The Informal Variations of Contracts in Brazilian Law and in Canadian Common Law. The Judicial Wand of Conscience and its Shadowy Magic

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La modification informelle des contrats en droit brésilien et en common law canadienne. La baguette magique de la conscience et sa magie entre ombre et lumière

La modificación informal de los contratos en derecho brasileño y en el *common law* canadiense : La varita mágica de la conciencia y su magia entre sombra y luz

A modificação informal dos contratos em direito brasileiro e na *common law* canadense : a varinha magica da consciência e sua magica entra a sobra e a luz

巴西法与加拿大普通法中的合同非正式变更：良心的司法魔杖及其玄虚的魔法

Résumé

Quelle est la valeur juridique de la modification tacite ou informelle d'une obligation contractuelle dans un pays romaniste comme le Brésil, ou dans des pays de common law comme l'Angleterre ou les provinces canadiennes de common law ? En dépit d'exigences formelles spécifiques déterminant le caractère liant

Abstract

What is the weight of tacit or informal contractual modifications in a civil law system such as Brazil, and in a common law system such as England or Canadian provinces of common law? Despite specific requirements in terms of enforceability, such as the notion of consideration rooted at the heart of the

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de telles modifications, telle la notion de *consideration* traditionnellement placée au cœur de la common law des contrats, les conventions brésiliennes ou canadiennes peuvent parfois être modifiées de manière informelle grâce à des instruments comme le *promissory estoppel* ou le *venire contra factum proprium*, ou d'autres, proches, comme le *waiver* ou la *supressio*. Ces institutions peuvent se recouper partiellement, leurs conditions d'existence être floues et le résultat de leur application, incertain. Mais dans tous les cas, la présente contribution tend à démontrer que quel que soit le remède utilisé, le cœur de cette métamorphose contractuelle est une espèce de baguette magique judiciaire guidée par la notion de conscience, plus spécifiquement appelée bonne foi au Brésil, et *equity* en common law. En premier lieu, prenant la mesure de la scène formelle, nous comparerons le seuil d'habilitation des engagements contractuels en droit brésilien et canadien. Ensuite, nous comparerons le type de baguette magique à la disposition des cours brésiliennes et canadiennes soucieuses de décider en conscience, et examinerons les frontières entre des institutions telles que le *promissory estoppel* et le *waiver*, ou encore la *supressio* et le *venire contra factum proprium*. Enfin, dans une troisième et dernière partie, nous tenterons de déterminer la mesure juridique de la métamorphose potentielle des obligations contractuelles du point de vue du créancier et du débiteur. Tout au long de cette étude, parce que la common law canadienne est à cet égard organiquement liée à la common law anglaise, nous nous référerons à celle-ci de façon systématique.

common law of contracts, Brazilian and Canadian contracts may sometimes be varied in an informal fashion through remedies such as promissory estoppel or *venire contra factum proprium*, or closely related ones such as waiver or *supressio*. These remedies may overlap, their requirements be fuzzy and the result of their operation sometimes be uncertain. In any case, this paper will demonstrate that whatever the remedy used, the medium of such contractual metamorphosis can be traced to a sort of judicial magic wand attuned to the notion of conscience, specifically called good faith in Brazil, and equity in common law. First, setting the formal stage, we will contrast the threshold of enforceability in Brazilian and Canadian law. Then, we shall compare the magic wand available to Brazilian and Canadian courts wishing to judge in conscience, and ponder the demarcation between promissory estoppel and waiver, as well as between *supressio* and *venire contra factum proprium*. Finally, in a third part, we will consider the legal extent of the potential metamorphosis of contracts from the point of view of the creditor and the debtor. All along, because the Canadian common law on the subject is so indebted to its English counterpart, we shall refer to the latter as well.

Resumen

¿Cuál es el valor jurídico de la modificación tácita o informal de una obligación contractual en un país de sistema romano como Brasil, o en los países del *common law*, como Canadá o Inglaterra? A pesar de las exigencias formales que determinan el carácter vinculante de tales cambios, como la noción de consideración tradicionalmente situada en el corazón de la *common law* de contratos, las convenciones brasileñas y canadienses pueden ser cambiadas a veces de manera informal gracias a instrumentos como el "impedimento promisorio" (*promissory estoppel)* o la doctrina de los actos propios (*venire contra factum proprium)* u otros cercanos, como la "renuncia" (*waiver)*, o la "supresión" (*supressio)*. Estas instituciones pueden superponerse parcialmente, sus condiciones de existencia ser confusas y el resultado de su aplicación, incierto. Pero en todo caso, la presente contribución intenta demostrar que cualquiera que sea el remedio utilizado, el corazón de esta metamorfosis contractual es una especie de varita mágica judicial guiada por la noción de conciencia, llamada específicamente buena fe en el Brasil y *equity* en *common law*. En primer lugar, tomando la medida de la escena formal, compararemos el umbral de aplicabilidad de los compromisos contractuales en el derecho brasileño y canadiense. En seguida compararemos el tipo de varita mágica a disposición de los tribunales brasileños y canadienses encargados de decidir en conciencia, y examinaremos los límites entre instituciones tales como el "impedimento promisorio" (*promissory estoppel)* y la "renuncia" (*waiver)*, o aún la "supresión" (*supressio)* y la doctrina de

Resumo

Qual é o valor jurídico da modificação tácita ou informal de uma obrigação contratual em um pais romanista como o Brasil, ou em países de *common law* como o Canadá ou a Inglaterra? Apesar das exigências formais especificas que determinam o caráter vinculante de tais modificações, como a noção de *consideração* tradicionalmente colocada no âmago do *common law* dos contratos, as convecções brasileiras ou canadenses podem ser modificadas às vezes de maneira informal, graças a instrumentos como a *promissory estoppel* ou o *venire contra factum proprium*, ou ainda outros como *waiver* ou a *supressio*. Estes institutos podem se recobrir parcialmente, suas condições de existência podem ser fluidas e o resultado de sua aplicação, incerto. Mas em todos os casos, a presente contribuição tende a demonstrar que qualquer que seja o remédio utilizado, o âmago desta metáfora contratual é uma espécie de varinha magica jurídica guiada pela noção de consciência, mais especificamente chamada de boa-fé no Brasil, e *equity* em *common law*. Em primeiro lugar, tomando por medida o cenário formal, nós compararemos o limiar da habilitação das obrigações contratuais em direito brasileiro e canadense. Em seguida, nós compararemos o tipo de varinha mágica à disposição das cortes brasileiras e canadenses ciosas de decidir conscientemente, e examinamos as fronteias entre institutos tais como o *promissory estoppel* e o *waiver*, ou ainda a *supressio* e o *venire contra factum proprium*. Por fim, em uma terceira e última parte, nos tentaremos determinar a medida jurídica da metamorfose potencial das obrigações contratuais do ponto

los actos propios (*venire contra factum proprium)*. Finalmente, en una tercera y última parte, intentaremos determinar la medida jurídica de la metamorfosis potencial de las obligaciones contractuales, desde el punto de vista del acreedor y del deudor. Durante este estudio, teniendo en cuenta que el *common law* canadiense está en este sentido vinculado orgánicamente al *common law* inglés, nos referiremos a él de manera sistemática.

de vista do credor e do devedor. Ao longo deste estudo, porque a *common law* canadense é neste sentido ligada à *common law* inglesa, nós nos referiremos a esta de maneira sistemática.

摘要

大陆法系如巴西与普通法系如加拿大或英国法律体系中，默示或非正式合同变更的法律价值是什么？尽管对合同的可执行性有具体的规定，如居于普通法合同核心地位的对价概念，巴西和加拿大的合同有时可以通过非正式方式变更，利用救济手段如“允诺禁反言规则”或称“行为不能自我抵触原则”，或是与之密切相关的方式如“弃权”或supressio。这些救济手段可能相互重叠，其条件也很模糊，在使用过程中有时具有不确定性。本文将论证无论采用哪种救济，该等合同变更的方式均可归结为一根与良心概念有关的司法魔杖，这一良心概念在巴西被称为“善意”，在普通法中被称为“衡平”。首先，我们将对比巴西和加拿大法律中合同可执行性的门槛。然后，我们将比较试图用良心作为评判依据的巴西和加拿大法院可以使用的魔杖，衡量“允诺禁反言规则”与“弃权”以及supressio与“行为不能自我抵触原则”之间的界限。最后，在第三部分中，我们将从债权人和债务人的视角考察合同变更的法律范围。综上，由于在这个问题上加拿大普通法尤其受惠于英国普通法，我们主要考察英国的相关规定。

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What is the weight of tacit or informal contractual modifications in a civil law system such as Brazil, and in a common law system such as Canada or England? As an illustration, a few years before the second world war, a company leased buildings to another in London for a rent specified in a deed. But when the war came, everybody fled the city and the defendant company, *High Trees*, had difficulty finding subtenants to occupy the buildings. The plaintiff company agreed to accept half the rent only while this exceptional situation lasted, but nothing was given in exchange for this specific promise. After the war, *High Trees* was sued in order to reimburse the rent in arrears. The action succeeded in relation to the full rent due since the end of the war. But regarding the half-rent unpaid during the war, the English Court of Appeal declared that the plaintiff would not be allowed to go back on its promise to accept half the amount of it. Despite the fact that the said diminution had not been properly bargained for, an "equitable principle", later coined as promissory estoppel, prevented this *volte-face*[1]. Conversely, in Brazil, the *Tribunal de Justiça* of Rio de Janeiro found that the factual acceptance, by a *locador*[2], of a rent inferior to the one specified in the *locação* agreement during a certain amount of time implied a suppression (*supressio*) of the *locador*'s right to the full original amount, not only for the past, but also for the future. The reason given was that the creditor's omission led to the birth of a new right, not originally declared in the contract[3].

Despite specific requirements in terms of enforceability, such as the notion of consideration rooted at the heart of the common law of contracts, Brazilian and Canadian contracts may sometimes be varied in an informal fashion through remedies such as promissory estoppel or *supressio*, or closely related ones such as waiver or *venire contra factum*

1 *Central London Property Trust Ltd.* v. *High Trees House Ltd.*, [1947] 1 K.B. 130 (C.A.) [afterwards referred to as "*High Trees*"]. This declaration was made in *obiter*, because the plaintiff company had not actually claimed the half rent unpaid during the war.

2 The contract of *locação*, concluded in Brazil between a *locador* and a *locatário*, is similar in practice to the common law lease, but entails only a personal right for the *locatário*, where the lessee enjoys a real right. The *locação* is thus similar to the French or Quebec *bail*: Anne-Françoise Debruche, "Les biens", in Aline Grenon et Louise Bélanger-Hardy (dir.), *Éléments de common law canadienne : Comparaison avec le droit civil québécois*, Toronto, Thomson-Carswell, 2008, p. 101, at pages 117 to 119.

3 TJRJ, AC 2009.001.17714, Relator Ronaldo Álvaro Martins, decided on 04.09.2009. It is worth mentioning that the time here was inferior to the required extinctive prescription time.

proprium. These remedies may overlap, their requirements be fuzzy and the result of their operation sometimes be uncertain. In any case, this paper will demonstrate that whatever the remedy used, the medium of such contractual metamorphosis can be traced to a sort of judicial magic wand attuned to the notion of conscience, specifically called good faith in Brazil, and equity in Canadian common law. Our comparative argument is that the transformation of a contract is in a way similar to a magic trick operated by the judiciary, where a contract concluded in the proper form enters a box on the stage, is subjected to the charm of the wand, and exits the box transformed into something else.

Accordingly, we shall proceed in three steps. First, we will show that in both systems, a brief perusal of the classic theoretical frame commanding the law of contracts, based on the freedom to contract (in common law parlance) or the autonomy of the will (in civil law terms), does not quite pave the way for such informal mutations. Setting the formal stage, we will contrast the threshold of enforceability in Brazilian and Canadian contract law (I)[4]. Then, in a second part, we shall compare the magic wand available to Brazilian and Canadian courts wishing to judge in conscience, and ponder the demarcation between Canadian promissory estoppel and waiver, as well as between Brazilian *supressio* and *venire contra factum proprium* (II). Finally, in a third part, we will consider the legal extent of the potential metamorphosis of contracts from the point of view of the creditor and the debtor (III). All along, because the Canadian common law on the subject is so indebted to its English counterpart, we shall refer to the latter as well.

I. Setting the Formal Stage

To make the change enforceable, how should a contract be varied according to "strict" legal principles in Brazil and Canada? Admittedly, the Anglo-Canadian common law requires a more stringent test than civil law systems such as Brazil, France or Quebec to endow a contractual promise with legal force. The name of this treacherous stepping stone is considera-

[4] Undeniably, it would have been quite interesting to also ponder the other formal requirements associated to the variation of contracts, especially in connection with writing and evidence. But given the comparative scope of this paper and the length it already entails, we chose to concentrate on the most interesting aspect of formalism, namely the threshold of enforceability.

tion, "something of value in the eye of the law"[5], expressing the element of exchange in the contractual bargain[6] (A). Nonetheless, the apparent flexibility (or receptivity to the parties's actual intent) of Brazilian civil law, flowing form the principle of consensualism, does not necessarily make contractual modifications as easy as could be expected (B).

A. A slippery and narrow stepping stone : Consideration in the Anglo-Canadian common law

To approach the notion of consideration, often considered baffling by common law students and civil law jurists alike, it is necessary first to understand how it relates to the general theory of contract (1). Then, we shall be able to ponder what is deemed a "good", or valid consideration (2).

1. Consideration and reliance : two distinct views as to the nature of contract

As stated above, the notion of consideration is considered to be the "exchange" element in the contractual equation, contract itself needing to qualify as a "bargain" to be enforceable according to a classic theory. This underlying contractual philosophy, still influential today, echoes nineteenth century *laissez-faire* values and thus promotes, among others, commercial certainty and the freedom to contract. The other element of the so-called bargain is agreement, roughly expressed in the meeting of valid offer and acceptance. But the dominant "bargain" trend in the common law of contracts has had to share the stage, increasingly, with another conflicting pervasive influence born out of the spirit of equity and fairness. This rival contractual theory promotes a reliance-based approach to contractual liability. It means, in short, that such liability should be found when the beneficiary of a promise (or *promisee*) has relied on it in such a way that it would now be unconscionable for the promising party (or *promisor*) not to be held accountable for it.

Over time, contract law has shown a tendency to sway slowly back and forth from these two distinct grounds of liability (or thresholds of enfor-

[5] *Thomas* v. *Thomas*, (1842) 2 Q.B. 851, 859 ; *Hill* v. *Haynes*, [2008] 2 All E.R. 901, 922.

[6] Gerald H.L. Fridman, *The Law of Contract in Canada*, 5th ed., Toronto, Carswell, 2006, p. 82.

ceability), like a pendulum moving gradually away from a position becoming too extreme towards its opposite. But balance is to be found in a reasonable blend of the two:

> "We now seem to be at a stage where an undue emphasis on certainty and predictability has given way to greater flexibility. But the tendency toward greater flexibility must always itself be disciplined by the need for preserving those values that tend to uphold contracts."[7]

As the exchange element of the bargain, consideration viewed as a filter of enforceability appears as the epicenter of the debate bearing on the limits and merits of the two visions of contract. In other words, the discussion as to the definition of what represents a proper consideration is almost inevitably rooted in a much larger one, and implies a choice in terms of which element (bargain and consideration, or equity/unconscionability and reliance) is vital to a binding promise. Thus, in the context of promissory estoppel and within the confines of the present paper, the predominant element in our formal stage (consideration) must always be thought as part of a much bigger theater (the two rival theories of contract). Following this analogy, it is easy to understand why an equitable institution such as promissory estoppel, itself crafted, as we shall see, in a hazy fashion not to clash with the consideration requirement, must also be perceived and understood as part of this larger contractual theater.

2. What is "good consideration"?

About the notion of consideration, much has been written. Given the scope of our paper, we do not pretend to make a full account of such debates, and our discussion of what can possibly be a "good consideration" will be limited to our specific comparative purpose: understanding promissory estoppel and waiver as judicial tools receptive to the requirements of equity and conscience. Since consideration is the formal filter against which these equitable remedies are set, they were devised in a reflexive fashion both to conteract this filter and coexist with it to some extent[8].

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7 Stephen M. Waddams, *The Law of Contracts*, 6th ed., Toronto, Canada Law Book, 2010, p. 94.

8 Which explains why both are often studied side by side: for example G.H.L. Fridman, *supra*, note 6, p. 81 to 136 or Laurence Koffman and Elizabeth Macdonald, *The Law of Contract*, 7th ed., Oxford, Oxford University Press, 2010, p. 95 to 130.

This being said, what is a valid consideration according to the common law of contracts ? Defining it as something of value in the eye of the law only serves to emphasize its flexible, rather discretionary character. In a more comprehensive fashion, it has also been said that "[a] valuable consideration in the sense of the law, may consist either in some right, interest, profit or benefit accruing to the one party, or some forbearance, detriment, loss, or responsability, given, suffered, or undertaken by the other"[9]. As a principle, courts are not to check the adequacy of consideration : the fact that the value given in return of the promise does not represent a fair exchange will not render invalid a good consideration[10].

Accordingly, a deposit or price paid in exchange of the promise would be viewed as good consideration. A promise to pay one of these could be as well, as long as the content of the promise is not frivolous or empty, in the sense of having no value for the promisor and entailing no detriment for the promisee[11]. But judges could also find an implied promise to undertake something on the part of the promisee, such as the promise by a retailer to promote the products of a certain supplier, which would be considered a valid consideration[12]. Other types of good consideration include the promise not to sue or exercise some legal right (forbearance) and, in the same line of thought, desisting (or promising to do so) from a legal suit in exchange of a promise to pay a certain amount of money. The whole operation is then called a compromise, or settlement of a claim[13]. Finally, the detriment suffered by the promisee in exchange of a promise can also be considered a valid consideration for it[14].

The notions of bargain and exchange, the latter understood in a practical and/or material fashion, shine through all these species of valid

9 *Currie* v. *Misa*, (1875) L.R. 10 Ex. 153 (Ex. Ch.) ; *Fleming* v. *Bank of New Zealand*, [1990] A.C. 577 (P.C.) ; S.M. Waddams, *supra*, note 7, p. 85, note 303.

10 *Calmusky* v. *Karaloff*, [1947] 1 D.L.R. 734 (C.S.C.). But the inequality of exchange may be taken into account at another level (such as unconscionability) : S.M. Waddams, *supra*, note 7, p. 88. See also : Angela Swan and Jakub Adamski, *Canadian Contract Law*, Markham, LexisNexis, 2012, p. 52. A. Swan and J. Adamski, *supra*, note 10, p. 64 to 72.

11 A. Swan and J. Adamski, *supra*, note 10, p. 64 to 72.

12 S.M. Waddams, *supra*, note 7, p. 89.

13 G.H.L. Fridman, *supra*, note 6, p. 94 to 97.

14 See for example: *Carlill* c. *Carbolic Smoke Ball Co.*, [1892] 2 Q.B. 484, [1893] 1 Q.B. 256 (C.A.), studied in A.W. Brian Simpson, *Leading Cases in the Common Law*, Oxford, Clarendon Press, 1995, p. 259 to 291.

consideration. The same notions also explain, by themselves or in connection with additional specific reasons, the exclusion of other elements as good consideration. What could a donee give in exchange of a promise to donate something ? By nature, what civil law systems call the "liberal intention" of the donor exists independantly of any bargain, and does not call for any reciprocity on the part of the donee. Therefore, the classic common law attitude towards gifts is that they are not contractual in nature due to the absence of a valid consideration[15], and can only be effected through a deed.

The logic underlying the concept of bargain also explains why a pre-existing duty (whether legal or contractual in origin) towards the promisor used not to be considered good consideration in exchange of a promise[16]. A classic example would be when a supplier of goods is promised more than the original price to deliver them at the agreed date (and not later)[17]. The buyer of goods has obtained something of interest : delivery on time is better than having to sue for damages later. But courts seemed to fear that if a pre-existing duty towards the promisor came to be accepted as valid consideration, this would encourage extorsion and undue pressure by the promisee to obtain more in exchange of something he is already bound to do. Today, combined with another filter to deter undue oppression (unconscionability, that shall be mentioned in connection with promissory estoppel, or duress), some cases suggest that the answer would now be different if the promisee actually performed the pre-existing duty, as opposed to simply promising to do so[18].

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15 This has a very practical impact on charitable subscriptions, as shown in a famous case of 1934 : *Dalhousie College* v. *Boutilier*, [1934] S.C.R. 642. In a civil law system such as Quebec, donations are contracts : *Re Ross, Hutchison* v. *Royal Institution for the Advancement of Learning*, [1933] S.C.R. 57. See in general : G.H.L. Fridman, *supra*, note 6, p. 88 to 90.

16 *Stilk* v. *Myrick*, (1809) 170 E.R. 1168.

17 *Gilbert Steel Ltd.* v. *University Construction Ltd.*, (1973) 36 D.L.R. (3d) 496 (Ont. H.C.J.), followed in *Western Surety Co.* v. *Hancon Holdings Ltd.*, [2007] B.C.J. N° 250 (B.C.S.C.).

18 *Pao On* v. *Lau Yiu Long*, [1980] A.C. 614 (J.C.) ; *Williams* v. *Roffey Brothers and Nicholls (Contractors) Ltd.*, [1991] Q.B. 1 (C.A.) ; *Greater Fredericton Airport Authority Inc.* v. *NAV Canada*, (2008) 290 D.L.R. (4th) 405 (N.B.C.A.) ; A. Swan and J. Adamski, *supra*, note 10, p. 61 and 62 and 82 to 98 ; Neil Andrews, *Contract Law*, Cambridge, Cambridge University Press, 2011, p. 142 to 146. And for the opinion that promissory estoppel should have been used instead of distorting the notion of consideration, see : Dan Halyk, "Consideration, Practical Benefits and Promissory Estoppel : Enforcement

Closely connected with finding consideration in a pre-existing duty is the situation where the promisor, being owned a sum of money by the promisee, agrees to accept a lesser sum in payment of the debt. "A bird in the hand is worth two in the bush", as authors are fond to say[19]. But here, the fear of undue pressure exerted on the creditor by the debtor has led the courts to reject part payment as good consideration for the promise to accept less than the sum due[20]. In Ontario and some other jurisdictions, this rule has been modified by statute[21], although the precise effect of such legislative amendments is not always clear[22].

B. A tricky veil to pass through : Consensualism in Brazilian civil law

As opposed to the general theory of contract implied by the twin notions of bargain and consideration, the Brazilian civil law of contracts follows the principle of consensualism bequeathed by medieval canon law to most European law systems (England excluded). Echoing the concerns of canon lawyers with the paramount importance of the word given, consensualism means that a contract is formed and recognized (or "habilitated") by the legal system as soon as the consents of the parties meet. Additional formal or substantial requirements may be set up by specific statutory provisions or the parties themselves in particular cases, but the general rule is that a contract exists in the eyes of the law at the moment

of Contract Modification Promises in Light of Williams v. Roffey Brothers", (1991) 55 *Sask. L.R.* 393.

19 Mindy Chen-Wishart, "A Bird in the Hand : Consideration and Contract Modifications", in Andrew Burrows and Edwin Peel (ed.), *Contract Formation and Parties*, Oxford, Oxford University Press, 2010, p. 89.

20 The leading authority is *Foakes* v. *Beer*, (1884) 9 A.C. 605 (H.L.), following *Pinnel's Case*, (1602) 77 E.R. 237 (Comm. Pleas), reiterated in *Collier* v. *P & M J Wright (Holdings) Ltd.*, [2008] W.L.R. 643 (C.A.). See for instance : Richard Austen-Baker, "A Strange Sort of Survival for *Pinnel's Case* : *Collier* v. *P & M J Wright (Holdings) Limited*", (2008) 71 M.L.R. 641.

21 *Mercantile Law Amendment Act*, R.S.O. 1990, c. M.10, s. 16 ; *Mercantile Law Amendment Act*, R.S.M. 1987, c. M120, s. 6 ; *Judicature Act*, R.S.A. 2000, c. J-2, s. 13(1) ; *Judicature Act*, R.S.Y. 2002, c. 128, s. 25 ; *Judicature Act*, R.S.N.W.T. 1988, c. J-1, s. 40 ; *Law and Equity Act*, R.S.B.C. 1996, c. 253, s. 43 ; *Queen's Bench Act*, S.S. 1998, c. Q-1.01, s. 64.

22 See the discussion in S.M. Waddams, *supra*, note 7, p. 103 et 104.

the parties agree on its main features[23]. But if Brazilian judges are encouraged to give effect to the parties's true intent, how can variations of contract be a problem in such a civil law system?

The answer to the apparent cunundrum is that to operate a proper contractual variation, there must be an intent, or will to do so, on the part of the creditor of the obligation concerned. This intent may be tacit, in the sense of being expressed by conduct instead of words, but it must exist and can not be presumed. Accordingly, the implicit nature of a an intent to vary a contract also means that such an alleged intent will be interpreted restrictively[24]. The emphasis placed in civil law traditions on volition as a key contractual concept implies that to modify a given obligation, the creditor must somehow intend to do so, be it expressly or tacitly. The "shiny" side of the paramount importance given to the parties' actual intent is undoubtedly consensualism as described above, but a "darker one" would lie in the fact that to operate a contractual variation, the actual will of the creditor is necessary. As a consequence, in situations where the creditor behaves outwardly in a way that induces the debtor to believe he agrees to a contractual modification, while intending all along to stick to the letter of the contract, the traditional "voluntarist" approach to contracts means that no variation can legally take place. This is where, in Brazil and other countries like Germany, the notion of objective good faith comes in to rescue debtors who relied on the spoken words or, more often, contradictory behavior of their creditors[25].

The 2002 Brazilian Civil Code incorporates a broad notion of good faith inspired by the German model. Although the article 422 only imposes a duty to act in good faith at the conclusion and in the execution of the contract, this duty is also deemed to apply to pre- and post-contractual periods[26]. This good faith is called "objective" because it does not seek to delve into the state of mind of any contracting party: this would be a

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23 For the principle and the canon law inheritance, see for example: Caio Mário da Silva Pereira, *Instituições de direito civil*, 16th ed., vol. III, Rio de Janeiro, Gen. Forense, 2012, p. 15 to 17. Of course, this also implies that the quality of consent will be duly scrutinized through the theory of defects of consent.

24 Anderson Schreiber, *A proibição de comportamento contraditório. Tutela da confiança e venire contra factum proprium*, 2nd ed., Rio de Janeiro, Renovar, 2007, p. 172 and 173.

25 Marcelo Dickstein, *A boa-fé objetiva na modificação tácita da relação jurídica: surrectio and suppressio*, Rio de Janeiro, Lumen Juris, 2010, p. 181.

26 Paulo Luiz Netto Lôbo, *Teoria geral das obrigações*, São Paulo, Saraiva, 2005, p. 83 to 88.

"subjective" brand of good faith. Instead, it focuses on their outer behavior and contrasts it with a certain pattern of conduct induced from the circumstances of the case, the type of contract and the relationship existing between the parties[27]. More generally, and beyond the realm of contracts, good faith is also required in the exercise of any right (art. 187)[28] and used to guide the interpretation of juridical transactions (*negócios jurídicos*), a legal category encompassing licit willful juridical facts producing legal effects that were specifically intended and engineered by the party or parties involved (art. 113)[29]. Accordingly, the three roles or functions of objective good faith have been connected to these three sections of the Civil Code. The first function of good faith relates to interpretation and flows from art. 113: it implies that objective good faith must help in the interpretation of contracts. In its second function, good faith completes the obligations springing from the contract by adding implied legal duties to them if necessary; this role is tied to art. 422. Finally, the limitative function of good faith entails a possible restriction to the enjoyment of contractual rights or legal positions (art. 187)[30]. As we shall see, *venire contra factum proprium* and *supressio* are connected to this third function of objective good faith.

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27 Teresa Negreiros, "O princípio da boa-fé contratual", in Maria Celina Bodin de Moraes (ed.), *Princípios do direito civil contemporâneo*, Rio de Janeiro, Renovar, 2006, p. 221, at pages 224 to 227; C.M. da Silva Pereira, *supra*, note 23, p. 18.

28 Art. 187 reads as follow: "The holder of a right also commits an illicit act if, in exercising it, he manifestly exceeds the limits imposed by its economic or social purpose, by good faith or by good conduct" (as translated by Leslie Rose, *O Código Civil brasileiro em Inglês – The Brazilian Civil Code in English*, Rio de Janeiro, Renovar, 2008, p. 47). It certainly recalls art. 6 of the 1994 Québec Civil Code ("Every person is bound to exercise his civil rights in good faith").

29 Art. 113 states that "[j]uridical transactions shall be interpreted in conformity with good faith and the practice of the place in which they are made" (as translated by L. Rose, *supra*, note 28, p. 34). So-called "juridical transactions" (*negócios jurídicos*) are defined as the (f)acts of men connected to the existence of a right, that can lead to the creation of a new legal relationship, or extent, conserve or protect an existing right; they rest on a manifestation of will connected to the production of legal effects (De Plácido e Silva, *Vocabulário jurídico*, 29th ed., Rio de Janeiro, Forense, 2012, p. 950).

30 Judith Martins-Costa, *A boa-fé no direito privado*, São Paulo, Revista dos Tribunais, 1999, p. 427; T. Negreiros, *supra*, note 27, p. 221, at the page 223. The second criteria sometimes becomes the third, and vice versa: Gustavo Tepedino and Anderson Schreiber, "A boa-fé objectiva no Código de defesa do consumidor e no novo Código civil (arts. 113, 187 e 422)", in Gustavo Tepedino (ed.), *Obrigações – Estudos na perpectiva civil-constitutional*, Rio de Janeiro, Renovar, 2005, p. 29, at pages 35 to 37.

Undoubtedly, such a principle of good faith means that the autonomy of the will (or, in other words, the paramount importance of actual intent) may be limited in certain cases, when a greater social concern connected to the importance of contracts in modern life conflicts with the individual will of the parties (or of only one of them), or when contractual justice (*justiça comutativa*) requires it. Objective good faith also promotes the idea of the contract as a dynamic bond, which is broader, richer and more complex than its formal instrument. Consequently, the parties' behavior turns out to be the most important parameter of interpretation and integration of the contract, even for the purpose of altering the formal agreement. Under this perspective, objective good faith highlights the autonomy of will (here with a broader meaning), which cannot be cristallized in the formal agreement, but should be identified through the whole set of the parties' manifestations:

> "The principle of good faith, notwithstanding contractual intent, seeks to go beyond it and take into account its exteriorization – in relation to the other contracting party and even third parties, as well as the social environment."[31]

Thus understood, objective good faith parallels the affirmation by the same Code that contractual freedom must be exercised by virtue and within the limits of the social function of contracts (art. 421). This particular principle underlies, of course, all the provisions in the 2002 Civil Code that strive to induce more contractual justice and protect weaker parties (rescision in case of lesion[32], unjust enrichment[33], imprevision[34], reduction of excessive penal clauses[35], etc.). But it also serves as a general guideline in any other case where the autonomy of the will is used to the detriment of

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31 Antônio Junqueira de Azevedo, "Interpretação do contrato pelo exame da vontade contratual", (2000) 351 *Rev. Forense* 275, 279 (our translation).

32 Art. 157 C.C. See for instance: Ana Luiza Maia Nevares, "O erro, o dolo, a lesão e o estado de perigo no novo Código Civil", in Gustavo Tepedino (ed.), *A parte geral do novo Código Civil*, Rio de Janeiro, Renovar, 2002, p. 251.

33 Art. 884 to 886 C.C. And for example Guilherme Araújo Drago, "O enriquecimento sem causa no novo Código civil: A delimitação do art. 884", (2011) 48 *Revista do direito privado* 69.

34 Also called "clausula rebus sic stantibus": Art. 478 to 480 C.C.; Paulo Magalhães Nasser, *Onerosidade excessiva no contrato civil*, São Paulo, Saraiva, 2011.

35 Art. 413 C.C. and among others, Judith Martins-Costa, "A dupla face do princípio da eqüidade na redução da cláusula penal", in Araken de Assis (ed.), *Direito civil e processo: Estudos em homenagem ao Professor Arruda Alvim*, São Paulo, Revista dos tribunais, 2007, p. 60.

contractual justice and fairness[36], particularly in connection with the relativity of contracts or in the case of contracts involving essential services (such as water, electricity, etc.)[37]. In this vein, the social function of contracts helps ascertaining the boundaries of the principle of objective good faith that will be explained below, in connection with doctrines such as *venire contra factum proprium* and *supressio*[38].

By comparison, the common law notion of consideration represents an additional filter of enforceability (or habilitation)[39], and also shows a law of contracts more preoccupied with commercial bargains than with the intangible intent of the parties – or with contractual justice, as a brief explanation of the notion has just made clear. Furthermore, the impact of canon law on the law of contracts in civil law systems such as Brazil, Germany or France also naturally fosters concepts such as good faith and explains the favorable (as opposed to the more restrictive trend observed in common law systems) interpretation given to contracts.

II. The Magic Wand

Given the comparative formal stage depicted above, how could a contract possibly be varied without satisfying the requirements of consideration? The answer to this conundrum lies in a sort of magic trick shrouded in mystery and operated by the judicial wand of conscience. As

[36] Naturally, Brazilian jurists are also aware, at the same time, of the economic function of contracts in the way common lawyers are. See in general: C.M. da Silva Pereira, *supra*, note 23, p. 10 to 13.

[37] Gustavo Tepedino, Heloisa Helena Barboza and Maria Celina Bodin de Moraes, *Código civil interpretado conforme a Constituição da República*, Vol. II, Rio de Janeiro, Renovar, 2006, p. 14 and 15.

[38] See *infra*, p. 243 and following and for the connection between the social function of contracts and objective good faith, for instance G. Tepedino and A. Schreiber, *supra*, note 30, p. 29, at pages 38 to 40. Besides the social function of contracts and objective good faith, the principle of contractual balance (though not explicit in the Brazilian Civil Code) is also often invoked, together with the other two principles, to promote justice and fairness in the contractual analysis. For a treatment of this problematic in Quebec Civil Law, see: Didier Lluelles and Benoît Moore, D*roit des obligations*, 2nd ed., Montréal, Éditions Thémis, 2012, nº 1992 and 1993, p. 1130 and 1131, and nº 2212, p. 1273 and 1274.

[39] Consideration has been compared to the notion of "cause" in Civil Law systems. See: Sébastien Grammond, Anne-Françoise Debruche and Yan Campagnolo, *Quebec Contract Law*, Montreal, Wilson & Lafleur, 2011, p. 100 to 102.

if the judge was a magician weaving a wand, the contract enters a box on the stage and exits it later having undergone an unpredictable metamorphosis. But how exactly? We submit that the wand used by courts to perform this shape-shifting trick is attuned to the needs of conscience, called equity in Anglo-Canadian common law and good faith in Brazil. The former is sometimes called waiver, at other times promissory estoppel (A); the latter is labelled *venire contra factum proprium* or *supressio* (B).

A. Promissory Estoppel and Waiver

The law relating to the magic wand alternatively known as promissory estoppel, or waiver, is not easy to summarize clearly[40], although the general idea underlying both doctrines is fairly simple: even if the consideration requirement is not quite satisfied[41], what could prevent two parties on equal footing from modifying their initial contract if they agree to do so[42]? In a *dictum* much criticized since for its general character, Lord Denning expressed the same conviction in *High Trees*: "A promise intended to be binding, intended to be acted upon, and in fact acted on, is binding so far as its terms properly apply"[43].

Rooted in the reliance-based approach defined earlier, waiver and promissory estoppel allow for such flexibility in specific cases[44]. The two doctrines are notoriously hard to distinguish in their application, if not in their theoretical outline[45], a state of confusion which must be taken as

40 Robert Bradgate, "Formation of Contract", in Michael Furmston (ed.), *The Law of Contract*, 4th ed., London, LexisNexis UK, 2010, p. 255, at pages 359 and 360.

41 Both required to effect a variation of contract *stricto sensu* when it benefits one party only: Edwin Peel, *Treitel – The Law of Contract*, 13th ed., London, Sweet & Maxwell, 2011, p. 105; Weeks v. *Rosocha*, (1983) 41 O.R. (2d) 787 (Ont. C.A.).

42 Richard Stone, *The Modern Law of Contract*, 9th ed., London, Routledge-Cavendish, 2011, p. 110.

43 *High Trees*, *supra*, note 1, 136.

44 Such cases are as a rule highly fact-specific: *Marchischuk* v. *Dominion Industrial Supplies Ltd.*, [1991] 2 S.C.R. 61; *Brar* v. *Roy*, [2005] A.J. N° 990 (Alta. C.A.).

45 Some courts apply both both like a pair of siamese twins (as in *Dewindt* v. *Sandalwood homes Ltd.*, [2003] A.J. N° 387 (Alta. Q.B.), while others fail to specify which one they use (*Ledlingham* v. *Bermejo Estancia Co.*, [1947] 1 All E.R. 749). At other times, each will be applied by different judges in the same case (*Brikom Investments Ltd.* v. *Carr*, [1979] Q.B. 467 (C.A.)), or appear to have been decided on grounds other than the alleged one (*Re William Porter Ltd.*, [1937] 2 All E.R. 361).

evidence of the functional proximity existing between waiver and promissory estoppel. Both are attuned to broader concerns flowing from conscience and fairness, here formulated in terms of reliance and equity. In an English 1970 case, an attempt was made to connect waiver and promissory estoppel to a more general principle "in the nature of a requirement of fair conduct"[46] which echoed the civilian notion of good faith. But this proposal has not met with much approval as a proper legal basis distinct from waiver or promissory estoppel, although it is agreed that both can be viewed as doctrines promoting good faith and fair conduct[47].

We shall first explain the notion of waiver (1), then of promissory estoppel (2) and conclude by pondering the relationship between these equitable doctrines and the common law of contract (3).

1. Waiver and the informal or tacit renunciation to a legal right

The concept of waiver is reputedly "difficult to define"[48], but the basic principle behind it is the following: when someone "waives" (i.e. promises not to seek to enforce) a specific contractual right for some time, that person may be precluded from demanding the performance of such a "strict" right as a result. A classic example would be that of a seller first allowed by the buyer to make a late delivery, then obtaining damages after the buyer refuses to accept it: it is considered that by accepting this, the buyer has waived his contractual right to obtain delivery at the original time[49].

Two types of waiver may be distinguished. The first one is called forbearance waiver. In this case, the waivor (the one who waives) leads the waivee (the other contracting party) to believe that he will not insist on his strict contractual rights and thus "forbears" from enforcing them[50]. In a terminology close to estoppel[51], the waiver allows the waivee to prevent the

46 *Panchaud Frères SA* v. *EF General Grain Co.*, [1970] 1 Lloyd's Rep. 53, 59.

47 See: *Glencore Grain Rotterdam BV* v. *Lebanese Organisation for International Commerce*, [1997] 4 All E.R. 514 and the discussion in R. Bradgate, *supra*, note 40, at pages 361 to 363.

48 R. Bradgate, *supra*, note 40, at the page 363; Michael P. Furmston, *Cheshire, Fifoot & Furmston's Law of Contract*, Oxford, Oxford University Press, 2012, p. 709 (the topic "is not a clear one").

49 R. Stone, *supra*, note 42, p. 110.

50 E. Peel, *supra*, note 41, p. 107.

51 Hence for instance the expression "waiver by estoppel" used in *HIH Casualty and General Insurance Ltd.* v. *Axa Corporate Solutions New Hampshire Insurance Co.*, [2002]

waivor from going back on his representation, made by words or conduct, and to rely on the initial contract. Representation must be clear and unambiguous, by reference to the way a reasonable person placed in the same situation would perceive it[52]. Silence may only amount to representation in exceptional circumstances, given the context[53]. And the waivor must be aware of his rights to waive them[54]. Just like such representation, reliance is a key element of forbearance waiver[55]. Another important feature is the possibility offered to the waivor to resume his strict right upon giving reasonable notice[56]. In a case involving the customized building of a car body to fit a Rolls Royce chassis, the suppliers had initially promised the buyer to deliver it within seven months following specification. When they failed to do so, the buyer did not sue for breach but instead, chose to wait for delivery, thus waiving the right to obtain it at the agreed time. But after several months passed and the buyer grew tired of waiting, he eventually notified the suppliers that he would wait one more month and no longer. When the suppliers failed to meet this deadline and pretended to deliver the car later, it was found that the notice given had been reasonable and that once it had run out, the buyer could cancel the contract[57]. Thus open to flexibility, forbearance waiver is only an instrument to prevent injustice and to protect reliance; it does not amount to an absolute tool of enforceability[58].

The second type of waiver could be called election waiver and defined as appearing when:

EWCA Civ. 1253. See: R. Bradgate, *supra*, note 40, at the page 364 and especially footnote 6.

52 *Scandinavian Trading Co. AB* v. *Flota Petrolera Ecuatoriana, the Scaptrade*, [1983] Q.B. 529.

53 Hugh G. Beale (ed.), *Chitty on Contracts*, 31st ed., London, Sweet & Maxwell, 2012, p. 352 and 353.

54 *Commonwealth of Australia* v. *Verwayen*, (1990) 170 C.L.R. 394; *Marchischuk* v. *Dominion Industrial* Supplies *Ltd.*, *supra*, note 44; R. Bradgate, *supra*, note 40, at the page 369.

55 R. Bradgate, *supra*, note 40, at pages 370 and 371; A. Swan and J. Adamski, *supra*, note 10, p. 134 and 135; *Saskatchewan River Bungalows Ltd.* v. *Maritime Life Assurance Co.*, [1994] 2 S.C.R. 490.

56 E. Peel, *supra*, note 41, p. 108.

57 *Charles Rickards Ltd.* v. *Oppenheim*, [1950] K.B. 616; M.P. Furmston, *supra*, note 48, p. 707 to 709. See also: *M.L. Baxter Equipment Ltd.* v. *GEAC Canada Ltd.*, (1982) 36 O.R. (2d) 150 (Ont. H.C.J.).

58 S.M. Waddams, *supra*, note 7, p. 151.

> "a state of affairs comes into existence in which one party becomes entitled, either under the terms of the contract or by the general law, to exercise a right and he has to decide whether or not to do so."[59]

When the waivor has chosen how he will use his right, there is no turning back. As an example, faced with the breach of a contractual condition, he may either accept the breach and terminate the contract, or affirm the contract and continue with the performance. By contrast with forbearance waiver, no reliance is required here.

This brief presentation of the double-sided doctrine of waiver will be sufficient because its closeness with promissory estoppel leads in practice to estoppel shadowing weaver[60]. This trend may be observed in the Canadian common law of contracts, which does not concern itself much with waiver and prefers making use of promissory estoppel instead.

2. Promissory estoppel and the bar to denying a previous representation

We shall start first by sketching the general outline of promissory estoppel, as well as by discussing its introduction in the landscape of the common law of contracts (a). Then, using Canadian and English cases, we shall try to explain its specific requirements (b).

a. Main features and legal basis

Promissory estoppel, as it should be called to avoid confusion, plunges its roots in two leading cases: *High Trees*, a 1947 case described in the introduction, which brought new fire to an older 1877 case, *Hughes* v. *Directors, etc., of Metropolitan Railway Corporation*[61]. Although the word "estoppel" was not mentioned in either of these two judgments, the equitable doctrine

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59 *The Kanchenjunga*, [1990] 1 Lloyd's Rep. 391 (per Lord Goff), quoted in R. Bradgate, *supra*, note 40, at the page 364.

60 Arlene J. Kwasniak, "Instream Flow and Athabasca Oil Sands Development: Contracting Out/Waiver of Legal Water Rights to Protect Instream Flow", (2010) 48 *Alta. L.R.* 1, 20 and references in footnote 94. According to E. Peel, *supra*, note 41, p. 109, promissory estoppel represents a better version of waiver because it focuses on the effect of the representor's conduct, not only on his state of mind.

61 (1877) 2 A.C. 439, 448 (per Lord Cairns LC)(H.L.) [hereafter "*Hughes*"]. In Canada, a 1964 case decided by the Supreme Court of Canada is considered to be the 'act of birth' of promissory estoppel in Canadian common law: *Conwest Exploration Co.* v. *Letain*

that emerged from their subsequent application came to be known as promissory (or equitable, debatable as the term may be[62]) estoppel. If *Hughes* did not spark much controversy, *High Trees* did. The resistance was both general and specific. On the one hand, Lord Denning expressed in a very broad fashion the principle that in order for a promise to be binding, it sufficed that it was intended to be so and was acted upon accordingly[63]. This statement seemed to negate the consideration requirement to form a binding contract, and to undermine the traditional approach resting on bargain[64]. On the other hand, on the facts of *High Trees*, the operation of promissory estoppel could lead to part payment extinguishing a debt. This contradicted the accepted axiom that consideration could not consist in a pre-existing duty, such as the part payment of an existing debt[65]. In one way as in the other, promissory estoppel was perceived as a sort of Troyan horse set to destroy the mighty consideration citadel[66].

After some doubts though[67], promissory estoppel springing from *High Trees* now meets with approval in England and Canada and is considered part of the common law of contracts[68], with applications extending in

(1964) 41 D.R.L. (2d) 198 ; Shannon K. O'Byrne, "More Promises to Keep : The Expansion of Contractual Liability Since 1921", (1996) 35 *Alta. L.R.* 165, 176.

62 The common denomination "equitable estoppel" also refers to proprietary estoppel, quite different from the promissory version : R. Bradgate, *supra*, note 40, at pages 379 and 380 and on proprietary estoppel, see for instance Mark Pawlowski, *The Doctrine of Proprietary Estoppel*, London, Sweet & Maxwell, 1996 and Jane M. Glenn, "Promissory Estoppel, Proprietary estoppel and Constructive Trust in Canada : 'What's in a name'? ", (2007) 30 *Dal. L.J.* 141.

63 *High Trees*, *supra*, note 1, 134.

64 "What Lord Denning created in *High Trees* was an overly powerful alternative to the doctrine of consideration" : A. Swan and J. Adamski, *supra*, note 10, p. 126.

65 *Foakes* v. *Beer*, *supra*, note 20, following *Pinnel's Case*, *supra*, note 20.

66 There was also the problem of reconciliating *High Trees*, where promissory estoppel applied to a promise as to the future, with cases connected to estoppel by representation (such as *Jorden* v. *Money*, (1854) 10 E.R. 868), only available in relation to statements of fact. But it was easier to solve, either by understanding promissory estoppel as a new and distinct species of estoppel, or by admitting that *Jorden* v. *Money* had been undermined : *Maracle* v. *Travellers Indemnity Co. of Canada*, [1991] 2 S.C.R. 50 ; S.M. Waddams, *supra*, note 7, p. 143 ; E. Peel, *supra*, note 41, p. 120 and 121.

67 *Tool Metal Manufacturing Co. Ld.* v. *Tungsten Electric Co. Ltd.*, [1955] 2 All E.R. 657 (H.L.).

68 R. Bradgate, *supra*, note 40, at the page 379 ; S.M. Waddams, *supra*, note 7, p. 148 to 150.

labour law[69] and civil proceedings[70]. This final welcome was helped by the way the general criticism was met : as we shall see below, the requirements of promissory estoppel were adjusted to limit its scope somewhat. As for the more specific opposition relating to part payment allowed to extinguish a debt, contrarily to the accepted notion of consideration, and the true effect of *High Trees* in this respect, matters remain more uncertain. It also depends on the actual effect of promissory estoppel in each case : does it lead in practice to effectively extinguishing the debt, or only to suspend it[71] ? Following cases on the subject are scarce, and their interpretation open to debate. On the whole, *High Trees* is considered grudgingly to have been accepted as an exception to the rule regarding part payments[72], but some authors carefully add that the effect might depend ultimately on what is necessary to avoid unconscionability[73].

b. Requirements

In most Canadian cases, the constitutive elements of promissory estoppel are listed in a consistent and apparently clear manner :

> "promissory estoppel applies to a promise or assurance made by one party which is intended to be acted on and affect the legal relationship between the parties, where the other party has in some whay changed his legal position to his detriment in reliance on the representation."[74]

Thus, three elements are traditionally required in Canada to raise promissory estoppel : representation, detrimental reliance and the intent to

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69 See for instance : *Irving Tissue Co.* v. *Communications, Energy and Paperworkers Union of Canada, Local 786*, [2010] N.B.J. N° 38 (N.B.C.A.) and in general M. Anthony Hickling, "Labouring with promissory estoppel : A well-worked doctrine working well ? ", (1983) 17 *U.B.C.L.R.* 183.

70 For example in *Murphy Oil Co.* v. *Commercial Petroleum and Hydraulic Service Ltd*, [2004] O.J. N° 5264 (Ont. S.C.J.).

71 The effect(s) of promissory estoppel will be studied below in the third part of this paper.

72 L. Koffman and E. Macdonald, *supra*, note 8, p. 84 ; Stephen M. Waddams, *Principle and Policy in Contract Law : Competing or Complementary Concepts ?*, Cambridge, Cambridge University Press, 2011, p. 68 (who considers that the mixing of this consideration aspect with promissory estoppel has made matters "unclear").

73 Such as R. Bradgate, *supra*, note 40, at the page 391.

74 *Maracle* v. *Travellers Indemnity Co. of Canada*, *supra*, note 66, 57 (per Sopinka J.), quoted for instance in *Brar* v. *Roy*, *supra*, note 44.

affect legal relations. In England, the test is formulated differently[75]. It includes representation and reliance, but the detriment component of the latter is discussed. It also adds an all-encompassing criteria of unequitability. As for the Canadian criteria based on the intent to affect legal relations, in England it is expressed in a slightly different way through the need for an existing legal relationship, which in turn implies that promissory estoppel should not represent the main cause of action. The same implication exists in Canada, but the Canadian formulation has been interpreted to mean other things as well, as we shall see by reviewing the requirements in turn.

i) Representation

The representation refers to a promise or assurance made by one person, the representor, that he will not insist on his strict pre-existing right, be it contractual or flowing from another legal source[76]. Promissory estoppel is thus not limited to the realm of contracts : the right estopped could have a statutory origin, such as a right to invoke a limitation period. In *Brar* v. *Roy*, a 2005 case decided by the Alberta Court of Appeal, settlement negotiations had been initiated after a motor vehicle accident for which the defendant admitted liability. The defendant's final offer was accepted by the plaintiff two days after the expiration of the limitation period for the original tort action that the plaintiff could have used. The Court found that the defendant was estopped from invoking the limitation of this action as a way to escape paying damages : his admission of liability, followed by his active participation in the settlement negotiations, had been interpreted as a representation not to invoke the limitation period against the plaintiff[77]. But in such cases, the promise or representation must extend to the whole of the limitation period and the admission of liability must be intended to hold whether the settlement is successful or not[78].

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75 See for instance : R. Stone, *supra*, note p. 112 to 122 and R. Bradgate, *supra*, note 40, at pages 380 to 385.

76 *Robertson* v. *Minister of Pensions*, [1949] 1 K.B. 227 ; *Durham Fancy Foods* v. *Michael Jackson (Fancy Goods) Ltd.*, [1968] 2 Q.B. 839 ; John A. Manwaring, "Promissory Estoppel in the Supreme Court of Canada", (1986-87) 10 *Dal.L.J.* 43, 55.

77 *Brar* v. *Roy*, *supra*, note 44.

78 *Murphy Oil Co.* v. *Commercial Petroleum and Hydraulic Service Ltd.*, *supra*, note 70 ; *Dewindt v. Sandalwood homes Ltd.*, *supra*, note 45 ; *Maracle* v. *Travellers Indemnity Co. of Canada*, *supra*, note 66.

The promise or assurance must be unambiguous and precise[79]. It may be made in words or be inferred from the representor's conduct. Silence or inaction rarely qualify by themselves as a valid representation, unless they are combined with some measure of words and conduct as to be clear and unequivocal[80]. As an example, the fact that eighteen monthly payments, made to reimburse a loan, are accepted late each time by the creditor does not estop him to ask for the application of an acceleration clause (increasing the debt) at the nineteenth payment[81]. A clear and unequivocal representation is often lacking in cases involving property and family law, which explains in part why promissory estoppel does not prove very useful there[82]. Finally, in England, the traditional view is that the representor's knowledge of his right is not relevant to the operation of promissory estoppel[83]. Representation is normally ascertained from the point of view of the representee, in an objective fashion, not by pondering about the subjective state of mind of the representor[84]. But in Canada, a particular interpretation of the fourth requirement (the intention to affect legal relations) has shed doubts on this matter : these shall be examined below.

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79 *Woodhouse AC Israel Cocoa SA* v. *Nigerian Produce Marketing Co. Ltd. (1972)*, [1972] 2 All E.R. 271 (H.L.) ; *Northstar Land Ltd.* v. *Maitland Brooks*, [2006] EWCA Civ. 756 ; *Anderson* v. *Anderson*, [2010] B.C.J. N° 1284 (B.C.S.C.) ; G.H.L. Fridman, *supra*, note 6, p. 129.

80 *Manitoba Association of Health Care Professionals* v. *Nor-Man Regional Health Authority Inc.*, [2010] M.J. N° 166 (Man. C.A.) ; E. Peel, *supra*, note 41, p. 113.

81 *John Burrows Ltd.* v. *Subsurface Surveys Ltd.*, (1968) 68 D.L.R. (2d) 354 (S.C.C.), and for a similar set of facts and decision, *Brandt Tractor Ltd.* v. *Pardee Equipment Employees Association*, [2006] A.J. N° 519 (Alta. Q.B.). See also : *Scandinavian Trading Co. AB* v. *Flota Petrolera Ecuatoriana, the Scaptrade*, *supra*, note 52 and M.P. Furmston, *supra*, note 48, p. 134.

82 See for instance : *Anderson* v. *Anderson*, *supra*, note 79, for children arguing that their father "had promised the lands to them", or *Sola Development Ltd.* v. *ICI Canada Inc.*, [2009] O.J. N° 1300 (Ont. S.C.J.) ; *Millet* v. *Murphy*, [2011] N.S.J. N° 182 (N.S.S.C.C.). Generally, promissory estoppel then also fails for want of a pre-existing legal relationship. See *infra*, p. 240-241.

83 E. Peel, *supra*, note 41, p. 111 and *Scandinavian Trading Co. AB* v. *Flota Petrolera Ecuatoriana, The Scaptrade*, *supra*, note 52 ; *The Kanchenjunga*, *supra*, note 52. But there are some opposing judgments, such as *HIH Casulatly and General Insurance Ltd.* v. *Axa Corporate Solutions New Hampshire Insurance Co.*, *supra*, note 51.

84 In *HIH Casualtly and General Insurance Ltd.* v. *Axa Corporate Solutions New Hampshire Insurance Co.*, *supra*, note 51, it is said that the representor' knowledge of his rights must be ascertained in an objective manner. See also : J.A. Manwaring, *supra*, note 76, 63.

ii) Reliance and Detriment

The reliance requirement means that the promisee, or representee, must have relied on the representation and thus acted in a way different from what he normally would have done[85]. We have seen how reliance is a key element in finding new sources of contractual liability, when the bargain approach founded on consideration would lead to an unfair or unconscionable result. Here, it may be ascertained in an objective fashion, by demonstrating that a reasonable promisee placed in the same circumstances would have relied on the representation[86].

But must this reliance have been detrimental, in the sense that the representee must have downgraded his position because of his relying on the representation? The question is a tricky one and has generated much debate. In *High Trees*, there was no detriment shown by the defendant representee: the company had simply enjoyed the advantage of having to pay half the rent only during the war years. Lord Denning himself consistently rejected the requirement of a detriment in addition to reliance afterwards[87], and English authors tend to agree with him[88], if only because the third requirement (unequitability) will actually be strenghtened by the evidence of a detriment[89]. But in Canada, detriment is usually listed among the requirements of promissory estoppel[90], even though in practice, the courts will tend to assess the requirement of detrimental reliance as a whole and not be very demanding as to the actual detriment suffered by the promisee[91]. But all the same, the test of reliance suffused by detriment might be more stringent in Canadian practice. In a case similar on the facts to *High Trees*, the Supreme Court of British Columbia found that the tenant did not change his position in reliance on the lower calculation

85 G.H.L. Fridman, *supra*, note 6, p. 131; E. Peel, *supra*, note 41, p. 113 and 114.

86 E. Peel, *supra*, note 41, p. 113 and 114.

87 For example in *WJ Alan & Co.* v. *El Nasr*, [1972] 2 All E.R. 127, 140 (Q.B.) and in later writings such as Alfred Thompson Denning, "Recent Developments in the Doctrine of Consideration", (1952) 15 *Mod. L.R.* 1, 5 to 8.

88 See: R. Stone, *supra*, note 42, p. 116; *Collier* v. *P & M J Wright (Holdings) Ltd.*, *supra*, note 20.

89 M.P. Furmston, *supra*, note 48, p. 136 to 138; G.H.L. Fridman, *supra*, note 6, p. 133 to 135.

90 With some exceptions, like *Desoto Resources Ltd.* v. *encana Corp.*, [2010] A.J. N°. 837 (Alta. Q.B.).

91 S.M. Waddams, *supra*, note 7, p. 147 and 148 and J.A. Manwaring, *supra*, note 76, 64 to 66.

of rent. The court even suggested that since the tenant had not argued that he would not have renewed his lease had he known the rent was actually higher, his position was completely unaltered. So more would be required to demonstrate detrimental reliance than just enjoying the benefit flowing from the representation[92].

iii) Unequitability

Called unconscionability in the context of proprietary estoppel, the requirement of unequitability is directly connected to broader notions such as equity and conscience and, through them, to another vision of contractual liablity rooted in reliance rather then consideration and bargain. Deemed a "crucial aspect" of the doctrine of promissory estoppel, unequitability appears as the key to its operation, a general requirement that underlies the others[93]. But if unequitability is a key, it may also be a negative one. While it might be unequitable to allow the promisor to go back on his representation, it may also be unequitable in a given case to find a promissory estoppel even though all the other requirements are satisfied.

In *D and C Builders* v. *Rees*, the plaintiffs had accepted to receive a lesser amount than the one due as payment of works done for the defendant. Rees knew that the plaintiffs had financial problems and had told them that this amount was all they could expect to get. Despite this promise, the plaintiffs sued for the remaining amount and the defendant Rees argued that they were estopped to claim it. After stating that in such a case, promissory estoppel might well have been available, Lord Denning held that given the behavior of the defendant, who had tried to take advantage of the plaintiffs' s financial troubles to pay less than what was originally agreed, it was not inequitable for the plaintiffs go to back on their promise[94]. In this fashion, unequitability appears as the very soul of the doctrine of promissory estoppel : ultimately, this is the invisible requirement which guides its application. Because "the principle is one of preventing injustices, not of enforcing promises"; thus "[t]he best solution would

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92 *Vancouver City Savings Credit Union* v. *Norenger Development Inc.*, [2002] B.C.J. N° 1417 (B.C.S.C.).

93 R. Bradgate, *supra*, note 40, at pages 382 and 383.

94 *D and C Builders* v. *Rees*, [1966] 2 Q.B. 617. See also : M.P. Furmston, *supra*, note 48, p. 138 and 139 ; G.H.L. Fridman, *supra*, note 6, p. 135.

seem to be that such promises should be enforceable subject to a rule of unconscionability"[95].

In Canada, unequitability is not formally included in the requirements of promissory estoppel[96]. But it operates nonetheless in the same way, as a safety device securing a fair application of the doctrine. In a 2010 case decided by the Supreme Court of British Columbia, the plaintiff had behaved badly during the proceedings : he had failed to disclose evidence and had been chronically untruthful in his testimony at trial. For this reason, the Court declared that even if the requirements of promissory estoppel had been met, the plaintiff would not be entitled to it by reason of his misconduct and application of the doctrine of clean hands[97].

iv) Pre-existing legal relationship v. Intent to affect legal relations

Crafted a few years after *High Trees*, the requirement of a pre-existing legal relationship restricts the operation of promissory estoppel to the variation of existing contracts and excludes it as a tool to create (a new) one. In *Combe* v. *Combe*, a divorced wife tried to compel her ex-husband to make good a promise he had made at the time of their separation, that he would pay her a monthly support. But seven years had elapsed since then, and there was no consideration for this promise. Lord Denning, speaking for the English Court of Appeal, decided that the *High Trees* principle could not come into play here, because it was limited to the modification of existing legal relationships[98]. In this way, he also limited the

95 S.M. Waddams, *supra*, note 7, p. 150 and 100.

96 But see nonetheless : *Manitoba Pool Elevators* v. *Gorrell*, [1998] 6 W.W.R. 596 (Man. Q.B.).

97 *Mayer* v. *Osborne Contracting Ltd.*, [2010] B.C.J. N° 1751 (B.C.S.C.).

98 [1951] 2 K.B. 215. See also for example : *Co-operative Trust Co. of Canada and Atlantic Steel Buildings (Re)*, (1982) 50 N.S.R. (2d) 609 (C.A.) ; *The Kanchenjunga*, *supra*, note 52 ; *Fraser Valley Credit Union* v. *Siba*, (2001) 42 R.P.R. (3d) 135 (B.C.S.C.) ; *M. (N.)* v. *A. (A.T.)*, (2003) 13 B.C.L.R. (4th) 73 (C.A.) ; *Desoto Resources Ltd.* v. *encana Corp.*, *supra*, note 90. This relationship may be contractual, but also statutory in nature : *Durham Fancy Goods Ltd.* v. *Michael Jackson (Fancy Goods) Ltd.*, *supra*, note 76. See in general : E. Peel, *supra*, note 41, p. 116 to 118 ; S.M. Waddams, *supra*, note 7, p. 144. But see, as an example of rare affirmations to the contrary : *Evenden* v. *Guildford City Ass'n Football Club Ltd.*, [1975] 3 W.L.R. 251 (C.A.)

frictions between promissory estoppel and the doctrine of consideration, and prevented the former from interfering with family and property law[99].

Flowing from the same decision is another sub-requirement connected to the need for a prior legal relationship, which emphasizes the ancillary nature of promissory estoppel. Saying that it creates no new cause of action not only means that it is limited to pre-existing legal relationships, but also that it can not be used as the main ground of a judicial demand[100]. To express this, it is often said that promissory estoppel can only be a shield and never a sword – in other words, it can defeat a claim but not support one by itself[101]. But the shield/sword analogy may be misleading[102]. It does not imply that promissory estoppel may be used by defendants only: plaintiffs could also do so to counter an argument raised in defense[103]. Even so, the limitation remains sometimes difficult to apply in practice[104], and some decisions have rejected it[105]. Others propose to mitigate it, by admitting promissory estoppel as an ancillary cause of action[106].

In Canada, the requirement of a pre-existing legal relationship between the parties is often expressed in a different way, as the "intent to

99 See for instance: *N.M.* v. *A.T.A.*, [2003] B.C.J. N° 1139 (B.C.C.A.); *Anderson* v. *Anderson*, *supra*, note 79; *Sola Development Ltd.* v. *ICI Canada Inc.*, *supra*, note 82; *Millet* v. *Murphy*, *supra*, note 82. But proprietary estoppel is very effective in those areas: see *supra*, p. 231 and note 62.

100 *Crabb* v. *Arun District Council*, [1976] Ch. 179 at 187 (C.A.); R. Bradgate, *supra*, note 40, at pages 391 and 392.

101 Among others, see for the principle: *Gilbert Steel Lt.* v. *University Const. Ltd.*, (1976) 67 D.L.R. (3d) 247 (Ont. C.A.); *Watson Estate* v. *Canada Mortgage and Housing Corp.*, [1995] A.J. N° 181 (Alta. Q.B.); *Anderson* v. *Anderson*, *supra*, note 79.

102 See in particular: *Azov Shipping Co.* v. *Baltic Shipping Co. (No 3)*, [1999] All E.R. (Comm) 453, 476; *Re Tudale Explorations Ltd. and Bruce*, (1987) 88 D.L.R. (3d) 584, 588 (Ont. Div. Ct.); E. Peel, *supra*, note 41, p. 118 and 119.

103 As in *Deer Valley Shopping Centre Ltd.* v. *Sniderman Radio Sales and Services*, (1989) 96 A.R. 321 (Q.B.) and S.K. O'Byrne, *supra*, note 61, 178.

104 D. Halyk, *supra*, note 18, 408 and 410.

105 As *Owen Sound Public Library Board* v. *Mial Developments Ltd.*, (1979) 102 D.L.R. (3d) 685 (Ont. C.A.); *Robichaud* v. *Caisse Populaire*, (1990) 69 D.L.R. (4th) 589 (N.B.C.A.).

106 *Amalgamated Investment & Property Co.* v. *Texas Bank*, (1982) 1 Q.B. 84 (C.A.); *La Cie Mccormick Canada Co.* v. *Brian Barr Holdings Ltd.*, [2009] O.J. N° 3001 (Ont..S.C.); *Dutertre Manufacturing Inc.* v. *Palliser Regional Park Authority*, [2012] 11 W.W.R. 352 (Sask. Q.B.); J.A. Manwaring, *supra*, note 76, 57 and 58.

affect legal relations"[107]. The prior legal relations is of course implied there, but another thing seems to be : the subjective will of the promisor that his representation will have the intended effect on the promisee. This certainly echoes Lord Denning's *dictum* in *High Trees*, at the effect that "*[a] promise intended to be binding, intended to be acted upon, and in fact acted on, is binding so far as its terms properly apply*"[108]. Interpreted in a restrictive fashion, such an intention could be inferred from the circumstances, if it can be thus understood by the promisee from an objective point of view[109]. But construed in a broader way, it could mean that the promisor must have had a specific subjective intent for promissory estoppel to come into play. This may fit well within a purely orthodox contractual context, but makes less sense in an equitable estoppel logic, where what matters is the objective impact of the representation rather than the state of mind of the representor. Accordingly, in England, we have observed that the promisor does not need know the extent of his strict right(s) to establish a promissory estoppel[110]. In Canada, while this subjective test is held to admit an inferred intent or knowledge, thus bordering an objective analysis based on reasonableness, it increases the burden of proof on the party seeking to claim promissory estoppel, with the consequence that it becomes harder to invoke it successfully in practice. That was the case in *Manitoba Association of Health Care Professionals* v. *Nor-Man Regional Health Autority Inc.* (2010), where a union acquiesced to the employer's practice pertaining to the calculation of vacation entitlement and then contested it. The Manitoba Court of Appeal quashed the award of the arbitrator who

[107] See for instance : *John Burrows Ltd.* v. *Subsurface Surveys Ltd.*, *supra*, note 81 ; *Engineered Homes Ltd.* v. *Mason*, (1983) 146 D.L.R. (3d) 577 (S.C.C.) ; *Maracle* v. *Travellers Indemnity Co. of Canada supra*, note 66 ; *Hepburn* v. *Jannock Ltd.*, [2008] O.J. N°. 62 (Ont. S.C.) ; *Can-Euro Investments Ltd.* v. *Industrial Alliance Insurance*, [2009] N.S.J. N°. 29 (N.S.S.C.) and for an affirmation in England, *IMT Shipping and Chartering GmbH* v. *Chansung Shipping Co. Ltd.*, [2009] EWHC 739. But in other Canadian cases it is omitted as a distinct requirement (in addition to representation and detrimental reliance), such as in *Wasauksing First Nation* v. *Wasausink Lands Inc.*, [2002] O.J. N°. 164 (Ont. S.C.J.) ; *Subway Franchise Systems of Canada, Ltd.* v. *Esmail*, [2005] A.J. N°. 1474 (Alta. C.A.) ; *Irving Tissue Co.* v. *Communications, Energy and Paperworkers Union of Canada, Local 786*, *supra*, note 69.

[108] *High Trees*, *supra*, note 1, 134.

[109] *British Columbia (Ministry of Housing and Social Developmemnt)* v. *WCG International Consultants Inc.*, [2011] B.C.J. N° 1882 (B.C.S.C.) ; *Owen Sound Public Library Board v. Mial Develpments Ltd.*, *supra*, note 105 ; S.M. Waddams, *supra*, note 7, p. 146.

[110] *Voir supra* p. 237.

found that the employer could claim promissory estoppel against the union, because the court held that the union was ignorant of the erroneous method of calculation : it did not have the requisite knowledge to form an intention to affect its rights, which amounted to a lack of representation. And the arbitrator did not demonstrate how knowledge and intent could be inferred[111].

3. Waiver and promissory estoppel as equitable tools in hard cases

Because they are attuned to a reliance-based, conscience-sensitive approach to the variation of contracts, promissory estoppel and waiver apparently clash with the bargain approach embodied by the notion of consideration and in return, impact both the latter and themselves. First, the widening of exceptions such as waiver and promissory estoppel proportionally weaken the consideration principle[112], although Lord Denning himself, while championing the exceptions, affirmed confidently that "[t]he doctrine of consideration is too firmly fixed to be overthrown by a sidewind"[113]. Second, the judicial carving of the exceptions is influenced by the need to limit the potential clash with the bargain approach. This concern, in turn, explains the sometimes restrictive fashion in which the requirements of promissory estoppel, in particular, are defined. It also helps to understand the fuzziness characterizing the features of both waiver and promissory estoppel, and the difficulty to distinguish them clearly : it is harder to collide directly with something that proves hard to pinpoint with certainty.

But as announced in the introduction, the opposition felt between doctrines such as waiver and promissory estoppel on the one hand, and the orthodox theory of contract on the other, should not be overemphasized because the collision is never a frontal one. In other words, waiver and promissory estoppel are not, by nature, tools pertaining directly to the law of contracts and meant to operate as labelled exceptions to cardinal principles like the notion of consideration. Their equitable

111 *Manitoba Association of Health Care Professionals* v. *Nor-Man Regional Health Authority Inc.*, *supra*, note 80. See also : *Telus Communications Inc.* v. *Telecommunications Workers Union*, [2010] B.C.J. N°. 1990 (B.C.S.C.) and *Anderson* v. *Anderson*, *supra*, note 79. See the discussion, and anticipatory criticism, in J.A. Manwaring, *supra*, note 76, 63 and 64.

112 R. Stone, *supra*, note 42, p. 110, footnote 111.

113 *Combe* v. *Combe*, *supra*, note 98, 220 ; [1951] 1 All E.R. 767 at 770.

essence implies that they work on a different plane, according to their own logic : the logic of equity, understood as a body of judicial rules designed to complement and if necessary, correct the common law on a case to case basis. The maxim "equity acts *in personam*" expresses this peculiar relationship between the common law rules, perceived as the accepted general legal norms, and equitable principles conceived as exceptional and fact-oriented. In this light, because of their equitable nature, waiver and promissory estoppel never purport to undermine the roots of the common law of contract (and particularly the doctrine of consideration)[114]. They only seek to provide a disposable tool to prevent injustices in specific hard cases, not to promote an alternative standard of enforceability. Even though they might also be analized by way of consequence as fostering a reliance-based approach to enforceability, in competition with the traditional bargain theory, at the core they should be viewed

> "not primarily as an instrument for enforcing a promise (for which consideration and, according to orthodox usage, a bargain would be needed) but as an instrument for preventing injustice to the promisee by protecting reasonable reliance."[115]

Accordingly, promissory estoppel and waiver are rather instruments designed to *prevent* the creditor *from* enforcing a specific strict right flowing from the contract, instead of *operating to* make a new promise enforceable despite lack of consideration. Of course, this tenet of equity only acting *in personam* does not prevent occasional clashes with established common law doctrines in single cases ; after all, equity may lead to altering the issue of a common law case if justice or conscience requires it. But what equity does not do is oppose common law rules as general principles : the magic trick operates on a string of single cases and does not aim at transforming the whole contractual orthodoxy in Canada or England[116]. These are the long-standing terms of cohabitation between equity and common law. The sometimes uneasy coexistence of waiver and promissory estoppel with the requirement of consideration is only one illustration of it.

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114 J.A. Manwaring, *supra*, note 76, 52.

115 S.M. Waddams, *supra*, note 7, p. 151 and 152.

116 For a clear affirmation regarding the law of limitations, see : *Tolentino* v. *Gill*, [2012] I.L.R. I-5349 (B.S.S.C.) : "If estoppel applies in a given case, it does not render a statutory limitation meaningless ; rather it renders it unenforceable in a particular circumstance on the basis of equitable principles" (§11).

B. *Venire Contra Factum Proprium* and *Supressio*

As stated earlier[117], doctrines such as *nemo potest venire contra factum proprium* and *supressio* are seen as avatars of objective good faith in its third function, or as applications of the doctrine of abuse of right since the latter may be seen as the "tail" side of the good faith coin[118]. Thus connected simultaneously to good faith and abuse of right, both *venire* and *supressio* lead to a limitation of the creditor's right in a specific set of circumstances, notwithstanding the latter's actual intent. With *venire*, it is the combination of the creditor's initial conduct and his later *volte-face* that characterizes violation against objective good faith (1) ; with *supressio*, it is rather the long passivity of the creditor that is scrutinized under the lense of good faith (2).

Interestingly though, just as we observed in relation to waiver and promissory estoppel, the twin doctrines of *venire* and *supressio* are not always easy to distinguish in practice. *Supressio* is sometimes deemed a mere variation[119] or corollary[120] of *venire*, while the creditor's long inaction simply qualifies as the initial conduct or representation (*factum proprium*) later denounced by the same creditor[121]. Furthermore, cases may occasionally be decided on the basis of one and the other simultaneously. In a 2010 judgment of the Superior Tribunal de Justiça (STJ) for instance, involving the *locação*[122] of a vehicle for a given period of time, the "lessee" (*locatária*) was not interested in renewing the contract, but had nonetheless continued using the vehicles after the expiration date. Conversely, the "lessor" (*locadora*) kept accepting the payment of the initial rental price

117 *Supra*, p. 227.

118 Abuse of right is defined in art. 187 C. civ. But the two doctrines nonetheless command specific fields of application, since their definitions do not exactly coïncide : A. Schreiber, *supra*, note 24, p. 118 and 119. Of the two, it is worth noting that good faith has the upper hand in Brazil and is much more popular as a concept than abuse of right : *Id.*, p. 109 to 113. The same is true in Quebec civil law.

119 See for instance : TJSP, AI 994090454510, Relator Enio Zuliani, decided on 30.07.2009.

120 As in TJDFT, the AC 2009 09 1 023225-3, Relator Arilson Ramos de Araujo, decided on 02.09.2010.

121 A. Schreiber, *supra*, note 24, p. 188 to 193 ; Guilherme Magalhães Martins, "A suppressio e suas implicações", (2007) 32 *Revista trimestrial do direito cívil*, 143, 152 to 157. One author even proposes an in-depth analysis of *supressio* as a specific application of *venire*, thus using the categories and components of *venire* to study *supressio* : M. Dickstein, *supra*, note 25, p. 131 to 164.

122 A sort of lease. See : *supra*, foot note 3.

and emitting invoices for that amount. When eventually the "lessor" decided to uphold the end of the original contract and asked for a superior price, the court found that she was precluded from so doing on the basis of both *venire* and *supressio*. *Venire* flowed from the active production of invoices with the amount agreed upon in the expired contract, and *supressio* could be found in the long inaction of the "lessor" when failing to denounce the termination of the rental agreement[123].

1. *Venire Contra Factum Proprium*

The doctrine of *nemo potest venire contra factum proprium* (literally, "no one is allowed to go against his own act") is referred to in Brazilian law in several different ways. The latin expression is usually shortened at least to "*venire contra factum proprium*", or even to just "*venire*". Some also call it the "interdiction of contradictory behavior", or even, like the *Superior Tribunal da Justiça* (STJ), the "teoria dos atos proprios" in a mere translation of the equivalent Spanish remedy[124]. Whatever the name, it is usually considered to be based directly on the third function of objective good faith (a). Specific requirements govern its application (b).

a. Main features and legal basis

Contrarily to the discussions surrounding the emergence of promissory estoppel, it has already been observed that both *venire contra factum proprium* and *supressio* are firmly rooted in the third function of good faith, called the "limitative" one. The extraction of the *venire* doctrine from the principle of good faith, itself enshrined in the 2002 Civil Code, can thus now technically perceived as an interpretation of the legal text. Accordingly, during the IV *Jornada de direito cívil* ("Civil law days") organized by the Council of Federal Justice at the STJ, the bond between arts.

[123] STJ, RESP 953389, Relatora Ministra Nancy Andrighi, decided on 15.03.2010. See also, in the domain of condomiums (the equivalent of Quebec divided co-ownership), TJPR, AC 545.377-8, Relator Lauri Caetano da Silva, decided on 19.05.2009, where an illegal construction on the façade of the building (an awning or "marquise") had not only been tolerated for a long time by the condomium owner now complaining about it, but also used to his own advantage by installing a clothes dryer on top of it. See also: STJ, RE 207.509/SP, Relator Ministro Sálvio de Figueiredo Teixeira, decided on 27.11.2001, and especially the decision of Ministro Ruy Rosado de Aguiar within it.

[124] See for instance: STJ, RE 141.879/SP, Relator Ministro Ruy Rosado de Aguiar, decided on 17.03.1998.

187 and 422 of the Civil Code was formally recognized, and reliance, as protected by these two legal dispositions, proposed as the basis of *venire*[125]. Apart from good faith and reliance, social solidarity, as affirmed by art. 3 of the 1988 Constitution, could represent an additional basis if necessary[126]. But judges and authors did not wait for the direct affirmation of objective good faith in the new Civil Code. Even though such good faith was absent in the 1916 Civil Code[127], *venire* has been applied in Brazilian jurisprudence since 1978[128], and had been discussed by Brazilian doctrine a long time ago[129].

In the end though, what is the use of a specific doctrine of *venire* if objective good faith may be pleaded instead? Since Roman times, it has become clear that no legal system should encourage the wild proliferation of concepts for fear of collapsing under their weight[130]. Accordingly, the answer lays in the excessive utilisation (or *superutilização*[131]) of objective

125 Statement (*Enunciado*) n° 362. These doctrinal statements, adopted by authors from all over the country in specialized commissions, have a very persuasive authority and are thus listed at the end of annotated civil codes.

126 A. Schreiber, *supra*, note 24, p. 107 to 109.

127 Specific provisions could be seen as applications of venire, but they never were interpreted to extrapolate the principle: *id.*, p. 71 to 80.

128 The "leading case" is considered to be a decision by the *Supremo Tribunal Federal* (STF) in 1978: RE 86.787/RS, Relator Ministro Leitão de Abreu, decided on 20.10.78 on a question of matrimonial property (Judith Martins-Costa, "A ilicitude derivada do exercício contraditório de um direito: o renascer do *venire contra factum proprium*", (2004) 376 *Revista Forense* 109, 116). But see also, after that decision and before the coming into force of the new Civil Code on January the 11th, 2003, TJRS, AC 589.073.956, Relator Ruy Rosado de Aguiar, Júnior, decided on 19.12.1989; STJ, RE 95.539/SP, Relator Ministro Ruy Rosado de Aguiar, decided on 3.09.1996; TJSP, AI 260.913-2, Relator José Osório, decided on 27.09.1996; STJ, RE 37.859/PR, Relator Ministro Ruy Rosado de Aguiar, decided on 11.03.1997; STJ, RE 47.015/SP, Relator Ministro Adhemar Maciel, decided on 16.10.1997; TJRJ, AC 2.699/97, Relator Wilson Marques, decided on 3.03.1998; STJ, RE 141.879/SP, *supra*, note 124; TJSP, AC 069.715-4/2-00, Relator Cezar Peluso, decided on 16.03.99; TJRS, 001175330, Relator Antônio Carlos Stangler Pereira, decided on 21.09.2000; TJSP, AC 185.660-4/7, Relator Ênio Santarelli Zuliani, decided on 13.02.2001; TJMG, AC 261.310-7/00, Relatora Maria Elza, decided on 16.05.2002.

129 Aureliano de Souza e Oliveiro Coutinho, "Quando se pode contravir o próprio facto?", (1893) 7 *Revista da Faculdade do Direito de São Paulo* 33.

130 Rudolph von Ihering, *L'esprit du droit romain dans les diverses phases de son développement*, 3e éd., vol. 3, Paris, Marescq, 1886, n° 43, p. 23.

131 A. Schreiber, *supra*, note 24, p. 120.

good faith in Brazilian civil law today, which means that the institution is frequently used incorrectly, instead of applying other pertinent legal dispositions. In this fashion, judges have been known to resort to good faith to sanction mere contractual inexecutions (instead of applying arts. 389-420 of the Civil Code governing the non-performance of obligations)[132] or as synonymous with fairness[133]. This "overuse" of objective good faith has worsened in the context of consumer relationships, where the concept is frequently interpreted very largely (and again, often inadequately given the remedies already existing in contract law) to protect consumers[134]. As a consequence, using *venire* may be seen as a mean to systematize the application of objective good faith and minimize the distorsions currently observed in it.

Based on objective good faith, the doctrine of *venire* applies naturally in the realm of contracts[135]. But in the manner of promissory estoppel, it extends far and wide in the realm of private law, for example in cases of family law[136], business law and the law of companies[137], labor law[138] or civil

[132] See for instance: TJRJ, AC 2001.001.26377, Relatora Leila Mariano, decided on 12.06.2002.

[133] On the subject, see the criticism of A. Schreiber, *supra*, note 24, p. 120 to 125.

[134] Gustavo Tepedino and Anderson Schreiber, "Os efeitos da Constituição em relação à cláusula da boa-fé no Código de Defesa do Consumidor e no Código Civil", (2003) 23 *Revista da EMERJ* 139.

[135] See for instance: TJRS, AC 589.073.956, *supra*, note 128; TJRJ, AC 0217333-52.2009.8.19.0004, Relator Carlos Eduardo Passos, decided on 2.12.2010.

[136] For example: STF, RE 86.787/RS, *supra*, note 128 (matrimonial property); TJSP, AC 185.660-4/7, *supra*, note 128 (consent of wife to contract signed by husband); STJ, RESP 1087163/RJ, Relatora Ministra Nancy Andrighi, decided on 18.08.2011 (refusal of paternal recognition asked by the biological father).

[137] See for instance: TJSP, AC 069.715-4/2-00, *supra*, note 128; TJRS, 001175330, *supra*, note 128.

[138] So in TJMG, AC 261.310-7/00, *supra*, note 128.

process[139]. In the public law domain also, *venire* governs the actions of the public administration, within itself or towards citizens[140], and tax law[141].

b. Requirements

Interestingly, the formal requirements of *venire contra factum proprium* mirror those of promissory estoppel. First, the need of a *factum proprium*, an initial conduct adopted by the creditor, recalls the element of representation required to establish a promissory estoppel. The *factum proprium* is a conduct which is, by definition, not illicit by itself, and also legally not binding[142]. Such would be case, for instance, of the owner of a small clothes store deciding, when selling it, to give the buyer a hand for a while, among other things by taking care of purchase orders and signing them in her own name, or of an insurance company authorizing a surgery. The conduct may also be an abstention, like an insurance company forgetting to ask a customer about preexisting illnesses before signing the contract[143].

Second element of *venire*, the debtor must have placed a reasonable reliance (*legítima confiança*) on this conduct, to be appreciated by the judge in each case. This induced reliance is evaluated in an objective manner, according to the factual circumstances of the case and the behavior that induced it, the *factum proprium*. Elements indicating reliance might be found, among other things, in expenses, acts or abtentions on the basis of expectations encouraged by the initial behavior. There might also be a public expression of those expectations. In any case, there should be no

139 See for example: TJRS, AC 70.008.720.641, Relator Arminio José Abriu Lima de Rosa, decided on 26.05.2004, as well as Fredie Didier Jr, "Alguns aspectos da aplicação da proibição do *venire contra factum proprium* no processo civil", in Cristiano Chaves de Farias (ed.), *Leituras complementares de direito civil*, Bahia, Podvim, 2003, p. 203.

140 As an illustration, see: STJ, RE 47.015/SP, *supra*, note 128, as well as Valter Shuenquener de Araújo, *O princípio da Proteção da confiança: uma nova forma de tutela do cidadão diante do Estado*, Rio de Janeiro, Impetus, 2009.

141 See for instance: TJRS, AC 70005342373, Relatora Maria Isabel de Azevedo Souza, decided on 12.03.2003; STJ, AR no RE, 396489/PR, Relator Ministro Humberto Martins, decided on 11.03.2008.

142 A. Schreiber, *supra*, note 24, p. 132 to 134; Thiago Sombra, "A tutela da confiança em face dos comportamentos contraditórios", (2008) 33 *Revista do direito privado* 307, 323 and 324.

143 TJSP, AC 0027706-32.2011.8.26.0564, Relatora Sandra Galhardo Esteves, decided on 19.09.2012.

hint of a future change in the plans of the author of the *factum proprium* for the reliance to be deemed reasonable[144]. In practice, this often amounts to requiring the subjective good faith of the party invoking *venire*[145]. In the example of the clothes store, the buyer is entitled to trust that the vendor, bent on helping with the change of management, will not undo what she has done for no good reason. The same applies to the customer expecting to be covered for health risks after signing the insurance contract, or after having obtained permission to have a surgery.

Third, the creditor must have turned around and gone against the representation he induced (the "contradictory behavior"). Again, the appreciation here is objective: the state of mind of the creditor is irrelevant, as is the contradictory nature of the contradictory behavior[146]. By itself, this new behavior is licit, just as the original one was. It is only the contrast between the two that justifies the operation of *venire*. Applied to the clothes shop actual case, if the vendor decides suddenly to cancel all purchase orders that she signed previously, the conduct itself might be legal in terms of the policy governing the orders. But it contradicts her *factum proprium*, and thus good faith[147]. In the health insurance illustration, the company would not be able to rely on the its general policy and invoke a previous illness in order to refuse coverage after forgetting to ask about such risks in the first place[148]. And if it authorized a surgery, it can't go back on its permission after the operation took place[149]. In another example, if a wife does not formally sign the contract concluded by her husband with a third party when she should have done so (because the contract involved the sale of an immovable belonging to the couple), her behavior is not illicit per se. According to art. 1647 of the Civil Code, it just allows her to ask for the nullity of this contract[150]. But should she decide to do so seventeen years later, after acting as if this was no problem at all, this

144 A. Schreiber, *supra*, note 24, p. 141 to 144.

145 RE 37.859/PR, *supra*, note 128. See also: TJRJ, AC 2007.001.37453, Relator Agostinho Teixeira da Almeida Filho, decided on 13.11.2007; TJRJ, AC 0217333-52.2009.8.19.0004, *supra*, note 135.

146 A. Schreiber, *supra*, note 24, p. 144 and 145.

147 TJRS, AC 589.073.956, *supra*, note 128.

148 TJSP, AC 0027706-32.2011.8.26.0564, *supra*, note 143.

149 TJRS, ED 70050931740, Relator Jorge Luiz Lopes do Canto, decided on 17.10.2012.

150 Orlando Gomes, "Validade do contrato do compra e venda de fazenda sem a outorga da mulher do vendedor", in *Pareceres inéditos*, Belo Horizonte, Ciência Jurídica, 1999, p. 417.

will characterize a contradictory behavior and cristallize the operation of *venire*[151]. Taken individually, both behaviors were licit, but their succession implies a sharp contradiction. As a consequence, the reliance of buyers in good faith must be protected[152].

An interesting moot point is the so-called "identity of subjects": must the author of the initial behavior be the same legal person as the one acting in a contradictory way afterwards? The answer seems to be negative, as long as the two share common interests, such as a company controlling another one, two solidary debtors, or two different divisions of some public administration. The second, albeit different, may thus be held liable although the dependent company, the other solidary debtor or the other administrative office was not the author of the *factum proprium*[153]. The same reasoning applies to the party invoking *venire* as well. In a case decided in 1999 by the *Tribunal de Justiça de São Paulo*, the defendant company always used to pay for the funeral expenses of deceased partners, even though the company's charter did not make this an obligation for them. So when the company pretended to go back to the letter of the charter to avoid paying for the funeral expenses of the plaintiffs' father, the TJSP found that *venire* applied and that the defendant could not deny its own *factum proprium*, even though others had actually benefited from it at the time, not the plaintiffs who only suffered the contradictory behavior[154].

Must there be a detriment flowing from the reliance? The question is much the same as the one discussed in relation with promissory estoppel. If money was spent by the debtor as a result of the representation induced by the initial conduct, reliance will be all the more easy to prove. This is also the case if the debtor neglected his activities and acted to his detriment in some fashion, although the prejudice need not be patrimonial to be taken into account[155]. In the clothes shop example, the buyer lost all the orders and had to start again, with the economic prejudice this involved. In practice, damage is often present, for instance, in cases involving banks

151 STJ, RE 95.539/SP, *supra*, note 128. See also: TJSP, AC 185.660-4/7, *supra*, note 128; TJSC, EDAC 2003.030846-6, Relator Carlos Prudêncio, decided on 03.04.2012.

152 See also: STJ, RE 37.859/PR, *supra*, note 128; STJ, RE 47.015/SP, *supra*, note 128; STJ, RE 141.879/SP, *supra*, note 124; TJRJ, AC 0003750-65.2006.8.19.0011, Relatora Luisa Cristina Bottrel Souza, decided on 15.12.2010.

153 A. Schreiber, *supra*, note 24, p. 154 to 162.

154 TJSP, AC 069.715-4/2-00, *supra*, note 128.

155 A. Schreiber, *supra*, note 128, p. 152 to 154; T. Sombra, *supra*, note 142, 328 to 330.

and credit. A bank might tolerate bad cheques by a customer for a long time, then suddenly negate him credit at the most inconvenient moment, three days before his monthly salary would boost his account[156]. Or the financial institution might decide to change the amount and mode of payment of moratory interests from one month to the next, without properly notifying customers of the change, and then cancel the credit card the following month as a result of the non-compliance with the new terms[157]. In both cases, the damage is done: credit cancellation has occurred, the customer was suddenly unable to face the expenses of daily life and and has been registered by the bank in the "black book" of credit (*cadastros negativos*) for the future. This last one might be undone as a result of the judgment applying *venire*. As for the rest of the prejudice, compensatory and moral damages are usually granted[158]. But according to other authors, detriment does not seem to represent an essential element of *venire*[159].

2. *Supressio*

Brazilian *supressio*[160] is a corrective mechanism targeting creditors who tolerate for a long time, or in a certain set of circumstances, contractual "misperformances" by the debtor, such as late payments or delivery in a way different from the one dictated by the original contract[161]. Partially shadowed by *venire*, *supressio* is now emerging as an avatar of good faith in its own right and expanding far from its contractual native ground. But mirroring the haphazard development of promissory estoppel as well,

156 TJRJ, AC 2007.001.37453, *supra*, note 145.

157 TJRJ, AC 0217333-52.2009.8.19.0004, *supra*, note 135.

158 Such was the case in the two judgments mentioned above, and in numerous others.

159 Most authors list only the three first ones, not detriment (or prejudice). See for instance: J. Martins-Costa, *supra*, note 128, 120; Luciano Penteado de Camargo, "Figuras parcelares da boa-fé objetiva and *venire contra factum proprium*", (2006) 27 *Revista de direito privado* 252, 261 and 262; Aldemiro Rezende Dantas Junior, *Teoria dos Atos Próprios no Princípio da Boa-Fé*, Curitiba, Juruá, 2008, p. 313 to 346. See also, in the jurisprudence of the STJ, RE 95.539/SP, *supra*, note 128.

160 Usually, Brazilian courts and authors write the word as "*suppressio*". We will follow here the spelling adopted by one of the co-authors in the paper grounding this part of the present one: Ana de Oliveira Frazão, "Breve panorama da jurisprudência brasileira a respeito da boa-fé objetiva no seu desdobramento da 'supressio'", (2010) 44 *Revista de direito privado* 28.

161 It is thus closely related to foreign civil law mechanisms such as the German *Verwirkung*, the Belgian and Dutch *rechstverwerking* or common law laches in the law of injunction.

supressio also induces opposition because its requirements and effects remain in a certain state of flux: in the words of a Portuguese author, *supressio* represents "a moving system"[162]. We shall study first its main features and legal basis (a) before examining those shifting requirements (b).

a. Main features and legal basis

Just like *venire*, the concept of *supressio* has been deduced from the third function of objective good faith through an interpretative process by judges and authors. All tend to agree that the unjustified passivity of the creditor, coupled with the passing of a certain time, is at the root of this specific avatar of good faith[163]. But *supressio* cannot be seen as a mere consequence of time, and thus confused with extinctive prescription: it is a response from the legal order to the disloyalty or the abusive inactivity of the creditor[164], functioning, at the same time, as a way of protecting the party who relied ont the creditor's behavior[165]. The emphasis placed on the protection of the debtor's reasonable expectations echoes the common law preoccupation with reliance evoked earlier[166]. *Supressio* thus appears as an equitable tool connected with contractual justice and the need to foster a certain balance between the contractual obligations[167].

And in the manner of *venire* again, *supressio* has the potential to apply in domains other than private contracts, as long as they involve some kind of obligation. Accordingly, the principle is used also in domains of private law presenting some connexity with the law of obligations, such as the law

[162] António Menezes Cordeiro, *Da Boa Fé no Direito Civil*, Coimbra, Almedina, 2001, p. 824.

[163] A. de O. Frazão, *supra*, note 160, 33 and 34; M. Dickstein, *supra*, note 25, p. 113.

[164] Among many others authors, Judith Martins-Costa (J. Martins-Costa, *supra*, note 30, p. 461 et 462) highlights the association between *supressio* and *Verwirkung*, since the latter sanctions disloyalty and inertia. Basil Markesinis and *al.* emphasize the relation between the right lost and the creditor's negligence (Basil Markesinis, Hannes Unberath and Angus Johnston, *The German Law of Contract. A Comparative Treatise*, Portland, Hart Publishing, 2006, p. 123).

[165] See: José Roberto de Castro Neves, "Boa-fé objetiva: posição atual no ordonamento jurídico e perspectivas de sua aplicação nas relações contratuais", (2000) 351 *Revista Forense* 161, 175; M. Dickstein, *supra*, note 25, p. 130.

[166] See in particular: A.M. Cordeiro, *supra*, note 162, p. 820, for whom detrimental reliance is the key to the application of *supressio*.

[167] *Id.*, p. 801 and 802.

of companies[168] and of divided co-ownership[169]. But it is also relevant in family law, particularly in the matter of alimony[170], in property law[171] and in public law[172].

b. Requirements

As stated above, the creditor's inaction before the non- or misperformance by the debtor and the lapse of a certain time are the main elements of *supressio*. Fifteen years is the general standard[173], but the time required might be shorter in some circumstances.Thus, for instance, a student owing 30 monthly payments as tuition fees to his school, who came to class regularly and was allowed to take the mid-terms can't be prevented from taking the finals on the basis of the fees unpaid. Here, the school's passivity was sufficient in the circumstances to warrant the application of *supressio* despite the fact that this passivity did not last for fifteen years[174]. All in all, the passivity should be unreasonable[175]; if it is deemed inaccep-

168 See for instance: TJRS, AC 70036067015, Relator Angelo Maraninchi Giannakos, decided on 06.10.2010.

169 For example in STJ, RESP 214680, Relator Ministro Ruy Rosado de Aguiar, decided on 16.11.1999; STJ, RESP 281290, Relator Ministro Luís Felipe Salomão, decided on 13.10.2008.

170 See among others: TJRJ, AC 2008.001.15578, Relator Edson Vasconcelos, decided on 16.04.2008; TJSP, AC 994080241501, Relator Francisco Loureiro, julgado em 21.05.2009.

171 For instance in TJDFT, APC 2009 08 1 008588-8, Relator Romeu Gonzaga Neiva, decided on 01.10.2009 (illicit occupation of another's immovable).

172 For example in STJ, RE 141879/SP, Relator Ministro Ruy Rosado de Aguiar, decided on 17.03.1998.

173 Thus for instance in TJRS, AC 70036067015, *supra*, note 168 (more than 20 years); TJRS, AC 70033073628, Relator Rui Portanova, decided on 03.12.2009 (24 years); TJRS, EI 70029964228, Relator Rui Portanova, decided on 14.08.2009 (15 years); TJRJ, AC 2009.001.10795, Relator Carlos Santos de Oliveira, decided on 07.04.2009 (more than 40 years); STJ, RESP 281290, *supra*, note 169 (15 years); STJ, RESP 325870, Relator Ministro Humberto Gomes de barros, decided on 20.09.2004 (more than 30 years); STJ, RESP 356821, Relatora Ministra Nancy Andrighi, decided on 05.08.2002 (idem).

174 See: TJRS, AC 70034079376, Relator Ney Wiedemann Neto, decided on 19.08.2010. See also: TJRS, AC 70026907352, Relator Rui Portanova, decided on 04.12.2008 (8 years); TJRS, AC 70024263758, Relator Rui Portanova, decided on 25.09.2008 (12 years); TJSP, EI 994031049155, Relator Francisco Loureiro, recorded on 24.01.2006 (more than 10 years).

175 TJDFT, APC 2006 07 1 000538-3, Relator Waldir Leôncio C. Lopes Júnior, decided on 17.12.2009.

table, *supressio* will be even easier to claim[176]. Finally, in a way reminiscent of promissory estoppel, *supressio* implies the existence of a previous legal relationship between the parties[177].

In addition to these, Brazilian courts also take into account other miscellaneous elements. Among these, some are more pertinent than others. Thus, insisting specifically on the bad faith of the creditor amounts to nothing more than a tautology, since *supressio* is based on good faith anyway[178]. But reliance may be a valuable criteria in ascertaining if *supressio* is available or not, in harmony with the doctrine mentioned earlier[179]. In a 2009 decision by the Tribunal de Justiça of Rio de Janeiro, the syndicate of a condominium tried to recover common expenses from a co-owner who had sold his apartment more than fourty years ago. *Prima facie*, such a claim was justified because this previous co-owner had failed to report the sale in the general register of immovables; as a consequence, the transmission of ownership to the buyer had not been completed[180]. But since the syndicate had abstained from asking such contribution to common expenses for more than fourty years, claiming it now amounted to "hurt the trust of the appellant in the inactivity of the creditor" and *supressio* thus prevented the syndicate from demanding the performance of this obligation[181]. Furthermore, in connection with reliance, the fact that the debtor suffered an actual prejudice helps prove the reliance, without amounting by itself to a necessary element of *supressio*[182].

Keeping in line with what we observed in relation to promissory estoppel and the Canadian criteria based on the intent to create legal relations, a certain unfortunate confusion appears sometimes between *supressio* and renunciation. Since *supressio* derives from objective good faith, the

176 TJDFT, APC 2006 07 1 000541-4, Relator Humberto Adjuto Ulhoa, decided on 10.04.2007.

177 M. Dickstein, *supra*, note 25, p. 119.

178 TJRJ, AC 2008.001.33165, Relator Ronaldo Álvaro Martins, decided on 16.12.2009.

179 See for example: TJRS, AC 70026907352, *supra*, note 174; TJRS, AC 70024263758, *supra*, note 174.

180 In relation to the sale of immovables, Brazilian law is similar to German law: publication is required to transfer ownership. See art. 1245 C. civ. and for instance C.M. da Silva Pereira, *supra*, note 23, p. 161.

181 TJRJ, AC 2009.001.10795, *supra*, note 173. See also, to the same effect, TJRJ, AC 2008.001.15578, *supra*, note 170.

182 M. Dickstein, *supra*, note 25, p. 130, 138, 147 and 148.

creditor's state of mind should not be relevant in its application. In this fashion, an employer was denied the right to ask back for a specific benefit that he had awarded to his employees during fifteen years in order to compensate for apparent unsanitary working conditions: even though an expert later concluded that no such conditions existed, his mistaken belief did not prevent *supressio* to come into play in this case[183]. As a consequence, *supressio* should be clearly distinguished from renunciation, which precisely implies such an intent to relinquish one's right on the basis of having knowledge of it. This, as we noted in our presentation of objective good faith in Brazil, is precisely what makes this principle and its dependents (such as *venire* or *supressio*) a tool to circumvent the "dark side" of the voluntarist, intent-based approach to contracts characteristic of civil law systems:

> "The basis of the interdiction of contradictory behavior lies in the objective contradiction of the manifest violation of the reasonable expectations encouraged by the initial behavior, not in the intent of the author of the contradictory conduct. What is at stake is the protection of reliance in those situations that do not amount to, in legal analysis, a declaration of will, a binding juridical act."[184]

Furthermore, what would be the use of doctrines such as *venire*, *supressio* and *surrectio* if they amounted to tacit renunciation, or, in the case of *surrectio*, to a tacit novation? Renunciation or novation would serve the purpose as well, and objective good faith be useless[185]. But contrary to principles and to the logic of objective good faith, an intent to renounce one's right is sometimes required by the court to establish *supressio*[186], thus liking it to forbearance waiver. Even the *Superior Tribunal de Justiça* (STJ) stepped on this crooked path in 2011, by emphasizing the proximity between *supressio* and the German notion of *Verwirkung*, the latter amounting, in practice, to the abandonment of a right[187]. This trend

183 Tribunal Superior do Trabalho, AIRR 133740-24.2002.5.01.0069, Relator Ministro Horácio Raymundo de Senna Pires, decided on 17.10.2008.

184 M. Dickstein, *supra*, note 25, p. 181 (our translation). See also: G.M. Martins, *supra*, note 121, 146. The same reasoning applies to *venire*: A. Schreiber, *supra*, note 24, p. 170 to 174; T. Sombra, *supra*, note 142, 317, 323 and 324.

185 M. Dickstein, *supra*, note 25, p. 174 and 182; A. Schreiber, *supra*, note 24, p. 174.

186 TJSC, AC 2001.003297-0, Relator Mazoni Ferreira, decided on 26.09.2007; TJSP, AC 1331967-0, Relator Moura Ribeiro, decided on 31.07.2008; TJRJ, AC 0006910-23.2005.8.19.0209, Relator Agostinho Teixeira de Almeida Filho, decided on 22.09.2010.

187 STJ, REsp 1190899/SP, Relator Ministro Sidnei Beneti, decided on 06.12.2011.

was confirmed in another case the same year, but fortunately it was more carefully phrased. *Supressio* intervened because an *appearance* of renunciation had been created towards the debtor, who had then relied on it[188]. Thus, the emphasis on the objective appearance of renunciation, rather than on the creditor's actual intent to renounce, restored both renunciation and *supressio* to their proper realms.

Another important aspect highlighted by that last case is the subcriteria linked to contractual balance, which is sometimes referred to – implicitly – by the courts when examining the question of *supressio*. The notion of contractual balance itself seems to point to detriment in the language of promissory estoppel: when the damage caused to the debtor is greater than the benefit the creditor can expect to receive by insisting on his strict rights, the contractual balance is broken and *supressio* is then used as a tool to restore it[189].

Otherwise, as with *venire* or promissory estoppel, all the circumstances of the case should be taken into account when deciding if *supressio* is to be found or not[190]:

> "*supressio* involves an individual act of justice, one that ponders the special circumstances of each practical case and studies in which way they make it particular, thus deserving to be compared with the institution of abuse of right, itself enshrined in art. 187 C.C."[191]

Reviewing the requirements used to apply *supressio* shows that this Brazilian institution lays in between waiver and promissory estoppel. The reference to detriment and reliance evoke both equitable doctrines, as does the need to take into account all circumstances of the case. But at least in theory, the emphasis on the creditor's long inactivity is quite

188 "*Suppressio* indicates the possibility of reduction of the obligational content due to the qualified inertia of one party, during the execution of the contract, in exercising one right or faculty, creating for the other the legitimate expectation that she must have renounced that right or faculty": STJ, REsp 1202514/RS, Rel. Ministra Nancy Andrighi, decided on 21.06.2011 (our translation).

189 TJDFT, APC 0071023-56.2008.807.0001, Relatora Nídia Correa Lima, decided on 23.06.2010; TJRJ, AC 2009.001.17109, Relator Carlos Santos de Oliveira, decided on 19.05.2009; TJRS, AC 70001911684, *supra*, note 141.

190 TJRJ, AC 0006910-23.2005.8.19.0209, *supra*, note 186; TJSP, AC 994070361822, Relator Vito Guglielmi, decided on 28.02.2008.

191 G.M. Martins, *supra*, note 121, 156.

unique. We have seen that waiver, as well as promissory estoppel, generally requires some sort of positive sign on the part of the promisor to qualify as a representation. Thus, for example, the mere fact that late payments were accepted without protest by the creditor eighteen times does not prevent him to decide to use a contractual sanction (an acceleration clause) at the nineteeth time[192]. In Brazil, *supressio* might well work in such a case, if the time of inaction on the part of the creditor is considered sufficient.

3. *Venire* and *supressio* as mechanisms of justice in particular cases

The very nature of doctrines such as *venire contra factum proprium* and *supressio* clashes with preoccupations traditionally entertained in the realm of contracts, connected to legal certainty, autonomy of the will (or freedom to contract as it would be called in common law systems) and in some cases, contractual balance. This is similar to what we observed about the relation between promissory estoppel and waiver, on the one hand, and consideration and bargain, on the other hand. As a result, mirroring what we observed in relation to both Anglo-Canadian doctrines, *venire* and *supressio* are conceived as exceptional remedies : they are available only when there is no other legal solution, and when a set of particular factual circumstances requires it[193].

The uncertainty plaguing the operation of both *venire* and *supressio* as to their precise requirements also recalls the fuzziness of the required components of waiver and promissory estoppel. But in Anglo-Canadian common law, this plasticity actually eased the difficult coexistence of the conflicting doctrines, because it allows for the equitable remedies to be toned down at need in order to alleviate specific collisions with the consideration requirement perceived as the core of the traditional vision of contracts. On the contrary, in Brazil, the uncertainty as to the precise requirements of *supressio* increases the tension between this mechanism and the fundamental tenets of contract law. Fortunately, in practice, the relative reserve shown by Brazilian courts when applying *venire* and *supressio* helps alleviate some of the doctrinal concerns sparked by the very existence of the two doctrines.

192 *John Burrows Ltd.* v. *Subsurface Surveys Ltd.*, *supra*, note 81 ; *supra*, p. 18.

193 M. Dickstein, *supra*, note 25, p. 508 and 509 ; G.M. Martins, *supra*, note 121, 146 ; A.M. Cordeiro, *supra*, note 162, p. 818.

Another difference between Brazil and common law systems such as Canada or England with respect of these doctrines based on conscience is that in Brazilian law, they form an integral part of the law of contracts. Because *venire* and *supressio* are seen as avatars of the principle of objective good faith placed by the 2002 Civil Code at the very heart of contracts, *venire* and *supressio* themselves are by nature instruments indigenous to this area of civil law. Within this forum, they are designed precisely to mitigate the sometimes unfortunate results of the voluntarist conception of contracts, and to protect reasonable reliance. For this reason, from a conceptual standpoint, they can never be conceived as "rogue" doctrines alien to the classic architecture of contract law. Where waiver and promissory estoppel, being equitable doctrines, can only interact with the common law of contracts according to the usual terms governing the relation between legal and equitable rules (*equity acts in personam*, etc.), *venire* and *supressio* always operate from the core of contract law and share some of the moral legitimacy imparted to the principle of good faith from which they flow directly. In this view, the Brazilian wand of conscience is located *within* the realm of contracts, whereas its common law equivalent can only make itself felt from *without*, since the existence of a general principle of contractual good faith continues to be rejected in England and Canada. Indeed, objective good faith in Brazil enjoys a double function within the law of obligations: it can be invoked both for flexibilization of what was formally agreed – enlarging or reducing the original content of the contract – or for enforcing the contractual prescriptions[194]. And the protection of reliance will be the key which defines when good faith should be used in one purpose or another. That's why only each particular case will define if the specific contract will exit the box transformed into something else or not. In a way, the impact on Brazilian law of remedies such as *venire* and *supressio*, seen as applications of the principle of good faith, has been to mitigate the traditional opposition between good faith, on the one hand, and autonomy of the will, on the other hand. Good faith is now considered an allied of what is called "private autonomy", a new vision of autonomy of the will which purports to look at the real intent of the

[194] A.M. Cordeiro, *supra*, note 162, p. 1.257 summarizes the tension which is inherent to objective good faith: "The evolution of good faith has shown how it has served different vectors and, perhaps, opposite ones: one may remember either the strengthening of contractualism or judicial control of contractual content. One cannot be asked for a theoretical solution imposed by good faith: only before a precise legal order and the practical case, will the response flourish" (our translation).

parties, thus beyond a formal *pacta sunt servanda* approach usually alien to objective good faith.

III. The Metamorphosis

What is the precise effect of the judicial wand of conscience? What is the contract altered into? In Brazil, *venire* and *supressio* are said to modify the legal relationship between the parties. The judge must then "interprete, and, when necessary, alter the contract to adapt it to the parameters defined by objective good faith"[195]. As a minimum result, the promisor's right may be merely suspended (A). But it can also be extinguished (B), and in Brazilian law, a new right might be created for the debtor through the operation of *surrectio* (C).

A. Suspension of the Creditor's Right

The cardinal rule to ascertain the effect of promissory estoppel or waiver is that it depends on different elements: the nature of the representation made, the type of contract involved, the extent of the reliance and the inequitability that would ensue (or not) if the promisor is allowed to go back on his promise in a certain manner at a certain time[196]. As a result, suspension might be the norm, but extinction of the promisor's right may be an exception given the circumstances of the case.

Suspension is typically the effect of forbearance waiver. As a rule, the waivor may resume the waived right by giving reasonable notice, as we observed with the example of the car body built to specification by a company that kept delaying the delivery. The buyer first chose to wait for completion and waived his strict right to have the car delivered at the agreed time, but he was able to terminate the contract after giving the company reasonable notice that they had to deliver for a certain final date[197]. In this way, waiver appears as an "instrument to prevent injustice [..] by protecting

[195] M. Dickstein, *supra*, note 25, p. 150 (our translation).

[196] R. Bradgate, *supra*, note 40, at the page 385; G.H.L. Fridman, *supra*, note 6, p. 136.

[197] *Charles Rickards Ltd.* v. *Oppenheim*, *supra*, note 57. See also, for the principle, R. Stone, *supra*, note 42, p. 136; S.M. Waddams, *supra*, note 7, p. 151.

reasonable reliance"[198] rather than to enforce a given promise (for which consideration would normally be necessary).

In most cases, such is also the end result of the judicial wand named promissory estoppel[199]. Reliance is the interest protected here as well, not expectancy which would guarantee the full performance of a certain promise[200]. Promissory estoppel thus generally leads to the suspension of the promisor's strict right, not to its extinguishment for the future[201]. When a representation implies that the promise will be revocable on notice, which is a common occurrence, it will make the operation of promissory estoppel merely suspensory. In *Vancouver City Savings Credit Union* v. *Norenger Development Inc.* (2002), a landlord claimed an adjustment of the rent due to an error in calculating the portion of property taxes included in it. The tenant tried to raise a promissory estoppel, but failed because the Court found that the tenant had been given reasonable notice that the landlord's strict rights were going to be reasserted[202]. Of course, "what is reasonable will be a question of fact in each case", and it might even be argued that reasonable notice may be given when a representation has been made that a right would be suspended during a given period of time, before the time allowed has lapsed[203].

B. Extinction of the Creditor's Right

Election waiver is normally permanent once the creditor has chosen a certain course of action[204]. When promissory estoppel implies a similar election process, the outcome is identical. If a union agrees to withdraw a

198 S.M. Waddams, *supra*, note 7, p. 151.

199 See for instance: *Tool Metal Manufacturing Co. Ltd.* v. *Tungsten Electrical Co. Ltd.*, *supra*, note 67; *Ajayi* v. *R.T. Briscoe (Nigeria) Ltd.*, [1964] 1 W.L.R. 1326 (P.C.); *Re Provincial Treasurer of Alberta* v. *Fen-Dor Plastics (1970) Ltd.*, (1973) 40 D.L.R. (3d) 292 (Alta. D.C.).

200 S.M. Waddams, *supra*, note 7, p. 151. But see *contra* Adam Ship, "The Primacy of Expectancy in Estoppel Remedies: An Historical and Empirical Analysis", (2008) 46 *Alta. L.R.* 77, 100, who acknowledges nonetheless that the majority of cases surveyed was also consistent with the protection of reliance.

201 R. Bradgate, *supra*, note 40, at the page 385.

202 *Supra*, note 92. See also: *Tool Metal Manufacturing Co. Ltd.* v. *Tungsten Electrical Co. Ltd.*, *supra*, note 67.

203 R. Bradgate, *supra*, note 40, at the page 382.

204 R. Bradgate, *supra*, note 40, at the page 364.

grievance from the negotiation table, with the employer relying on this to concede more in the following proceedings, the union can not re-file an identical grievance later[205]. And a promise not to claim the benefit of a limitation period amounts to such an election as well[206]. The same can be said about *venire* or *supressio*, which may lead to the creditor being deprived of the right to use contractual or legal sanctions that he did not resort to in time.

In connection with *venire*, for example, a municipal administration will not be allowed to demand the nullity of compromises of sale to private citizens under the pretext that they finally discovered that the subdivision of the proposed housing scheme is invalid[207]. The same decision awaits the spouse asking for the nullity of an immovable for want of her formal permission, when she treated the sale as valid for seventeen years and led the buyers to believe that everything was fine[208].

Conversely, by the operation of *supressio*, a creditor could find himself unable, after a long inaction, to register the debtor on the "black book" of credit (*cadastros negativos*)[209], to claim interests for late payment[210] or the application of a penal clause[211]. Moreoever, especially if the contract involved belongs to those protected by the Brazilian consumer's code, such as a health insurance plan or a contract of furniture of electricity or water, the passive creditor (in front of late payments, say) might be denied the right to demand the nullity of the contract[212]. This is particularly likely if the creditor has been purposefully waiting, after non-performances for a long

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205 *Irving Tissue Co.* v. *Communications, Energy and Paperworkers Union of Canada, Local 786*, *supra*, note 69.

206 *Brar* v. *Roy*, *supra*, note 44; *Murphy Oil Co.* v. *Commercial Petroleum and Hydraulic Service Ltd.*, *supra*, note 70 and in general J.A. Manwaring, *supra*, note 73, 66 and 67.

207 STJ, RE 37.859/PR, *supra*, note 128; STJ, RE 47.015/SP, *supra*, note 128; STJ, RE 141.879/SP, *supra*, note 124; TJRJ, AC 0003750-65.2006.8.19.0011, *supra*, note 152.

208 STJ, RE 95.539/SP, *supra*, note 128. See also: TJSP, AC 185.660-4/7, *supra*, note 128; TJSC, EDAC 2003.030846-6, *supra*, note 151.

209 TJRJ, AC 2009.001.61241, Relator Azevedo Pinto, decided on 02.12.2009; TJGO, AC 200902138485, Relator Geraldo Gonçalves da Costa, decided on 15.09.2009.

210 TJRS, AC 70033659590, Relator Pedro Celso Dal Pra, decided on 25.02.2010.

211 TJSP, AC 990092622447, Relator Adilson Araújo, decided on 24.08.2010; TJSP, AR 992090490362, Relator Adilson de Araújo, decided on 01.12.2009; TJSP, AI 991080588358, Relator Moura Ribeiro, decided on 18.09.2008; TJSP, AC 1109661009, Relator Hamid Charaf Bdine Júnior, decided on 25.02.2008.

212 TJSC, AC 2001.003297-0, *supra*, note 186.

time on the part of the debtor, to demand the nullity just in time to renegotiate the contract to his own advantage, and to the loss of the debtor[213]. In a synallagmatic contract (involving obligations for more than one party, such as in a health insurance plan or a contract of services), the inactive creditor might even lose the benefit of the exception *non adimpleti contractus*. Again, this result is more likely when the contract involved belongs to those protected by the consumer's code[214]. The exception *non adimpleti contractus*, a particular form of retaliation in synallagmatic contracts, means that if one party does not perform his contractual obligation, the other has the faculty to suspend the performance of his own as a form of retaliation[215]. *Supressio* will then mean, for the creditor, that he can't stop providing health services, electricity or water if he tolerated late payments for a very long time without complaining[216]. It is only when the client's non-performance is recent, so that it can possibly be remedied sucessfully, that the exception *non adimpleti contractus* may be used by the creditor to interrupt services[217].

As for promissory estoppel and forbearance waiver, the cardinal rule stated above implies that the suspension outcome might be set aside if the circumstances require it. Thus for instance, the waivee or promisee might have irrevocably altered his position in reliance on the waiver or the promissory estoppel[218]. It then would appear inequitable to allow the promisor/waivor to resume his strict rights after a period of suspension, even by giving reasonable notice. When an employee accepts to continue employment with the company's new buyer because his previous employer assured him verbally that his additional pension plan would be paid despite the

213 TJSC, AC 2008.050547-0, Relatora Maria do Rocio Luz Santa Ritta, decided on 25.05.2010.

214 TJSC, AI 2008.015499-8, Relatora Maria do Rocio Luz Santa Ritta, decided on 22.04.2010.

215 Art. 476-477 C.C. and for example C.M. da Silva Pereira, *supra*, note 23, p. 135 to 137. For the same notion in Quebec, see among others: Quebec Research Centre of Private & Comparative Law, *Private Law Dictionary and Bilingual Lexicons*, Cowansville, Yvon Blais, 2003, at *exception of non-performance*.

216 TJRJ, AC 2009.001.63963, Relator Edson Vasconcelos, decided on 11.11.2009; TJRS, AC 70024338758, Relator Odone Sanguiné, decided on 29.10.2008; TJSP, AC 992090687972, Relator Carlos Alberto Garbi, decided on 01.09.2009. See also, for a contract between a school and a student (who had failed to pay his tuition for 30 consecutive months): TJRS, AC 70034079376, *supra*, note 174.

217 TJRJ, AI 2008.002.02815, Relator Marcos Alcino Torres, decided on 23.09.2008.

218 R. Bradgate, *supra*, note 40, at pages 364 and 385.

strict letter of agreement, the operation of promissory estoppel simply means that the said benefits will have to be paid once and for all[219]. Conversely, revocation might be impossible if there was a contractual time limit assigned to the performance and the revocation did not allow the promisee to respect it[220]. It all depends on the circumstances of each case. In *D and C Builders* v. *Rees*, for example, what would have happened if the court had found no unequitability on the part of the defendant and applied promissory estoppel? The part payment made by the defendant would then have led to the extinguishment of the debt[221].

When an instalment obligation is involved, the effect of promissory estoppel is almost inevitably permanent. Such was the case in *High Trees*: the half-rent not perceived during the war years by the plaintiff could not be recovered afterwards at all, thus leading to the permanent extinguishment of this obligation of the defendant[222]. In short, when promissory estoppel applies to a continuing contract, the effect is to "both extinguish and suspend"[223].

The same dilemma can be found in Brazilian law in relation to *venire*: impeding or even declaring null and void the contradictory conduct has the same dual effect[224]. If the *factum proprium* concerns a single obligation or issue, impeding the contradictory behavior amounts to altering permanently the legal situation of the parties. Thus for example, a party who first praised an expert report as to the value of a deceased partner's share, then judicially opposed its homologation, will receive the said homologation as the appropriate sanction for his contradictory behavior[225]. The same final

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219 *Hepburn* v. *Jannock Ltd.*, *supra*, note 107. See also: *Shoppers World Co.* v. *808602 Ontario Ltd. (c.o.b. C.J.'s Sportsbar)*, [2004] O.J. N° 781 (Ont. S.C.), where a tenant in a mall accepted to relocate his bar in reliance on the promise by mall authorities to pay for moving expenses, as well as, for the principle, general J.A. Manwaring, *supra*, note 73, 66 and 67.

220 *Ogilvie* v. *Hope-Davies*, [1976] 1 All E.R. 683; R. Bradgate, *supra*, note 40, at the page 386.

221 *Supra*, p. 225 and 239-240, as well as R. Stone, *supra*, note 42, p. 119.

222 *High Trees*, *supra*, note 1; M.P. Furmston, *supra*, note 48, p. 134 to 136; David Capper, "The Extinctive Effect of Promissory Estoppel", (2008) 37 *C.L.W.R.* 105.

223 R. Stone, *supra*, note 42, p. 118.

224 A. Schreiber, *supra*, note 24, p. 162 to 169; L.P. de Camargo, *supra*, note 159, 262 to 263; T. Sombra, *supra*, note 142, 327 to 329.

225 TJRJ, AC 2.699/97, *supra*, note 28. This contradictory behavior was exhibited before the court, the report having been first praised by the party as a piece of "well-crafted

result is also produced when tax authorities are forbidden to apply retroactively a change in the judicial interpretation of a fiscal statute[226], when a municipality is ordered to treat annulled labor contracts as valid and pay the remaining salary[227], or when a health insurance company has to pay for an operation it authorized before retracting this permission afterwards[228], or is prevented from invoking a preexisting illness because it forgot to do so at the time of the conclusion of the contract[229].

This implicit duality can be found also in relation to *supressio* in cases where it parallels the operation of promissory estoppel or forbearance weaver, but judges and authors express it in a rather inconsistent fashion. Thus, the STJ sometimes defines *supressio* as an instrument of extinction of contractual obligations[230] and at other times as leading only to their loss of efficacy[231]. Interestingly enough, these conflicting statements originated from the same judge, but this uncertainty is reflected in the decisions of lower courts, only increased by the diversity of the terminology used to describe the effect of *supressio*[232]. The STJ recently decided in the sense of allowing *supressio* an extinctive effect for the future[233], but other courts disagree and limit the operation of *supressio* to past effects only[234], in a way reminiscent of the common law notice in promissory estoppel and forbea-

work", "serious and learned", and apt to "solve the conflict between the parties" (our translation). See also, in relation to matrimonial property and divorce, STF, RESP 86.787/RS, *supra*, note 128.

226 TJRS, AC 70005342373, *supra*, note 141.

227 TJMG, AC 261.310-7/00, *supra*, note 128.

228 TJRS, ED 70050931740, *supra*, note 149.

229 TJSP, AC 0027706-32.2011.8.26.0564, *supra*, note 143.

230 STJ, RESP 953.389, Relatora Ministra Nancy Andrighi, decided on 15.03.2010. See also, to the same effect: M. Dickstein, *supra*, note 25, p. 150. The fact that the author adopts the theorical frame of *venire* to analyze the effects of *supressio* does not help clarify the matter.

231 STJ, RESP 1096639, Relatora Ministra Nancy Andrigui, decided on 12.02.2009.

232 Some evoke the "limitation of the validity of the ulterior application of a right" (TJSC, AC 2009.051870-0, Relatora Maria do Rocio Luz Santa Ritta, decided on 26.10.2010); others the "limitation of the exercice of a subjective right" (TJRJ, AC 2009.001.17109, *supra*, note 189), or the "paraysis of the claim" (TJRS, AC 70001911684, *supra*, note 141), or the "disparition of the right itself" (TJPR, AI 0557362-8, Relator Jurandyr Souza Junior, decided on 24.06.2009).

233 STJ, REsp 1190899/SP, *supra*, note 187.

234 TJSP, APC 0121901-14.2009.8.26.0100, Relator Luiz Antonio de Godoy, decided on 19.06.2012.

rance weaver. As a result, the only certainty is that the creditor is precluded[235] from asserting his particular strict right in a given case, so that his legal action against the debtor fails at least in part. Since there is no equivalent of the reasonable notice associated with waiver in the Brazilian law of *supressio*, the awkward practical result is a disparition of the creditor's right for the part of the claim connected to past payment, with no real clue as to the fate of the obligation for the future. Things are pretty straightforward when the contract involves a single performance. Thus, creditors might well be denied their right to demand the agreed performance[236], for example to receive payment on time[237]. As with the common law though, the maximum uncertainty lays with instalment obligations (contracts of successive performance[238], in civil law parlance). But it seems clear that

> "[the] creditor who agreed, during the execution of a contract of successive performance, with the payment in another place or at a time different from the one provided in the agreed contractual dispositions, can not surprise the debtor by demanding the literal application of the contract"[239].

It may be that the notion of *surrectio*, which is going to be explained now, is designed precisely to remedy this particular difficulty.

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235 The term used in Portuguese is the substantive *preclusão*. See especially: Pedro Henrique Pedrosa Nogueira, "Notas sobre preclusão e *venire contra factum proprium*", (2009) 168 *Revista de processo* 331, 332 to 343. Interestingly, French-speaking common laywers in Canada also translate *estoppel* by "*préclusion*": see for instance the Centre de traduction et de terminologie juridique de l'Université de Moncton, *Vocabulaire anglais-français de la common law*, vol. 3 « Procédure civile et preuve », Moncton, Éditions du Centre universitaire de Moncton, 1983.

236 See the case mentioned in the introduction: TJRJ, AC 2009.001.17714, *supra*, note 3.

237 See for instance: TJRS, AC 70036846012, Relator Dorval Bráulio Marques, decided on 29.07.2010; TJRJ, AC 2009.001.65801, Relator Miguel Ângelo, decided on 03.11.2009; TJRJ, AC 2008.001.56381, Relator Marco Aurelio Fores, decided on 10.03.2009; TJSP, AC 994060176798, Relator Francisco Loureiro, recorded on 07.02.2007; TJSP, AC 994000723563, Relator Luís Eduardo Scarabelli, recorded on 21.10.2005.

238 *Contractos de execução sucessiva*: for example: C.M. da Silva Pereira, *supra*, note 23, p. 60 and 61.

239 Ruy Rosado de Aguiar Júnior, *Extinção dos contratos por incumprimento do devedor*, Rio de Janeiro, AIDE, 2004, p. 254, quoted by M. Dickstein, *supra*, note 25, p. 125.

C. *Surrectio* and the birth of a new right for the debtor

A conceptual twin to the doctrine of *supressio*, again in the manner of heads and tails on the same coin, *surrectio* is defined as the birth of a right or a prerogative as a result of the operation of *supressio*, and as required by social necessity[240]. In other words, when the creditor is precluded to ask for the performance of what was agreed originally, this impediment may be interpreted as creating a correlative right on behalf of the debtor, a right to fulfill the obligation only as modified through the operation of *supressio*[241]. An example of *surrectio* was given in the introduction to this paper: the factual acceptance of a rent inferior to the one specified in the agreement during a certain amount of time implied a suppression (*supressio*) of the creditor's right to the full original amount, not only for the past, but also for the future[242]. The same would occur if late payments were accepted for a long time[243]. Thus, *surrectio* amounts to the result of an implied modification brought to the original contract.

The precise effect of *surrectio* may be retroactive only, or apply in the future as well. It all depends of the circumstances of the case. Thus, for instance, when it was found that a public servant was promoted to a higher post, with a better salary, contrarily to the rules of public labor law, he was demoted to his previous position but allowed, thanks to the operation of *surrectio*, to keep the higher pay he had received in the meanwhile[244]. In such a case, *surrectio* applied only to a past benefit, that the party was allowed to keep. But *surrectio* may also secure a right for the future. In a case decided by The *Tribunal Superior do Trabalho*, the Brazilian Superior Court of Labor, an employee had received for fifteen years an extra pay to compensate for an unhealthy working environment. But when an expert finally hired by the employer concluded to the inexistence of such insalubrious

240 A.M. Cordeiro, *supra*, note 162, p. 821 to 824.

241 The doctrine of *surrectio* corresponds to the German institution of *Erwirkung*, closely associated to the one of *Verwirkung*.

242 TJRJ, AC 2009.001.17714, *supra*, note 3. See also: TJRJ, AC 2009.001.50478, Relator Alexandre Câmara, decided on 12.01.2010; TJRJ, AC 2009.001.61241, *supra*, note 209; TJRJ, AC 2009.001.63963, *supra*, note 216; TJPR, AC 545.377-8, *supra*, note 123; TJRJ, AC 2009.001.17109, *supra*, note 189; TJRJ, AC 2009.001.10795, *supra*, note 173; TJRS, RC 71001586668, Relator Ricardo Torres Hermann, decided on 15.05.2008.

243 TJSP, AC 1331967-0, *supra*, note 186.

244 Tribunal Superior do Trabalho, RR 59200-56.2006.5.04.0012, Relatora Ministra Dora Maria da Costa, decided on 18.05.2012.

work conditions, the employer decided to cut the additional pay and the employee went to court. The Brazilian Superior Court of Labor decided in favor of the operation of *surrectio*, in order to avoid the interruption of the benefit. The reasons given were that the Court focused first and foremost on the subjective reliance of both parties about the insalubrity rather than on the objective conclusion from the expert. As a result, *surrectio* led to the incorporation of the benefit in the employee's remuneration. Conversely, as a consequence of the *surrectio* in favor of the employee, the employer's right to cut the additional payment was effectively suppressed for the future as well[245]. The same was held of health insurance benefits for "minor" dependents, when the insurance company accepted payments during ten years after their majority without protest: *surrectio* meant that they had acquired the right to enjoy this benefit independently of their age[246].

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As a tentative conclusion, informal variation of contracts is possible both in Canadian provinces of common law and Brazil through judicial magic wands such as waiver, promissory estoppel, *supressio* and *venire*, with different outcomes. The creditor may be temporarily prevented from using a right born out of the original agreement, or permanently lose it. The Brazilian debtor may also acquire through *surrectio* a new right out of the extinction of the creditor's correlative right. All along, we observed that the shadows and uncertainties associated with the whole metamorphosis, both in terms of the requirements behind the operation of the wand and the exact scope of the end result, are mirrored in Brazilian law and Canadian common law. So is the expected "collision", albeit to a different extent, between the remedy used and the general frame underlying contract law. The magic of the judicial wand works precisely to avoid such a direct clash. Indeed, it operates by removing the case from the sphere of orthodox contract law and placing it, instead, either within the confines of another legal domain altogether (the realm of equity in Canada), or within reach of a natural counterweight in the contractual sphere (objective good faith in Brazil).

245 Tribunal Superior do Trabalho, AIRR 133740-24.2002.5.01.0069, *supra*, note 183.
246 TJSP, APC 0121901-14.2009.8.26.0100, *supra*, note 234.

In relation to the issue of good faith, the reluctance to replace promissory estoppel and waiver by a general principle of good faith examplifies the traditional common law distrust towards general principles used as legal rules rather than as informal guiding lights. Good faith is thus generally ousted as a legal basis, although any odd case to the contrary is hailed with enthusiasm by a growing fringe of Academics[247], but accepted as the underlying context of specific doctrines such as waiver and promissory estoppel[248]. The situation may appear to be different in Brazilian civil law, but we saw that even though *supressio* and *venire* are applications of the third function of objective good faith, they are useful as separate doctrines to avoid the "overuse" and deformation of the latter. If anything, this Brazilian experience might support the fears of some common lawyers in connection with the vagueness and uncertainty that good faith as a principle would potentially introduce in contract law, and encourage them to work on a more precise definition of the requirements and effect of promissory estoppel and waiver instead.

247 See for example: *Yam Seng PTE Ltd.* v. *International Trade Corporation Ltd.*, [2013] EWHC 111, where an implied obligation to act in good faith was found in a very short express contract which stated none, in order to find liability in a party making false statements. English academics immediately organized an event to discuss this progression in the reception of the good faith principle (*The role of good faith in English contract law after Yam Seng PTE Ltd v International Trade Corporation Ltd.*, British Institute of International and Comparative Law, March 20th 2013.

248 Good faith in English or Canadian law is a prickly subject: while still marginal in the practice of the courts and thus, in the actual common law (a state of fact reflected in the perfunctory treatment usually given to it in contracts treatises: see for example M.P. Furmston, *supra*, note 48, p. 33), it has been the focus of much interest on the part of doctrine authors. But given the fact that the function of objective good faith is already fulfilled for the most part by other principles, such as estoppel, waiver, unconscionability or others, even the adoption of a general principle would not displace them. It would probably act only as an underlying basis, moving in the open only where no other remedy can be found: S.M. Waddams, "Good Faith, Unconscionability and Reasonable Expectations", (1995) 9 *Journal of the Common Lawyer* 1.