Fundamental Rights and Contract Law

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Abstract: Originally, contract law was considered to be immune from the effect of fundamental rights, the function of which was limited to being individual defences against the vigilant eye of the state. This traditional view, however, has recently been put under pressure as a result of fundamental rights increasingly becoming relevant for (European) contract law. The relationships between private parties under contract law have started losing their immunity from the effect of fundamental rights. It is argued in this essay that the major question at present is no longer whether fundamental rights may have an impact on contract law, but to what extent this will occur, and that the answer to this question will determine the future of (European) contract law.

I. Introduction

What is the potential of fundamental rights to influence the relationships between private parties under contract law? In the past, this question provoked a short answer: little, if any at all. Such an answer was based on the sharp analytical and historical distinction between public and private law. In most European legal systems, fundamental rights as an aspect of public law were for a long time considered to be individuals’ defences against the vigilant eye of the state, and in this function, they did not have any prominent impact on the relationships between private parties in the different phases of the life of a contract. It is noteworthy that even in Germany, where as early as 1958 the Federal Constitutional Court ruled that the German Constitution contained an objective system of values which must apply throughout the whole legal order, including private law, contract law had not been substantially affected by fundamental rights for several decades. Yet, recently, in some legal systems, in German law in particular, there has been a noticeable change in the extent to which fundamental rights have begun to have an impact on the relationships between private parties under contract law. The latter have started losing their immunity from the effect of fundamental rights, which has led

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1 BVerfG 15 January 1958, BVerfGE 7, 198 (Lüth).
many authors to speak about the tendency towards the constitutionalisation of contract law.  

At present, this tendency has primarily manifested itself in the national contract law of some EU Member States where, as will be shown in this essay, the domestic constitutional and/or ordinary courts have to a greater or lesser degree demonstrated their readiness to extend the effect of fundamental rights in the realm of contracts, in particular, through the general private law norms such as good faith or good morals. Recently, the willingness to subject the interpretation of private agreements concluded under the national contract law of the States Parties to the European Convention on Human Rights to control concerning their compatibility with the Convention has also been clearly demonstrated by the European Court of Human Rights (ECtHR) in the Pla case which will be discussed below. In contrast to the national contract law of some EU Member States, European contract law has been affected by fundamental rights to a much lesser extent. There is, however, a huge potential for fundamental rights to play a more prominent role also in this area of the law. It should be taken into account that according to Article 6(1), (2) of the EU Treaty currently in force, the Union shall respect fundamental


rights as guaranteed by the European Convention on Human Rights and as they result from the constitutional traditions common to the Member States, as general principles of Community law. In view of this obligation, the developments in the national legal systems of the EU Member States and in the case law of the ECtHR may exercise a profound impact on the EU approach to the relationship between fundamental rights and contract law. Furthermore, the inclusion of the extensive catalogue of fundamental rights in the Nice Charter for the Fundamental Rights of the European Union 2000 which has been included in the Constitution for Europe illustrates the growing importance of fundamental rights in the EU and opens up the possibility for EU law, including European Contract Law, to be influenced by them. It appears that whatever may be the destiny of the Constitution for Europe, there is no longer any way back as far as the recognition of the binding character of the Nice Charter is concerned. Therefore, Part II of the Constitution for Europe devoted to EU fundamental rights has not lost its significance today.

In light of that, this essay will first briefly discuss the major recent developments in the relationship between fundamental rights and contract law in several EU Member States, namely, Germany, the Netherlands and the United Kingdom. The choice of these legal systems is explained by the fact that whereas in Germany the relationship between fundamental rights in contract law is largely determined by the constitutional court, in the Netherlands and the UK, in the absence of such a court, this issue falls exclusively within the competence of the ordinary courts. The focus of the discussion will primarily be the extent to which the national contract law in these legal systems has been affected by fundamental rights. Subsequently, the recent case law of the ECtHR, which throws some light on the views of the Court with regard to the effect of fundamental rights on contracts, will be considered. Against this background, the potential effect of EU fundamental rights on European contract law and the readiness of the European Court of Justice (ECJ) to make use of them will be analysed.

II. Fundamental Rights and Contract Law in the National Legal Systems

1. Lessons from Germany: Towards the Subordination of Contract Law to Fundamental Rights?

It would not be an exaggeration to say that the constitutionalisation of contract law in Europe has currently reached its most advanced stage in Germany where the case law of the Federal Constitutional Court contains the most telling examples of the far-reaching effect of constitutional rights on the
relationships between private parties under contract law. It all started with the judgment of the Constitutional Court in the *Handelsvertreter* case\(^4\) in 1990 where, in essence, the Court invalidated a non-competition clause in the contract between a commercial agent and his principal on the ground that it was contrary to the agent’s constitutional right to freedom to exercise a profession guaranteed by Article 12(1) of the Basic Law. According to this contractual term, the agent was barred from working in any capacity for any competitor of the principal for two years after the termination of the contractual relationship, and in the event that the termination was brought about by the culpable behaviour on his part he would not be entitled to any compensation. Although this clause was compatible with the mandatory provisions of the German Commercial Code introduced by the German legislator with a view to regulate the conflict of interests between the principal and the agent and, in particular, to protect the agent who often had only little negotiating power, the Federal Constitutional Court overturned the decision of the German Supreme Court in civil law matters in which the clause in question was upheld and it declared the respective provisions of the Commercial Code to be unconstitutional. In the view of the Constitutional Court, in those cases where the legislator omits to adopt mandatory contract law for particular areas of life or types of contract, it is the private law courts which are obliged to protect constitutional rights in situations of disturbed contractual parity using the means available within private law.

In 1993 the Constitutional Court delivered another revolutionary judgment in the famous *Bürgschaft* case\(^5\) where, essentially, the Court invalidated a contract under which the daughter had acted as a surety for her father’s debts on the basis of her constitutional right to the free development of one’s personality (Article 2[1] of the Basic Law) in conjunction with the principle of the social state (Articles 20[1] and 28[1] of the Basic Law). According to the Court, in cases where a ‘structural inequality of bargaining power’ has led to a contract which is exceptionally onerous for the weaker party, the private law courts are obliged to protect the constitutional right to private autonomy of this party by intervening within the framework of the general clauses (§ 138[1] and § 242 of the German Civil Code concerning good morals and good faith, respectively). In the case at hand, a contractual imbalance existed because the bank had failed to sufficiently inform the daughter, who at the time of concluding the contract was 21 years of age, did not have a high level of education, owned no property and worked as an unskilled employee.

\(^4\) BVerfG 7 February 1990, *BVerfGE* 81, 242 (*Handelsvertreter*).
\(^5\) BVerfG 19 October 1993, *BVerfGE* 89, 214 (*Bürgschaft*).
at a fish factory for a modest salary, about the risk relating to the suretyship, although the risk was relatively high compared to her income.

In addition to commercial agents and sureties, some six months later extensive protection on the constitutional level was also given to tenants as a result of the Constitutional Court’s decision in the *Parabolantenne* case.⁶ In this case the Constitutional Court obliged a landlord to allow the tenant of Turkish origin to install an additional antenna in order to be able to receive Turkish TV programmes. The decision of the private law courts which upheld the refusal of the landlord to permit such an installation on the basis of the contract concluded between the parties was considered by the Constitutional Court to be unconstitutional. According to the Court, by interpreting § 242 of the Civil Code on good faith, which was applicable in this case, in a very restricted manner, the private law courts had violated the tenant’s constitutional right to freedom of information guaranteed by Article 5(1) of the Basic Law.

Despite fierce criticism of this approach in the German literature not only from lawyers with a private law background, but also from those with a public law background,⁷ the more recent case law of the Constitutional Court does not show any signs of the Court retreating from this stance. On the contrary, by two spectacular judgments of 26 July of 2005⁸ in which the Court

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⁶ BVerfG 9 February 1994, BVerfGE 90, 27 (*Parabolantenne*).
declared clauses in life insurance contracts to be unconstitutional, it has demonstrated its readiness to interfere further with contract law and to subject contractual agreements of private parties to control as to their compatibility with constitutional rights. In these judgments, the Court held *inter alia* that the State’s duties to protect the insured person’s constitutional right to the free development of personality (Article 2[1] of the Basic law) and the constitutional right to property (Article 14[1] of the Basic Law) ensure that in the case of the assignment of claims out of life insurance contracts, the assets created with the insurance company through the payment of the fees by the insured will not be negatively affected to the detriment of the insured.

A characteristic feature of this case law of the Constitutional Court is the leading role of constitutional rights in the resolution of disputes arising under contract law. Although in all of the cases mentioned fundamental rights were not formally directly applied to the relationships between private parties and it was contract law which remained applicable, in practice the Constitutional Court determined the outcome of the case on the constitutional law level by balancing the competing fundamental rights involved in each case against each other. Thus, for example, in the *Bürschaft* case, the conflict arose between the daughter’s constitutional right to party autonomy in conjunction with the principle of the social state and the bank’s constitutional right to party autonomy, and the good morals clause which was formally applicable in that case could not change the outcome of this balancing.9 Moreover, in those cases where the private law courts were held to be *obliged* to protect the constitutional rights of certain actors and for this purpose to intervene in contractual relationships by means of the general clauses, the role played by contract law, in particular general clauses, in determining when, under what conditions, and to what extent constitutional values should be incorporated into its own fabric seems to have been rather limited.10

Such case law of the Federal Constitutional Court raises the question whether it still follows its own formula of the relationship between fundamental rights and private law, as established in the *Lüth* case, which became known as the theory of ‘indirect effect’.11 According to this theory, constitu-

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9 On this in more detail, see Cherednychenko, n 2 above, 6 ff. Compare Hager, n 8 above.
11 The theory of ‘indirect effect’ adopted by the Constitutional Court in *Lüth* was first defended by Dürig in response to the theory of ‘direct effect’ proposed by Nipperdey. See G. Dürig, ‘Grundrechte und Zivilrechtsprechung’, in T. Maunz (ed), *Vom Bonner*
tional rights as objective values were only to influence private law by affecting the interpretation of its existing rules, whereas a dispute between private parties on the rights and duties that arise from rules of conduct thus influenced by the constitutional rights was to remain ‘substantively and procedurally a private law dispute’. This reasoning seemed to suggest that it was private law which determined the outcome of the case. It appears, however, that in practice, a distinctive feature of the constitutionalisation of contract law in Germany is that it is no longer contract law influenced by constitutional rights, but constitutional law which determines the outcome of the disputes between contractual parties, and that contract law is limited to implementing this outcome within itself. As a result, it can be argued that there is a tendency in German law towards contract law becoming subordinate to the Constitution, which entails a growing relevance of fundamental rights for the relationships between private parties under contract law.

2. Dutch and English experiences: Towards the Complementarity between Fundamental Rights and Contract Law?

By contrast, a much more cautious approach to the effect of fundamental rights in the relationships between private parties under contract law appears to have been adopted in Dutch law. Although fundamental rights have recently been frequently invoked in this legal system, in practice the courts tend to resolve disputes involving contract law ‘substantially and procedurally’ on the basis of contract law, taking into account fundamental rights.

One of the most common ways in which fundamental rights have influenced Dutch contract law for more than half a century is the purely indirect horizontal effect of these rights as a result of the private law courts considering them as one of the relevant factors when applying open textured private law norms. Thus, for example, as early as 1969, the Dutch Supreme Court had to decide the question of whether a contractual clause which barred the person concerned from teaching Mensendieck physiotherapy exercises for the rest of her life, if she failed to obtain the required diploma, was in fact void. This


12 BVerfG 15 January 1958, BVerfGE 7, 198 (Lüth) 205, (my translation and emphasis).
13 HR 31 October 1969, NJ 1970, 57 (Mensendieck I). For other cases of this kind, see, for example, HR 18 June 1971, NJ 1971, 407 (Mensendieck II); Hof Arnhem 25 October 1948, NJ 1949, 331 (Protestantse Vereniging/Hoogers); HR 22 January 1988, NJ 1988, 891 (Maimonides).
question was answered in the affirmative by the lower court, which ruled that such a clause is *per se* contrary to public order and good morals on the ground that it is contrary to the freedom of education. This decision was, however, overturned by the Supreme Court. According to the Supreme Court, when considering whether a clause is contrary to public order and good morals, regard should also be had to the interest which the contract serves, as well as the question whether this interest is of such importance so as to justify an encroachment on the freedom of education. By this decision the Dutch Supreme Court clearly took the view that fundamental rights must not be the sole factor in determining whether a certain contract is contrary to public order and good morals and that it is contract law which remains decisive in this respect.

Although in other cases involving contract law the Dutch courts at first sight took a more radical approach by granting direct horizontal effect to fundamental rights, in practice contract law remained decisive for the resolution of those cases. For example, in a recent case decided by the Dutch Supreme Court in 2003, the Court had to resolve the issue of whether the patient’s post-contractual duty of care owed to a dentist on the basis of the medical treatment contract and involving in this instance the patient’s obligation to undergo an AIDS test constituted a violation of the patient’s constitutional right to bodily integrity guaranteed by Article 11 of the Dutch Constitution. The Supreme Court answered this question in the negative by upholding the decision of the district court in this case. In this decision, the district court first held that the duty to undergo an AIDS test did indeed constitute an intrusion upon the constitutional right to bodily integrity, but immediately afterwards it noted that this constitutional right is limited by restrictions laid down by or pursuant to the law as they follow from the Civil Code as well as from the contract, and in the circumstances of the case it is the patient’s post-contractual duty to undergo an AIDS test which serves as such a restriction. After these considerations the Court turned to the balancing of the competing interests of the parties involved in this case and found that there was relatively little intrusion upon the patient’s right to bodily integrity when weighed against the compelling interest of the dentist in knowing whether or not he had been infected by the HIV virus. Thus, even in this case the Court did nothing more than to take a constitutional right into account when resolving a dispute between private parties on the basis of contract law and with regard to contract law.

A rather cautious attitude by the courts to the extent to which fundamental rights may affect contract law can also be noticed in the United Kingdom after the incorporation of the European Convention on Human Rights by the Human Rights Act in 1998. In the Wilson v The First County Trust Ltd case,¹⁵ which currently constitutes the leading authority on the potential effect of the Convention’s rights on the specific consumer protection legislation in the UK, the House of Lords expressed its view on the compatibility of section 127 of the Consumer Credit Act 1974 with Article 1 of the 1st Protocol to the European Convention containing the right to property. According to section 127 of the Act, the court could not enforce an otherwise regulated consumer credit agreement where there was no document containing all the prescribed terms of the agreement signed by the debtor. Contrary to the Court of Appeal, which had held that this provision was a violation of the right to property, the House of Lords held that this was not the case. In its view, although the right to property was indeed engaged by the inability of the lender to enforce its security rights as a result of the provision in question, the latter was not disproportionate. The key considerations which explain the attitude of the House of Lords to the scope of review of the specific legislation are illustrated in the following passage:

‘Parliament is charged with the primary responsibility for deciding whether the means chosen to deal with a social problem are both necessary and appropriate. Assessment of the advantages and disadvantages of the various legislative alternatives is primarily a matter for parliament. The possible existence of an alternative solution does not in itself render the contested legislation unjustified … The court will reach a different conclusion from the legislature only when it is apparent that the legislature has attached insufficient importance to a person’s Convention right. The readiness of a court to depart from the views of the legislature depends upon the circumstances, one of which is the subject matter of the legislation. The more the legislation concerns matters of broad social policy, the less ready will be a court to intervene.’¹⁶

Although at present the reported case law of the English courts does not contain examples in which the common law of contracts would be clearly affected by the Convention’s rights, a cautious approach adopted by the courts in the cases relating to the protection of privacy makes it possible to assume that the same attitude would also be adopted in cases relating to contract law. A characteristic feature of the privacy case law is the reluctance of the English courts to create new causes of action by accepting the general right to privacy on the basis of the European Convention and their preparedness to grant necessary protection for this right only through the existing cause of action

¹⁵ [2001] 4 All ER 677.  
¹⁶ [2003] 4 All ER 97 (HL) at [70].
provided by the tort of breach of confidence.17 This approach by the English courts is certainly not surprising if one takes into account the general culture in the UK which is characterized by pragmatism, scepticism and incrementality. In light of that, it can be argued that the English courts are likely to carefully develop the existing common law of contract in the light of the Convention’s rights without undermining its own principles.

The way in which the constitutionalisation of contract law has so far been taking place in the Netherlands and in the UK appears to suggest that, at present, both legal systems tend to establish a complimentary relationship between fundamental rights and contract law rather than that of subordination, and preserve the key role of contract law in accommodating the values underlying fundamental rights within its own fabric.

It is also notable that neither in Dutch nor in English law have fundamental rights played any significant role in the family surety cases which were decided by the highest courts of these legal systems during approximately the same period as the German Bürgschaft case and the facts of which were also quite similar to those of Bürgschaft.18 Instead, relief for the family sureties was provided on the basis of well-established contract law concepts such as mistake in Dutch law and constructive notice in conjunction with undue influence in English law. In fact, resorting to fundamental rights in these legal systems turned out to be simply not necessary in order to achieve a result comparable to that reached by the German Constitutional Court on the basis of constitutional rights. This outcome raises the question of whether the constitutionalisation of contract law in every case constitutes something more than a mere transformation of contract law issues into fundamental rights issues, and the answer to this question may determine the extent to which contract law will be affected by fundamental rights in each legal system.19

17 See in, for example, Douglas v Hello! Ltd [2001] Q.B. 967, CA, 2 All ER 289 (interlocutory stage); Douglas v Hello! Ltd [2003] WL 18228877 (Ch D), [2003] 3 All ER 996 (trial).
18 See HR 1 June 1990, NJ (Van Lanschot v Bink) and Barclays, Bank plc v O’Brien [1994] 1AC 180, for Dutch and English law, respectively. On these cases in more detail, see Cherednychenko, n 2 above.
19 For a comprehensive study of these issues, see O. Cherednychenko, Fundamental Rights, Contract Law and the Protection of the Weaker Party: A Comparative Analysis of the Constitutionalisation of Contract Law, with Emphasis on Risky Financial Bargains, (doctoral thesis), forthcoming.
III. The European Convention on Human Rights and Contract Law: Towards the Control of Private Acts by the ECtHR?

The ECtHR has recently demonstrated the significant potential of the European Convention on Human Rights for imposing its own standards with regard to the way in which contract law and fundamental rights should relate to each other in national legal systems in the *Pla* case.\(^{20}\) Although the issue at stake here mainly concerned the law of succession, the reasoning of the Court opens up the possibility for fundamental rights enshrined in the Convention to deeply affect the national law of contracts of the Contracting States. According to the ECtHR:

‘[T]he Court is not in theory required to settle disputes of a purely private nature. That being said, in exercising the European supervision incumbent on it, it cannot remain passive where a national court’s interpretation of a legal act, be it a testamentary disposition, a private contract, a public document, a statutory provision or an administrative practice appears unreasonable, arbitrary or, as in the present case, blatantly inconsistent with the prohibition of discrimination established by Article 14, and more broadly with the principles underlying the Convention’.\(^{21}\)

It follows from this passage that the Strasbourg Court is prepared to check the national courts’ interpretation of contractual agreements as to their compatibility with the Convention. Moreover, the *Pla* case also shows how subtle the distinction between testing the *interpretation* of private arrangements and testing these *arrangements* themselves can be in practice when the compatibility of their interpretation with fundamental rights is decided in Strasbourg. It is notable that, whereas the Constitutional Court of Andorra which considered the case before it went to Strasbourg and one of the judges of the ECtHR found that it was a discriminatory *testamentary disposition* which was involved in this case, the majority of the Strasbourg Court held that it was a discriminatory *interpretation* of the testamentary disposition which was at stake. What may therefore occur is that under the cover of testing the interpretation of contractual agreements, the ECtHR may in reality start exercising control over these agreements and thus extend the horizontal effect of fundamental rights to the very heart of contract law.\(^{22}\) This may entail a total subordination of the national contract law of the States Parties to the Convention to fundamental rights embodied therein.


\(^{21}\) *Pla and Puncernau v Andorra*, n 3 above, para 59 (emphasis added).

\(^{22}\) On this in more detail, see Cherednychenko, n 20 above, 203 ff.
IV. EU fundamental rights and European Contract Law

1. Possibilities for the effect of EU fundamental rights in European contract law under the current case law of the ECJ

When the three EC Treaties were originally signed in the 1950s, they contained no express provisions concerning the protection of fundamental rights in the conduct of Community affairs. However, governed by the common constitutional traditions of the Member States and by the fundamental rights recognized in the international human rights treaties, first and foremost, in the European Convention on Human Rights, the ECJ, over the years, has developed in its case law what effectively amounts to an unwritten charter of rights for the Community, and this development has gradually been given formal recognition within the amended EU and EC Treaties. Article 6(1), (2) of the EU Treaty currently in force explicitly states that the Union shall respect fundamental rights as general principles of Community law. The adoption of the Nice Charter for the Fundamental Rights of the European Union, which contains in addition to individual civil liberties a rich set of social and economic rights, can certainly be considered to be the culmination point in this development. According to Article II-51 of the Constitution for Europe of which the Nice Charter now forms part, fundamental rights of the Charter are addressed to the Institutions, bodies and agencies of the European Union and to the Member States when they are implementing Union law.

Although the recognition of the importance of fundamental rights has not yet led to a series of spectacular decisions of the ECJ dealing with European contract law, the possibilities for fundamental rights affecting this field of law have certainly been opened up. The current case law of the Luxembourg Court contains examples of the fundamental rights review of EC law and the Member States’ measures implementing EC law or derogating there-
from. Furthermore, in a number of cases the Court has interpreted the EC legislation in the light of fundamental rights. Thus, for example, in the Johnston case, the Court treated Article 6 of the Equal Treatment Directive 76/207 establishing the requirement of judicial control as a specific manifestation of the general principle of law. The Community provision was therefore to be read in the light of the corresponding principle in the European Convention on Human Rights dealing with access to court and an effective judicial remedy. The use of the fundamental rights laid down in the European Convention was here indirect, it being used as an interpretative aid to the written provisions of Community law against which a Member State’s derogation was to be tested.

It is also notable in the present context that in its recent case law the ECJ has recognised that fundamental rights may serve as a justification for the Member States’ restriction of EC freedoms resulting from the prohibition of a certain commercial activity with a cross-border element in a Member State. Thus, for example, in the Omega case, which involved the German authorities banning the computer game ‘laserdrome’ as it involved simulated killings, the Court held that the objective of protecting human dignity could justify the restriction of the freedom to provide services.

Thus, under existing EC law, firstly, the content of fundamental rights must be respected when adopting and implementing EC law or derogating therefrom, and, secondly, EC law and the national law of the Member States

29 Case 36/02, Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn [2004] OJEC C 300/3 (ECJ). See also Case 112/00 Eugen Schmidberger Internationale Transporte und Planzüge v Republik Österreich [2003] OJEC C 184/1 (ECJ).
30 On the relationship between EU fundamental rights, EC freedoms and private law, see Cherednychenko, n 24 above, with further references.
31 It is not entirely clear, however, whether the expansion of the ECJ’s review to those situations when Member States are derogating from Community law is compatible with the limitation contained in Article II-51 of the Constitution for Europe under which Member States are only bound by fundamental rights when they are implementing EU law. How the scope of the Court’s review will develop still remains to be seen therefore.
must be interpreted and applied in a way which is compatible with them. Therefore, European contract law as part of EC law in theory also cannot escape from the influence of EU fundamental rights. Potentially, such rights of the worker as, for example, the right to working conditions which respect his or her health, safety and dignity or the right to a limitation of maximum working hours may be used to influence the interpretation of more specific legislation and even form the basis for repealing the incompatible legislation. Moreover, the contractual relationships between private parties may also be indirectly affected by EU fundamental rights through the fundamental rights review of the EC legislation in the field of contract law and the national laws adopted in the course of its implementation. Fundamental rights may therefore in practice form the basis for challenges to the validity of certain contract terms. This may in particular be the case if the ECJ follows the German Constitutional Court and, with a view to strengthening the position of the weaker contractual parties, imposes on the EC legislator and the national courts of the Member States the duty to protect EU fundamental rights in the relationships between private parties under contract law.

Further possibilities for the horizontal effect of EU fundamental rights in contractual relationships may be opened up if, despite all hurdles, the ongoing process of the harmonization of European contract law will some day in the future result in the adoption of a comprehensive binding code of contracts which would replace the national contract laws of the Member States and would contain the European general clauses such as good faith or good morals. Such clauses may then become a powerful means in the hands of the ECJ for shaping European contract law in the light of fundamental rights. At the moment, however, a more likely scenario appears to be the effect of EU fundamental rights through the general clauses in the national contract laws of the Member States. In the light of the Omega case, such an influence may lead the national courts to restrict EC freedoms by holding, for example, that a certain contractual agreement with a cross-border element is contrary to good morals on the basis that it infringes the fundamental rights recognized in the Community.

2. The ‘alignment’ between EU fundamental rights and European contract law: how far is the ECJ prepared to go?

In view of the foregoing, it is clear that EU law contains possibilities for the impact of fundamental rights on European contract law. Yet, at present, it is difficult to predict how far this impact will extend. Many private law scholars today point to the need for an ‘alignment’ of private law, in particular the ‘principles of social justice in European contract law’ with the ‘constitutional principles already recognized in Europe’.

Moreover, the duty to observe fundamental rights when adopting EC law clearly implies that all legislation, including that in the field of contract law, should be in conformity with fundamental rights. This means that both ‘the Common Frame of Reference’ and a ‘non-sector-specific optional instrument’, which were indicated in the European Commission’s European Contract Law Communication of October 2004 as the forms of the harmonization of contract law to be accomplished in the near future, will have to be scrutinized for compatibility with EU fundamental rights and thus integrated into the constitutional framework. Much however depends on how the ECJ will regard its role with respect to the ‘alignment’ between EU fundamental rights and European contract law.

Whether the ECJ is prepared to play an active role in making such an ‘alignment’ is not entirely obvious if one looks, for example, at the judgement of the Court in the Dietzinger case delivered in 1998. The facts of this case were quite similar to the German Bürgschaft case discussed above. In Dietzinger, considerable difficulties awaited Mr Dietzinger who, being without a regular income, had agreed to act as a surety for his parents’ business debts. Because the contract of suretyship had been concluded at the home of Mr Dietzinger’s parents during a visit by an employee of the bank to which Mr Dietzinger’s mother had agreed over the telephone, he tried to rid himself of his liability by arguing that he had not been acting rationally, as the contract

35 Communication on European Contract Law, n 34 above, 17 ff (Annex II).
37 Case 45/96, Bayerische Hypotheken- und Wechselbank AG v Edgar Dietzinger, 17.03.1998 (ECJ).
was signed away from business premises. In particular, he maintained that he had not been informed of his right to cancellation, in violation of the Law on the Cancellation of ‘Doorstep’ Transactions and Analogous Transactions which transposed the Directive into German law. What is striking about the decision of the ECJ in this case is that although the Court was certainly aware of the fundamental rights issues which under quite similar circumstances had arisen in the German Bürgschaft case, it did not engage in any debate on these issues in the context of interpreting the Doorstep Selling Directive. Instead, it limited itself to the following answer:

‘(…) a contract of guarantee concluded by a natural person who is not acting in the course of his trade or profession does not come within the scope of the directive where it guarantees repayment of a debt contracted by another person who, for his part, is acting within the course of his trade or profession.’

In this way, the ECJ demonstrated judicial self-restraint and its unwillingness to become involved in politically sensitive matters. Whether the Court will adhere to this approach in the future or opt for more judicial activism in cases potentially involving fundamental rights issues remains to be seen. It is certainly possible that the recognition of the binding character of the Nice Charter for the Fundamental Rights of the European Union will lead the Court to play a more active role in promoting EU fundamental rights in all fields of EC law, including European contract law.

V. Conclusion

The growing influence of fundamental rights on contract law in the last decade makes it clear that the world of fundamental rights and the world of contract law no longer exist in isolation from each other. The tendency towards the constitutionalisation of contract law is true for many European legal systems, and it is obvious that in the years to come European contract law will also not escape from it. Considerable potential for the ‘alignment’ of EU fundamental rights and European contract law is present in the existing

38 Case 45/96, n 37 above, para 24.
EU law, and it can only be strengthened in view of the recent case law of the ECtHR and, in particular, once the Nice Charter for the Fundamental Rights of the EU becomes binding. Therefore, the major issue at present is no longer whether fundamental rights may have an impact on contract law but to what extent this will occur. The tendency towards the subordination of contract law to fundamental rights which can currently be traced in the German legal system, on the one hand, and the tendency towards complementarity between fundamental rights and contract law which is characteristic of the Dutch and English approach, on the other, shows that there is no agreement between the EU Member States on the issue of how far fundamental rights must affect the relationships between private parties under contract law. As a result, the major task now is to determine the desirable degree of the constitutionalisation of contract law. One of the fundamental issues to be resolved in this respect is which body of law substantially determines the outcome of the dispute between private parties – fundamental rights law or contract law. The answer to this question is of crucial importance for the future of (European) contract law, as it will determine whether contract law will be turned into a wholly malleable vehicle for promoting fundamental rights or whether it will enter into a dialogue with fundamental rights and have a final word in the regulation of private law relationships.