁰¹ Given the heterogeneity of people's needs, preferences and skills, and the diversity of circumstances in which they bargain, it is clear that default rules cannot reflect the parties' expectations in each and every contract. Yet, a rule is efficient inasmuch as it reflects the parties' expectations in most cases, while allowing them to contract around the rule whenever they choose to do so.²⁰²

This description of the role of contractual default rules reveals the relationship between economic analysis and the "realization of expectations" theory in this context. In principle, both theories strive to introduce default rules that imitate the terms that the parties would have expected to find in their contract. In that sense, realization of the parties' expectations is in itself an economic goal, and economic analysis is a useful tool in determining the typical expectations of rational parties.²⁰³ Yet, unlike the economic perspective, in realizing the parties' *reasonable* expectations, one is not limited to efficiency considerations.

200. Other costs are those of gathering information, choosing the partner to the transaction, and the costs relating to the uncertainty involved in the performance of the transaction, particularly in executory transactions. See generally, Coase, *The Problem of Social Cost*, 3 *J. Law & Econ.* 1, 15-19 (1960).

201. A. Kronman & R. Posner, *supra* note 199, at 4; R. Posner, *Economic Analysis*, *supra* note 195, at 82.

202. Thus, even efficient default rules are only Kaldor-Hicks efficient, and not Pareto efficient.

203. Economic analysis assumes that people are *usually* "rational maximizers," which means that they are self-interested egotists who maximize their utilities. A disparity between the outcomes of economic analysis and the conclusions based on the parties' will or expectations may result *inter alia* from refutation of this assumption in certain situations. In spite of the basic differences between the will theory and the "realization of reasonable expectations" theory, the relations between each of these right-based theories and the consequentialist theory of wealth maximization are quite similar in the present context. For a broader examination of the relationship between efficiency analysis and consent-oriented theories of default rules, see Coleman, Heckathorn & Maser, *supra* note 185, at 640-50. A linkage between reasonable expectations and economic analysis is also indicated by B. Reiter & J. Swan, *supra* note 188, at 6-7.

It should be noted that the above mentioned consideration is not the only efficiency consideration pertinent to default rules.²⁰⁴ Other factors have to do with information problems and with risk aversion. These factors will be discussed as well.

3. *The Efficiency of Conformity Rules*

a. *Preliminary Comments*

Beyond the basic insight that efficient default rules should "imitate" the terms that most parties would have expressly agreed to had there been no transaction costs, economic analysis also indicates the content of these terms. In the present context, the proposition is that rational parties would have agreed to the rules of conformity.

Since conformity is examined at the time of performance (which is usually the moment of supplying the object), the relevant default rule should affect the parties' behavior until that time. This is not to say that later actions of the parties may not influence matters connected with conformity. For example, careless use of a nonconforming object by a buyer or a lessor may increase the injuries it causes. Prevention of such additional damages requires a liability rule that will influence this late conduct.²⁰⁵ However, since we focus on the object's conformity at the time of its supply, we shall consider later behavior only inasmuch as it may influence the appropriate rule applicable to that time.

The conclusion of an efficient transaction requires that each party has correct information about the value of the resources she parts with and the resources she is about to receive. If, as a result of nonconformity, the value of the object to the receiver has decreased, then the calculation on which basis she entered the transaction is no longer

204. For economic studies of the role of default rules that go beyond the standard justification, see Ayres & Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 *Yale L.J.* 87 (1989); Goetz & Scott, *The Limits of Expanded Choice: An Analysis of the Interactions Between Express and Implied Contract Terms*, 73 *Calif. L. Rev.* 261 (1985); Coleman, Heckathorn & Maser, *supra* note 185.

205. These are the kind of considerations that are relevant, for example, when dealing with the operation of remedies for nonconformity (e.g., the choice between rectification of the defect, replacement of the object and rescission of the contract). In this context, one must consider the later conduct of the parties and try to influence it. For an analysis of such considerations, see Priest, *Breach and Remedy for the Tender of Nonconforming Goods under the Uniform Commercial Code: An Economic Approach*, 91 *Harv. L. Rev.* 960 (1978); Chapman & Meurer, *Efficient Remedies for Breach of Warranty*, 52 *Law & Contemp. Prob.* 107 (1989). See also Priest, *A Theory of the Consumer Product Warranty*, 90 *Yale L.J.* 1297 (1981) [hereinafter Priest, 1981] and references *infra* to Priest's analysis in notes 207, 213, and 233.

accurate.²⁰⁶ In this regard, it makes no difference whether the nonconformity diminishes the market value of the object, or only its subjective value to the receiver. In other words, where the maximal welfare (of the individual and society) is to be achieved by a voluntary transaction relating to an object that possesses certain qualities, then if the object does not possess these qualities, that maximization of welfare will not be achieved.

Certainly, the optimal efficiency of a transaction does not require maximal conformity of the object to the promisee's needs. Usually, the greater the quality, quantity, safety, soundness of title, suitability for idiosyncratic needs, or any other feature of an object are, the greater the costs involved in its supply. Presumably, the net surplus of any transaction will be maximized by stipulating the optimal features of its object. These features will be determined according to the marginal costs and utilities of both parties. Thus, many times the promisee will prefer to contract for an object that involves some risks, for its costs appear to be lower than the difference between the price of that object and an object free of those risks.²⁰⁷ In this regard, costs of several kinds must be taken into account. One is the cost of the risk itself, which depends on the scope of losses the nonconformity may cause and the probability of its occurrence. Another includes the cost of preventing the nonconformity. This cost may vary depending upon who is to prevent the risk, the supplier or the promisee. Presumably, if the costs of preventing the risk are higher than the expected cost of the risk itself, the parties will prefer not to prevent it, and to execute the transaction though it involves that risk.²⁰⁸ In such a case, the risk would not be considered as nonconformity.

206. The costs of any transaction include all the other opportunities for the use of resources that the receiver forewent when entering into the transaction. See R. Bowles, *Law and the Economy* 21 (1982); F. Stephen, *supra* note 199, at 46-49. Had the promisee known that she would get an object that did not conform to her expectations (based on the agreement), she would not have entered into the contract, or at least would not have done so under the same terms.

207. This may be illustrated by two of Professor Priest's examples (see Priest, 1981, *supra* note 205). Most consumers probably prefer to reinstall shelves that fall in their refrigerators than to pay the additional price for refrigerators whose shelves never fall. Likewise, most consumers are not interested in washing machines that would not break even if used many hours every day. Rather, they would prefer machines that function satisfactorily in normal frequency. See also *infra* notes 213 and 233.

208. See Schwartz, *The Private Law Treatment of Defective Products in Sales Situations*, 49 *Ind. L.J.* 8 (1973), especially at 23-28. See also *infra* note 234; Priest, 1981, *supra* note 205. An additional assumption made at that stage is that the parties are risk neutral. See *supra* Part IV.C.3.e, where this assumption is relaxed.

At times, the assessment of those different costs is difficult, especially from the promisee's point of view (see the considerations detailed below). Thus, where the law's

Apparently, there may be three major causes for a transaction to be sub-optimal (in the present context). First, it is possible that the promisor is unaware of the promisee's needs and preferences. Second, the promisee may be mistaken about the qualities of the promised object.²⁰⁹ Third, there may be nonconformity between the promised object and the object actually supplied. An efficient set of conformity rules should create appropriate incentives to prevent these possible causes of sub-optimality. We shall examine how the conformity rules deal with these problems, while paying attention to other relevant considerations, including risk aversion.²¹⁰

b. Informing the Promisor About the Promisee's Needs

A possible cause for the object's unsuitability to the promisee's needs is the promisor's unawareness of those needs. Clearly, the promisee has more information about her designated uses for the object, the frequency and conditions in which she will use it, as well as her taste and preferences. However, one should not infer from this observation that the promisor should never be liable for the object's nonconformity unless the promisee actually advised her of her needs. On the contrary, efficient default rules may save the need for such a communication.

First, most objects have an ordinary use or uses. By definition, "ordinary use" is the use for which the majority of purchasers acquire the object. An owner who orders building plans from an architect is very rarely interested in them as a piece of art to be hung in her living room. Usually, she needs them for executing a building project. Cars are usually bought or rented for driving, and so forth. In most cases, a default rule that requires the promisor to provide an object suitable for its ordinary use will save the need for express agreement in this regard. In fact, as was observed in the comparative survey (Part II *supra*), the central requirement of conformity in all legal systems is conformity to ordinary use. This is the essence of "redhibitory defects"

point of departure is that liability for nonconformity is placed on the promisor, it may encourage him to expressly delimit the scope of this liability, thereby revealing that information to the other party (see also Ayres & Gertner, *supra* note 204 and *infra* text accompanying notes 215 and 232).

209. In a sense, these two causes are the two sides of the same coin; it is the existence of a gap between the information each of the parties has that results in a nonconforming performance. Yet, it seems that the different objects of knowledge, the promisee's needs on the one hand and the thing to be provided by the promisor on the other hand, justify separate analysis thereof.

210. As has already been indicated, we shall not address the questions involved in the regulation of considerable market failures that may necessitate compulsory standards of conformity.

in the Civil Law and "merchantability" in the Anglo-American systems.²¹¹ Similar reasoning applies to other conformity requirements, such as the requirement that the object be free of third party rights, or that in the absence of contradictory indications, it be of a medium quality.

Another situation in which an efficient default rule can save the communication of the promisee's needs to the promisor occurs when the promisor knows of those needs from another source. The promisor may know about those needs from previous transactions, from the circumstances of contracting,²¹² or otherwise.

There is no justification, however, for establishing a default rule requiring the object to be suitable for every purpose for which it may be acquired. Since most promisees are satisfied with an object suitable for ordinary uses, there is no reason to "force" them to accept an object fit for unusual purposes as well. Such a requirement would probably make the object more costly, while not increasing its value for the ordinary promisee.²¹³ A default rule that realizes the expectations of "unusual" parties and upsets the expectations of ordinary parties is inefficient.²¹⁴

The question which then arises is what rule will induce the "unusual" promisee to communicate her special needs to the promisor. First, it should be clear that the appropriate rule should induce such communication only when its utility is greater than its cost. However, since communication costs are normally not very high in contractual settings, this will usually be the case. Essentially, the appropriate incentive to inform the promisor of the promisee's special needs may be established by a "penalty default rule." As was recently pointed out, default rules may enhance efficiency even if they do not reflect the parties' presumed expectations. "Penalty default rules" are strategically

211. See *supra* Parts II.B.1 and II.B.2.

212. For example, when an evidently disabled man personally orders a room in a resort place, he should be provided with a room that is accessible to disabled people.

213. The "ordinary use" of any object depends on the circumstances. A power drill sold for household use may break down when intensively used for commercial purposes, and still conform to its ordinary use. Professor Priest expresses his skepticism regarding the existence of such thing as a "normal use" of a product, particularly with respect to the frequency and extent of the use (see Priest, 1981, *supra* note 205, at 1312-13). This skepticism is part of his "investment theory," which explains standard consumer product warranties as an instrument for efficient allocation of risks. Our reply to this skepticism is twofold. First, we are not as skeptical about the courts' ability to determine the "normality" of uses. Second, there is no contradiction between the need for express warranties providing specific allocation of risks in specific contracts and between the justification for subsidiary default rules that apply in the absence of any express agreement. Presumably, Priest would not suggest the repeal of the statutory warranty of merchantability.

214. But see *infra* the discussion on "penalty default rules" at note 232.

designed to encourage at least one of the parties expressly to contract around the default rule, thereby revealing information to the other party or to third parties.²¹⁵ In the present context, a rule providing that the promisor is not responsible for the object's conformity to special purpose unless she is informed thereof will encourage the promisee to provide her with this information. In fact, under most legal systems the risk of nonconformity to special purposes is borne by the promisee unless she has notified the promisor of her needs.²¹⁶

Of course, a promisee cannot unilaterally compel a promisor to provide her with any certain object merely by indicating her needs. Yet, in many situations the promisor's knowledge of the promisee's purpose gives rise to the assumption that the promisor undertakes to supply an object suitable for that purpose.²¹⁷ In such circumstances, an efficient rule should induce *the promisor* to contract around that assumption whenever she is not ready to undertake that obligation.

c. Informing the Promisee About the Object's Qualities

Having discussed the rules designed to deal with nonconformities that result from the promisor's unawareness of the promisee's needs, we shall hereafter assume that this problem does not exist. In examining the influence each of the parties has on the conformity of the object to the promisee's expectations, one should distinguish between two situations. In the first situation, the promisor knows (or foresees) at the time of contracting that the object does not (or will not) conform to the promisee's needs, but conceals this knowledge from her. In the other situation, none of the parties knows (at least not on a high level of probability) that the object will not (or may not) conform.²¹⁸ We shall now discuss the first situation.²¹⁹

215. Ayres & Gertner, *supra* note 204.

216. For a comparable analysis in the context of contract damages, see Bebhuk & Shavell, *Information and the Scope of Liability for Breach of Contract: The Rule of Hadley v. Baxendale*, Discussion Paper Note 78, Program in Law and Economics, Harvard Law School (1990). We shall address (and reject) the claim that conformity obligations are generally "penalty default rules," *infra* note 232.

217. See, e.g., § 14(3) of the English Sale of Goods Act 1979, *supra* note 38, and § 35(2)(b) of the 1980 UN Convention on Contracts for the International Sale of Goods, *supra* note 150.

218. The third possibility, in which only the promisee knows of the object's nonconformity, or that he too knows about it, is improbable. Acquiring the object while knowing about its "nonconformity" implies that this does not reduce the object's value from the receiver's point of view (in other words, that the defect or lack of quality does not amount to a nonconformity). Of course, if a promisee fraudulently conceals the fact that he is aware of the object's "nonconformity," in order to subsequently claim a breach by the promisor, this should not be allowed. See also *infra* text accompanying notes 224-226.

219. The second situation will be discussed *infra* in Part IV.C.3.d.

Usually, the promisor has greater information about the qualities and characteristics of the object, its potential uses, its common defects and dangers, etc. In this regard, there is no difference between a professional promisor and a casual, private one. Professional contractors, lessors and sellers obtain that information as part of their profession. Private sellers and lessors may have the information as a by-product of their previous use or handling of the object.

Whenever the promisor knows that the object does not or will not conform to the promisee's needs, efficiency will be maximized if she informs the promisee of it, because this disclosure involves almost no cost. Sometimes the promisee has no means of revealing the nonconformity in advance, and often she may discover it only at some cost.²²⁰ In either case, a more efficient solution would be to require the promisor to disclose this information to the promisee. When any of the parties has information that she knows may negate or frustrate the other party's benefit from the transaction, the cheapest way to prevent the execution of the inefficient transaction is by compelling her to inform the other party.²²¹ An efficient way to create the necessary incentive is to hold the promisor liable for any nonconformity that could have been eliminated by appropriate disclosure.²²² Since a mutually informed agreement to contract around this rule is hardly imaginable (because the promisor conceals the relevant facts from the promisee), this rule must be compulsory.

This conclusion may change when special efforts are necessary to obtain information, and there is an interest to encourage its procurement and dissemination.²²³ However, when referring to the data concerning the object of a certain transaction, such considerations are usually irrelevant, as the obtaining of this information is merely a by-product of the handling of the object by the promisor.

220. A typical example of a transaction in which the promisee can hardly get accurate information about the object's quality at a low cost is the sale of a used automobile. See Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 84 Q.J. Econ. 488 (1970). Another example involves transactions (construction, sales and rentals) relating to real estate.

221. See Kronman, *Mistake, Disclosure, Information, and the Law of Contracts*, 7 J. Legal Stud. 1, 25 (1978).

222. Another way is to impose compulsory disclosure duties, as most legal systems in fact do. Those duties are beyond the scope of this discussion, yet they must be taken into account in every comprehensive analysis of any system.

223. In such a case, compelling the person who obtained the information to reveal it prior to the conclusion of the contract may prevent him from deriving benefit from the information, and will thus be a negative incentive to its very obtainment. For an analysis of the various situations, see Kronman, *supra* note 221; Kronman, *Contract Law and Distributive Justice*, 89 Yale L.J. 472, 489-91 (1980); R. Posner, *Economic Analysis*, *supra* note 195, at 96-97. For a critique of Kronman's analysis, see Coleman, Heckathorn & Maser, *supra* note 185, at 691-707.

Thus far, it has been assumed that the promisee was unaware of the object's nonconformity at the time of contracting. If the promisee was in fact aware of it, then there is no point in requiring the promisor to give any notice, nor is there a justification for holding her liable for the nonconformity (which the promisee could have easily prevented). The universal rule is in fact that a promisee who knew of the nonconformity at the time of contracting cannot rely on it.²²⁴

A more delicate question arises when the promisee is unaware of the nonconformity at the time of contracting, but could have detected it had she reasonably inspected the object beforehand (the assumption being that the object was already existing and identified prior to the making of the contract). It is not very clear whether the promisee's cost of so inspecting the object is greater than the promisor's cost of informing the promisee of the object's condition.²²⁵ This question is complicated where the promisor is unaware of the promisee's preferences, in which case a disclosure duty may become less practical and less effective. Conceivably, the answer to this question varies with the circumstances (the nature of the object, the parties' relative expertise, the nature of the nonconformity, etc.). This variance gives rise to another efficiency consideration, namely the costs and benefits involved in the administration of a highly elaborate system of specific rules as opposed to a system of a few general rules.

In this specific issue, efficiency analysis is not very insightful, as is perhaps indicated by the considerable variety of answers given to this dilemma in different systems.²²⁶ The changing answers to this question—which lies at the heart of the struggle between *caveat emptor* and the conformity principle—were largely determined by changes in the prevailing views about how markets should operate and what social values should be enhanced by contract law.

d. Risk Allocation

When none of the parties knows (or suspects) at the time the contract is concluded that the object will not conform to the promisee's

224. See *supra* the references in note 155.

225. The present question is frequently dealt with in light of a distinction between latent and patent nonconformities. See Kronman, *supra* note 221, at 22-26; Coleman, Heckathorn & Maser, *supra* note 185, at 705-07.

226. See, e.g., §§ 460 and 539 of the German BGB; art. 1642 of the French Civil Code; arts. 1491 and 1578 of the Italian Code; § 14(2) of the English Sale of Goods Act, 1979, *supra* note 38, and § 4(3) of The Supply of Goods and Services Act, 1982, *supra* note 58; art. 36 of ULIS and § 35(3) of the 1980 UN Convention on Contracts for the International Sale of Goods, *supra* note 150. On the controversy regarding the burden of preliminary examination imposed on the buyer under French and Quebec law, see the articles of Gow, *supra* note 21 and Durnford, *supra* note 21.

needs, then nonconformity is a risk involved in the transaction, and not a certainty as in the previous situation. The present case includes both situations where the object does not yet exist at the time of contracting, and situations where the object already exists, but suffers a defect unknown to the parties. An inefficient transaction may be avoided either by assuring the conformity of the object to the promisee's needs, or by revealing the fact that it does not (or will probably not) conform to these needs, and avoiding that transaction. As was clarified at the outset, it is assumed that the expected costs of the risk of nonconformity are greater than the costs of its prevention, so that it would be inefficient to carry out the transaction with that risk.²²⁷ Thus, the central question is what rule will ensure the prevention of the risk.

In principle, the risk of nonconformity should be placed on the party who may prevent its occurrence at a lower cost. The reason for this is that in a mutual transaction each party derives maximal utility from the transaction by taking on the risks which she is able to bear at a lower cost than her counterpart. As long as the remuneration she gets for taking on the risk is lower than the cost the other party would incur, they both benefit.²²⁸ For example, one may assume that a carpenter, making a table for a client, can ensure at a relatively low cost that the wood she uses for this purpose is of a suitable quality. The remuneration the carpenter will demand for ensuring the suitability of the wood will be considerably lower than the cost the orderer would incur were she to see to it herself. It pays for both parties to place this responsibility on the carpenter. Since contracting involves costs, the way to reduce these costs is by introducing a default rule that places the risk on the party who is usually able to bear it at a lower cost.

The great variety of situations to which conformity rules are applicable makes it difficult to make a general statement as to who may ordinarily prevent the risk of nonconformity at a lower cost. The answer to this question may vary according to such factors as: the particular expertise of the parties in regard to a given transaction; the promisee's opportunity to influence the process of production or acquisition of the object, and its handling by the promisor; and the scope of the promisor's information about the conditions of the designated use of the property and the extent of her influence upon it. In order to determine the efficient ways to prevent nonconformity, one should characterize the possible causes of nonconformity.

227. See *supra* Part IV.C.3.a.

228. See R. Bowles, *supra* note 206, at 135. Compare Posner & Rosenfield, *Impossibility and Related Doctrines in Contract Law: An Economic Analysis*, 6 *J. Legal Stud.* 83 (1977) (analyzing the allocation of risks to the "superior risk bearer").

One important cause of nonconformity has already been discussed, namely, information gaps between the parties at the contracting stage. It was observed that in general the promisee has more information of her designated needs and uses for the object, while the promisor has greater information regarding the qualities and characteristics of the object. Thus, the conclusion was reached that each party should be encouraged to provide the other party with this information.

Other conspicuous causes for nonconformity are defects in the raw materials used for manufacturing the object, carelessness in its production by the promisor, or the promisor's inattention when purchasing the object from another person. The required rule should prompt the promisor to use suitable materials and to act carefully in the process of production, or to purchase the object from a reliable seller. As was already stressed, the required rule is not one that will bring the promisor to produce or supply the best possible object, or even to improve its ordinary quality. The yardstick for conformity is the expectation of the parties, based on the contract, and not an external criterion of utmost quality.²²⁹

Sometimes, nonconformity may be avoided by the promisee's intervention in the course of production or purchase of the object by the promisor. Where, after the conclusion of the contract but prior to the acceptance of the object, the promisee knows that the object is affected by nonconformity, and particularly where prevention at that stage is cheaper and easier than at a later stage, the promisee should be encouraged to give notice to the promisor. In certain cases, it is also worthwhile to encourage early examination of the object by the promisee during its manufacture. Often the cost of making the examination and preventing nonconformity at such an early stage will be considerably lower than the cost of its correction after the completion of production (despite the fact that in many instances the examination may reveal no defect).

Nonconformity may also result from harm caused to the object after its production or acquisition, while it is in the possession of the promisor or persons acting on her behalf (carriers, storekeepers, etc.). The promisor, who is in direct or indirect control of the object, should be urged to take precautions against injuries and damage that can be economically prevented.²³⁰ In this regard, there is no essential difference between a professional and non-professional promisor.

229. Since we strive toward the furnishing of an object of the quality that the promisee may reasonably expect it to be according to the contract, and not to the maximal possible improvement thereof, Schwartz's critique on other formulations of this goal does not apply here. See Schwartz, *supra* note 208, at 21-39.

230. Compare Posner's example, R. Posner, *Economic Analysis*, *supra* note 195, at 82-83.

On the basis of this characterization of causes for nonconformity, and in light of common experience, it may be determined that the party who undertakes to supply the object (the seller, the lessor, the contractor) is usually the one who can more economically prevent or reduce the risk of nonconformity.²³¹ Usually, that party has more information and expertise concerning the object. Where she is also the manufacturer of the product or the executor of the work, she can take the necessary precautions to lessen the danger of defect in the final product. If she employs other people to do the work for her, she may choose more reliable workers, and perhaps also supervise their work. When she purchases the object or parts thereof from other suppliers, she is in a better position to inquire as to their reliability and the quality of their products. She has control over the object until its delivery to the promisee, she can protect it from harm during that period, and she may even influence its use following its transfer to the promisee (i.e., by suitable use instructions).²³²

Indeed, the promisee's conduct may also serve to reduce the risk of nonconformity. As mentioned above, she may specify her particular needs, and at times she may intervene in the process of production in order to prevent defects. Therefore, the promisee should be encouraged to prevent nonconformity in those cases where prevention by her is cheaper than by the promisor.²³³ However, these considerations cannot

231. See also H. et L. Mazeaud & A. Tunc, *supra* note 109, § 103-8, at 126.

232. Ayres and Gertner, *supra* note 204, at 107 n.92, allege that the warranties provided by §§ 2-314 and 2-315 of the U.C.C. "cannot easily be justified as 'what the parties would have contracted for.'" Rather, they are designed to "force sellers to reveal information to consumers about the extent of their coverage," by expressly contracting around these provisions. This argument, which stresses the information gap between the parties (that we described above), seems to be self-contradictory. If indeed sellers are better informed about the risks of nonconformity dealt with by these provisions (a conclusion that we share), it is due to the typical circumstances of the transactions under discussion. Sellers are usually better informed with respect to the risks and dangers of the goods, due to the fact that they manufactured them, used them (e.g., in the sale of used cars), or otherwise possessed or dealt with them. These same factors usually enable sellers to prevent the risk of nonconformity at lower costs, thus justifying default rules that impose liability for conformity on them.

233. Priest stresses these aspects in his analysis of standard consumer product warranties (Priest, 1981, *supra* note 205, at 1307-13). According to Priest, the two major ways in which a consumer influences the conformity of the object are the consumer's selection of the product and the consumer's decision about the extent to which he will use the product. Although Priest discusses the terms of consumer contracts for the sale of goods, his penetrating analysis is clearly relevant to all transactions to which the conformity principle applies, and to default rules as well. However, it should be clear by now that efficient conformity rules can take those considerations into account. The qualification of the promisor's responsibility to the ordinary uses of the object, unless the promisee has informed her of his exceptional needs (including the frequency of the object's use)

turn the scale towards placing the risk on the promisee. Regard for these considerations leads only to qualifying the promisor's liability in certain circumstances. Thus, the risk of nonconformity to particular purposes—purposes of which the promisor was not informed—should be placed on the promisee. It is also possible to exclude the promisee's reliance on nonconformity of which she was aware at the time of manufacture, unless she gave the promisor immediate notice thereof (insofar as such notice would have enabled the latter to overcome or reduce the nonconformity, or to mitigate its costs).²³⁴

e. Risk Spreading

Thus far, it has been assumed that the cost of nonconformity (or, as is usually the case, the cost of the risk of nonconformity) may be placed on one of the parties. One should also consider the possibility of distributing the risk among other people. According to the economic principle of diminishing marginal utility, distribution of risk is in itself a worthwhile goal.²³⁵ This leads to the consideration that the risk of

may serve that purpose. Inasmuch as special restrictions on the promisor's responsibility are efficient, the parties may contract around the default rule (as mentioned above, we do not deal with the special considerations applicable to market failures, consumer transactions, and the like).

234. Professor Schwartz opposes the claim that the liability should be placed on the party who may prevent the nonconformity at a lower cost, on the grounds that the market mechanism enables sellers to shift the cost of the nonconformity risk to the buyers (Schwartz, *supra* note 208, at 21-39). In his view, the question of whether a conforming object or a nonconforming one will be supplied, and the measure of the cost that will be shifted to buyers, depend on a comparison of the following costs: the cost of the nonconformity risk, the cost of the avoidance of that risk by the purchaser, and the cost of avoiding the risk by the promisor. As a result of the market mechanism, the transaction will be made at the lowest of the mentioned costs, and that cost will ultimately be placed on, or shifted to, the purchaser (but see *infra* note 238).

Schwartz's model is problematic from the point of view of its implementation in reality. The central obstacle which Schwartz discusses in the article relates to the information problem of the purchasers. In any case, there is no contradiction between our conclusion and Professor Schwartz's analysis. A default rule imposing the liability for conformity on the promisor is not designed to change the market's behavior but to assist it in realizing the ends to which it naturally "aspires." From the start, we have excluded those cases in which the cost of the nonconformity risk is lower than the cost of its avoidance by any of the parties. As for the comparison between the cost of preventing the nonconformity by the purchaser and the cost of its prevention by the promisor, we accept the idea that liability will be borne by the party capable of coping with it at a lower cost. We propose that the promisor is usually the one who can more cheaply bear that risk (even if this cost is ultimately shifted, in whole or in part, to the purchasers). Since default rules play an important role in reducing the transaction costs of contracting, imposing the liability on the promisor by a default rule is economically worthwhile.

235. On this principle, see generally, G. Calabresi, *The Costs of Accidents—A Legal and Economic Analysis* 39 (1970); S. Shavell, *Economic Analysis of Accident Law* ch. 8 (1987).

nonconformity be placed on the party who is able to spread it more efficiently.²³⁶ In many cases, this consideration strengthens the conclusion that the nonconformity risk should be placed on the promisor rather than on the promisee.²³⁷ A commercial promisor may easily distribute the cost of the risk among all the people who purchase the object, by raising the price.²³⁸ It could be argued that placing the risk on the promisee would (presumably) result in a decrease of the object's price. With this difference, the promisee could insure herself against the risk. However, distributing the cost of the risk by means of insurance is an expensive way compared to the price mechanism. In this regard, one should distinguish a promisee who is the last link in the chain of marketing from a promisee who uses the object as an input to the production or marketing in which she is engaged. In the latter case, the promisee can spread the risk by including its expected cost in the price of the product or service she supplies to her customers. In such a case, the weight of the present consideration is substantially diminished.

It may be argued that the availability of means to spread the risk of nonconformity derogates from the above analysis, based on the relative cost of preventing the nonconformity by each of the parties. This claim should be rejected. Each party's ability to insure her risk, or to distribute it among her clients does not render superfluous the need for a liability rule regarding the risk under discussion. The premium charged by the insurer reflects the risk the insured person bears. Therefore, a rule that allocates the risk between the parties in a way that is likely to reduce the probability of risk realization will reduce the cost of insurance, and hence the total cost of the transaction will also be reduced.²³⁹

When the promisor bears the risk, and she insures herself against it, her motivation to prevent that risk will indeed be smaller (the "moral hazard"). However, since in the long run the cost of insurance (the premium she pays) reflects the magnitude of the risk, the promisor has a perceptible incentive to reduce it, i.e., to prevent defects in the object. In contrast, the promisee's potential influence on the realization of the nonconformity risk is much smaller. If the risk is placed on her, then despite her clear interest in diminishing it in order to lower the cost

236. Compare Posner & Rosenfield, *supra* note 228, at 90-92.

237. Compare H. et L. Mazeaud & A. Tunc, *supra* note 109, § 103-8, at 126-27.

238. Though it should be noted that the seller's ability to shift the costs involved in that risk to the customers depends on the relative elasticity of supply and demand in that market. At times, when the demand for a certain product is very elastic, or when the supply curve is very inelastic (or when the two coexist), the seller would be almost unable to shift the costs to the buyers, and will have to bear them by himself.

239. See also R. Bowles, *supra* note 206, at 136.

of insurance, it would be very difficult for her to cause such diminution. At the same time, the promisor's motivation to reduce the risk will lessen, although she has the means to achieve that task.²⁴⁰ Moreover, insurance must accurately reflect the probability of the realization of risk. Promisors hold more comprehensive and precise information in this regard (because of considerations similar to those mentioned above), and it is therefore preferable that the insurance—if obtained—be obtained by them.

Thus, in many situations the introduction of risk aversion strengthens the desirability of default rules placing the responsibility for conformity on the promisor.

4. Summary

The above discussion illustrates some of the advantages and drawbacks of economic analysis. It shows that at least in market situations this analysis is very fruitful. It enables one to evaluate even the details of many rules, and to draw practical conclusions regarding many dilemmas. However, it does not give much guidance where empirical data is hard to get and where different perceptions of the reality exist. Usually, these are precisely the cases in which different legal systems diverge in their solutions, and guidance is particularly needed. Economic analysis is one-dimensional. Sometimes, its disregard for other considerations weakens the force of its conclusions.

For our purposes, the most important conclusion is that conformity default rules are indeed efficient, and are therefore justified from an economic point of view.

D. Non-Promissory Theories

1. General

Postclassical theories of contract law tend to depreciate the elements of will and promise in contracts and contract law.²⁴¹ Some scholars stress the importance of reliance and benefit (restitution) as the basic principles of contract law, thus blurring the distinction between contracts

240. See also Priest, 1981, *supra* note 205, at 1313-14.

241. The clearest example of these tendencies is probably the association of contract law and paternalism. See, e.g., Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 *Md. L. Rev.* 563 (1982); Kronman, *Paternalism and the Law of Contracts*, 92 *Yale L.J.* 763 (1983); Braucher, *Defining Unfairness: Empathy and Economic Analysis at the Federal Trade Commission*, 68 *B.U.L. Rev.* 349, 384-94 (1988). Since this study concentrates on default rules, this issue shall not be discussed.

and the involuntary liability in torts.²⁴² Others point out that the role of the law (and particularly the role of the courts) in enforcing contracts is not a neutral one, but rather involves an imposition of collective value choices. Whenever a court rules in favor of one of the parties, it "puts the sovereign power of the state at the disposal of one party to be exercised over the other party." From that perspective, the law of contract regulates the exercise of the state power in regard to "more or less voluntary transactions."²⁴³ This view blurs the basic distinction between private and public law.²⁴⁴

Modern contract law is characterized by an increasing recourse to general standards and principles, such as good faith, unconscionability and others.²⁴⁵ Along with these developments, and as part of the theoretical trends mentioned above, there is a growing willingness to introduce non-individualistic values and considerations to the law of contract. Different theories argue that the role of contract law (or at least part of it) is to implement distributive policies,²⁴⁶ fairness²⁴⁷ and even altruism.²⁴⁸ We shall briefly examine the extent to which each of these views sheds light on the present issue.

2. *Consequentialist Justifications—Redistribution of Power and Wealth*

It is claimed that a legitimate role of contract law is to advance a more equal division of wealth among members of society. This claim

242. See generally Fuller & Perdue, *The Reliance Interest in Contract Damages*, 46 *Yale L.J.* 52, 373 (1936); G. Gilmore, *The Death of Contracts* (1974); P. Atiyah, *supra* note 164.

243. Cohen, *The Basis of Contracts*, 46 *Harv. L. Rev.* 553, 586 (1933).

244. See also Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 *Yale L.J.* 997 (1985); Feinman, *supra* note 191; Gordon, *Unfreezing Legal Reality: Critical Approaches to Law*, 15 *Fla. St. U.L. Rev.* 195, 201-20 (1987); Singer, *Legal Realism Now* (Book Review), 76 *Calif. L. Rev.* 465, 482-87 (1988).

245. The principle of good faith is gaining force not only in the Civil Law systems, which recognized it long ago, but also in Common Law systems and in the international trade. See §§ 1-201(19), 1-203 and 2-103(1)(b) of the U.C.C.; § 205 of the Restatement (Second) of Contracts. See also Farnsworth, *supra* note 124; Summers, "Good Faith" in *General Contract Law and the Sales Provisions of the Uniform Commercial Code*, 54 *Va. L. Rev.* 195 (1968); Summers, *supra* note 124. As for international trade, see § 7(1) of the 1980 Vienna Convention; C. Bianca & M. Bonell, *supra* note 91, at 65-94, and the references mentioned therein. On the tendency to introduce substantive fairness concepts into the law of contract, see G. Eörsi, *Comparative Civil (Private) Law* §§ 135-138, at 250-58 (1979); Shell, *Substituting Ethical Standards for Common Law Rules in Commercial Cases: An Emerging Statutory Trend*, 82 *Nw. U.L. Rev.* 1198 (1988).

246. Kronman, *supra* note 223; Kronman, *supra* note 241, at 766-74; Kronman, *supra* note 186, at 416-23; Kennedy, *supra* note 241; H. Collins, *The Law of Contract* (1986), especially chs. 1, 2 and 9. See also *infra* Part IV.D.2.

247. See, e.g., Levin & McDowell, *supra* note 103; H. Collins, *supra* note 246; Feinman, *Contract After the Fall* (Book Review), 39 *Stan. L. Rev.* 1537 (1987). See also *infra* Part IV.D.3.

248. Kennedy, *supra* note 104. See also *infra* Part IV.D.4.

rejects both the view that it is not the role of the state to redistribute wealth, and the (more prevailing) view that contract law is not an appropriate vehicle for such redistribution.²⁴⁹ Other views emphasize the role of contract law as a means for the redistribution of power in society.²⁵⁰

Conformity rules may have distributive effects, both in terms of power and in terms of wealth. Compulsory rules of conformity change the balance of power between the contracting parties. They strengthen the position of the promisee *vis-à-vis* the promisor. Conformity *default rules* may have similar effects to the extent that formal, interpretative and substantive doctrines (such as Section 2-316 of the U.C.C., *contra proferentum* interpretation or unconscionability) create obstacles to the exclusion of liability. Even in the absence of such obstacles, in small-scale transactions the costs of contracting around the conformity obligations may be too high. Conformity default rules may also have indirect distributive effects inasmuch as there is a difference between utility measured in terms of willingness to pay for having an entitlement, and utility measured in terms of one's readiness to part with an entitlement.²⁵¹ To the extent that the asking price of an entitlement is higher than its offer price, initial allocation of the entitlement to conforming objects to promisees improves their position.

Nevertheless, the proposal to ground conformity rules on considerations of redistribution, and particularly redistribution of wealth, seems rather problematic. In comparison to other means (such as taxes and transfer payments), conformity rules (like contract rules in general) are very limited means of redistribution.²⁵² They are also very imprecise means to that end, because there is no necessary correlation between the promisor-promisee dichotomy and the rich-poor dichotomy.²⁵³ Furthermore, the wealth-distributive effects of even compulsory conformity

249. See *supra* the references in note 246. On the central shortcomings of this theory, see Kennedy, *supra* note 241, at 604-24; C. Fried, *supra* note 186, especially at 103-09; Braucher, *supra* note 241, at 381-84. It should be noted that an egalitarian view is not entirely incompatible with efficiency considerations. A central development in economic thought at the beginning of the twentieth century was the concept of diminishing marginal utility. This concept may justify the taking of steps designed to bring about a more equitable allocation of resources; to a welfare economy. See P. Atiyah, *supra* note 38, at 607-11, and the references mentioned there.

250. See Dalton, *supra* note 244; H. Collins, *supra* note 246, chs. 1, 2 and 9; Beermann, *Contract Law as a System of Values*, 67 B.U.L. Rev. 553 (1987); Feinman, *supra* note 247 (the last two are reviews of Collins's Book).

251. See generally, Kelman, *Consumption Theory, Production Theory, and Ideology in the Coase Theorem*, 52 S. Cal. L. Rev. 669, 678-95 (1979); Kennedy, *supra* note 195, at 401; F. Stephen, *supra* note 199, at 32-35.

252. See Braucher, *supra* note 241, at 384.

253. *Id.* at 383. But see Kronman, *supra* note 241, at 772.

rules depend on the specific structure of every market (the relative elasticity of supply and demand). Many times, the inability to contract around a conformity obligation results in a price raise, that shifts the additional costs to the promisees, and forces some of them out of the market.²⁵⁴ Hence, even within the sphere of contractual relations, other techniques—particularly regulation of prices—are clearly superior means for redistribution. In light of these considerations, it is hardly possible to view redistribution as the basis for conformity rules, especially when dealing with default rules and with the redistribution of wealth.

This is not to say that conformity rules are inconsistent with redistributive considerations. On the contrary, to the extent that these rules have any such effects, they will usually be desirable. Very roughly speaking, conformity obligations tend to favor the sectors that in fact deserve assistance. This rough estimation is based on the fact that many times, the promisors whose obligations are subject to the conformity concept (sellers, contractors, lessors)²⁵⁵ are wealthier than the promisees. This is particularly so in those areas where the conformity rules are compulsory (such as residential leases).²⁵⁶ Many times, the promisee in such contracts is a private consumer who earns her living as an employee. As was demonstrated earlier, in employment contracts no requirement of conformity is imposed on the employee.²⁵⁷

Historical perspective provides support for this correlation between conformity rules and the distribution of power in society. During the second half of the nineteenth century and the beginning of the twentieth century, the working class, and later the "consumer class," gradually gained social, economic, and political power. The rise of these classes challenged the concepts of liberal economy, and brought about significant changes in the legal sphere. The decline of the *caveat emptor* ideology and the development of conformity rules are but one illustration of those trends.

3. Fairness Justifications

There are different versions of the theory that contract law is at least partly designed to enhance fairness in contractual relations. Fairness is a fairly vague concept. We shall not try to define fairness, nor to

254. Kennedy, *supra* note 241, at 604-24; Braucher, *supra* note 241, at 383-84. For a general discussion on the indeterminacy of the distributive effects of product warranties, see Craswell, *Passing On the Costs of Legal Rules: Efficiency and Distribution in Buyer-Seller Relationships*, 43 *Stan. L. Rev.* 361 (1991).

255. On the applicability of the concept of conformity, see *supra* Part III.C.

256. See Kronman, *supra* note 241, at 766-74.

257. See *supra* Part III.C.3.

delineate its relations to other collective goals and social values.²⁵⁸ For our limited purpose, it will suffice to indicate two ways in which conformity obligations may be grounded on considerations of fairness.

The first way follows Atiyah's thesis of promises as mere (yet conclusive) *admissions* of obligations, obligations that are in fact based on benefits received by the promisor (restitution) or harm caused by her conduct (reliance).²⁵⁹ Reliance and benefit are alternatives to promise as the basis for the binding force of contracts. They are founded on the community's shared sense of fairness, rather than on respect to the individual's autonomy and will.

On several occasions, Atiyah uses the law of warranty to illustrate his arguments.²⁶⁰ Discussing the imposition of warranties by the courts, he mentions the parties' intentions, but emphasizes that it is only one relevant factor. Another factor is "the Court's view of what is just. If the buyer has paid a price which would be a *fair price for a sound horse* (which suggests that he believed and acted upon the statement), most modern judges would say without hesitation that it ought to be treated as a warranty."²⁶¹ This is a substantive fairness argument, intertwined with the argument of reliance. The promisee is justified in relying on the assumption that she will get a good object for her good money.

A very similar argument has already been presented. The present argument is a modern, English version of the older German and French justifications for conformity obligations, based on the equivalence of considerations in a reciprocal transaction.²⁶² The main difference between the two versions is that the German scholars attempted to connect the equivalence of considerations to the parties' will, while Atiyah links it to the promisee's reliance. Yet, the closeness between the theories in this context is obvious. This closeness reveals that in spite of their emphasis on subjective elements, the German theories also relied on objective criteria of fairness. This is particularly conspicuous in the theory shaped by

258. On fairness and other collective concerns in contract law, see generally Braucher, *supra* note 241; Johnson, *supra* note 186; Feinman, *supra* note 191; Levin & McDowell, *supra* note 103; H. Collins, *supra* note 246; Feinman, *supra* note 247; Beermann, *supra* note 250; P. Atiyah, *supra* note 109, at 300-31.

259. P. Atiyah, *supra* note 164; Atiyah, *Contracts, Promises and the Law of Obligations*, 94 L.Q.R. 193 (1978); Atiyah, *supra* note 186. See also Raz, *Promises in Morality and Law* (Book Review), 95 Harv. L. Rev. 916 (1982) (book review of Atiyah's *Promises, Morals, and Law*); Fried, *Book Review*, 93 Harv. L. Rev. 1858 (1980) (reviewing P. Atiyah, *The Rise and Fall of Freedom of Contract* (1979)).

260. For example, in his critique of promise as the basis of contractual obligations (P. Atiyah, *supra* note 164, at 148), Atiyah stresses that the "implied warranty" of merchantability can neither be attributed to the promisor's subjective intention, nor to an objective construction of his words or behavior.

261. P. Atiyah, *supra* note 164, at 171 (emphasis added).

262. See *supra* Part IV.A.3, and the references therein.

Krückmann and Süss, a theory that expressly refers to the principle of good faith.²⁶³

Another method of grounding conformity rules on fairness involves the considerations discussed in relation to the economic analysis.²⁶⁴ Like other efficiency considerations in various contexts, these considerations may equally serve as fairness arguments.²⁶⁵ The factors that tend to make the promisor a "superior risk bearer" (her greater knowledge of the object's characteristics, her greater ability to monitor the production of the object or its procurement from third party, her control of the object prior to its delivery, her greater capability of spreading the risk of non-conformity, etc.), are equally relevant to fairness analysis. In light of all these factors, and regardless of any consequentialist viewpoint, it is only fair that the promisor, rather than the promisee, be responsible for the nonconformity. Usually, she is the one who could more easily prevent the nonconformity, hence she is the one to blame. Just as one weighs the relative fault of the parties in tort law, so does one here. Fairness considerations similarly apply to more specific aspects of conformity rules. For example, it would be unfair to hold the promisor liable for defects of which the promisee knew at the time of contracting, or for the object's conformity to a specific purpose, unknown to the promisor.

Thus, conformity rules are compatible with criteria of fairness. They are fair both because they support fair equivalence of considerations in reciprocal contracts, and because the moral responsibility of the promisor in instances of nonconformity is usually greater than that of the promisee.

4. *Altruistic Justification*

Perhaps the simplest way to explain the introduction of conformity rules is on the basis of altruism. A seller acting under the imperative of "Love thy neighbor as thyself" is required to supply a property suitable for its ordinary uses, of at least a medium quality, and so on. Since the promisor is usually in a better position to assure the conformity of the object,²⁶⁶ she must assure it in order to protect the interests of the promisee. Since everyone who acts as a promisor in one transaction is the promisee in other transactions, it should not be difficult for her to put herself in the promisee's place. Since as a promisee she (like everybody else) would have disliked and resented the idea of being provided with a nonconforming object, she must recognize that it is morally wrong to

263. See T. Süss, *supra* note 18, at 127-34, and *supra* Part IV.A.3.

264. See *supra* Part IV.C.

265. For a general discussion on the relations between consequentialist and moral analyses, see Barnett, *Forward: Of Chickens and Eggs—The Compatibility of Moral Rights and Consequentialist Analyses*, 12 *Harv. J.L. & Pub. Pol'y* 611 (1989).

266. See the explanation in *supra* Part IV.C.3.

do that to others. This recognition is based not only on a long-term egotism (the belief that her consideration for the counter-party's interests will enhance a similar consideration for her own interests in future instances), but also on a true comprehension of the moral virtue of such altruism.²⁶⁷

Some support for the hypothesis of altruism as the basis for conformity obligations may be found in the history of the conflict between conformity and *caveat emptor* in the Anglo-American law. The doctrine of *caveat emptor*, the antithesis of conformity, emerged alongside the rise of individualism and the decline of moral and religious altruism, since the seventeenth century.²⁶⁸ Contrarily, since the middle of the nineteenth century, conformity rules evolved and expanded along with the decline of individualism and the rise of more communitarian and collective views in social, political and legal thinking.²⁶⁹ These processes may indicate that moral ideas of mutual consideration and altruism are an appropriate background for the implication of conformity obligations, while individualistic views are more compatible with an ideology of *caveat emptor*.²⁷⁰

Fitting the rules of conformity into the altruist mold is not free of difficulties. Basically, conformity obligations are default rules that can be contractually waived by the parties. Only under certain circumstances does the law impose them as compulsory duties. Whereas it is not so difficult to explain compulsory regulation of contractual relations (the contracting process, the performance, and even the content of contractual obligations) on the basis of altruism, it is harder to so justify default rules. The possibility to contract around these rules indicates the importance of the parties' will in this regard.

Indeed, even in the sphere of conformity obligations, and surely in other aspects, modern contract law is quite far away from adopting a truly altruistic approach. But this does not prevent one from recognizing

267. On altruism, see T. Nagel, *The Possibility of Altruism* 79 (1970). On altruism in private law, see Kennedy, *supra* note 104. See also Dowd, *Critical Legal Studies: Beyond Skeptical Jurisprudence*, 11 *J. Contemp. L.* 345, 353-58 (1984); Feinman, *supra* note 191.

268. See *supra* note 38.

269. See P. Atiyah, *supra* note 38, at 571-778, and especially at 771-78. During the past few years, there have been signs of return to more individualistic attitudes in the political, economic and legal thinking, at least in some countries (such as the United States and England). The emergence of the economic analysis of law is but one manifestation of this trend (see P. Atiyah, *supra* note 109, at 30-39). However, it is too early to evaluate the long-run significance of those changes.

270. In light of the correlation between individualism and *caveat emptor*, it is not surprising to find that scholars in the law and economics school seem to be rather hostile toward conformity obligations, even when imposed as contractual default rules: see *supra* notes 232-234. This tendency is striking because such rules are perfectly compatible with efficiency analysis. See *supra* Part IV.C.

the altruistic characteristics of conformity rules. There is an unmistakable correlation between an inclination towards altruism along the individualism-altruism continuum, and a tendency towards a broad concept of conformity, along the *caveat emptor*-conformity continuum.

E. Conclusion

The conclusion is reached that conformity rules are justified in light of all the pertinent considerations and are compatible with all the relevant theories about contract law. Rules based on the general concept of conformity are compatible with the parties' presumed will, they realize the reasonable expectations of the parties, and they enhance both efficiency and fairness. Not all theories may equally be regarded as a basis for the introduction of conformity default rules. Yet, even those theories that do not significantly support the principle of conformity (such as the goal of redistribution, or the theory relying on the promisee's ignorance),²⁷¹ definitely do not support the opposite view of *caveat emptor*.

This unanimity is significant for two reasons. First, it emphasizes the soundness of the principle of conformity in the performance of contracts.²⁷² Second, it illustrates the interrelations between the different theories. Theories that are very different in their points of departure refer to like factors and lead to very similar conclusions when implemented on specific issues. Thus, in supplementing the parties' will, even individualistic theories refer to external, objective criteria of good faith.²⁷³ Likewise, fairness and efficiency are sometimes different labels for exactly the same considerations.²⁷⁴ The above discussion reveals the merits and limits of the various theories in analyzing the issue of conformity, the broader subject of contractual default rules, and to some extent even contract law in general.

V. CONCLUSION

This study employed several methodologies in reexamining the ancient, yet ever recurring problem of nonconformities in the performance of contracts. The study examined how different legal systems deal with various instances of nonconformity, and observed the historical developments of the relevant legal concepts. The comparative survey illustrated the imperative need for reforms in most legal systems. The great complexity and disharmony of existing rules, which lead to confusion in the administration of the rules and to discrimination between substantively similar

271. See *supra* Parts IV.D.2 and IV.A.2.

272. See Barnett, *supra* note 265, at 615-17.

273. We refer to the theory shaped by Krückmann and Süß, on the basis of Windscheid's "Voraussetzung." See T. Süß, *supra* note 18, at 127-34 and *supra* Part IV.A.3.

274. See *supra* Parts IV.C and IV.D.3.

situations, call for such reforms in both Common Law and Civil Law systems. It was suggested that such reforms should be founded on a unified analytical framework, on a general concept of conformity in the performance of contracts. This study characterized this concept as a common aspect of the performance of numerous obligations, and delineated the obligations to which it should apply. The study then described the role of the rules to be formulated within the suggested framework, and depicted the task of the legislature in providing a satisfactory set of conformity rules. Following this analytical discussion, the third part of the study examined the justification for introducing default rules of conformity. This examination was based on the various theories about contract law, and about the role of contractual default rules in particular. The theoretical analysis showed that conformity default rules are unequivocally justified.

The background to this study is the apparent discontent with the existing concepts, rules and doctrines associated with the quality, quantity, description, title, safety and similar aspects of objects provided under such contracts as sales, leases and services. This study tried to point the way towards a better arrangement of this subject, and it is hoped that legislatures will accept the challenge.