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## **Relational contract theory and management contracts: A paradigm for the application of the Theory of the Norms**

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# CONTENTS

## INTRODUCTION

### CHAPTER A: RELATIONAL CONTRACTS THEORY AND CONTRACTUAL NORMS

#### I. First Approaches towards Relational Contracts

#### II. McNeil's Relational Contracts Theory

##### *1. The core of McNeil's Theory*

- a. McNeil's Focus*
- b. Transactions & Relations*
- c. Towards a Relational Contracts Theory*

##### *2. The Main Aspects of McNeil's Theory*

- a. Presentiation*
- b. Relational Contracts*
- c. Contracts' "Primal Roots"*
- d. Relational Adjustments, Negotiation and Conflicts' Resolution*
- e. Agents & Principals*

##### *3. McNeil's Contractual Norms*

- a. The concept of Norms*
- b. The List of Common and Relational Norms*
- c. The Common Norms*
- d. The Relational Norms*

#### III. Other Literature about Relational Contracts Theory

##### *1. Acceptance and Application of McNeil's Theory*

##### *2. Other Arguments and Approaches towards Relational Contracts*

- a. Definition of Relational Contracting*
- b. Reputation & Long-Term Relations*
- c. Contract Enforcement and Remedies in Relational Contracts*
- d. Suggestions for a Simpler Contractual Norms' Theory*

### CHAPTER B: THE RELATIONAL CHARACTER OF MANAGEMENT CONTRACTS

#### I. General Content of Management Contracts

- 1. Historic Evolution of Management Contracts*
- 2. Object of Management Contracts*
- 3. Management Contracts as Reciprocal Contracts*
- 4. Benefits of Management Contracts for the Parties*

#### II. The special characteristics of the Parties' Relation within a Management Contract

- 1. The complexity of the Contract's Object*
- 2. Principals and Agents in a Management Contract's Relation*
- 3. Private and Exclusive Character of the Relation*
- 4. Interdependence between the Parties*

#### III. The Fiduciary Element in Parties' Obligations

1. *The Merge of Structures and Management*
2. *The nature of Fiduciary Duties between the Parties*
3. *Fiduciary Duties in relation to Mutuality, Parties' Roles and Relational Planning*

#### **IV. The Incomplete Character of Management Contracts**

1. *Constant Negotiation and intended combination of Completeness and Incompleteness*
2. *Management Contracts as Frameworks for Future Obligations*

#### **V. The various factors affecting the Relation's Content**

## **ANALYSIS OF THE OBLIGATIONS FROM MANAGEMENT CONTRACTS UNDER A RELATIONAL CONTRACTS THEORY NORMS FRAMEWORK**

### **CHAPTER C: UNILATERAL OBLIGATIONS**

#### **I. Recipient's Obligations**

1. *Fee Payment*
2. *Obligation for Provider's Integration into its Structure*

#### **II. Provider's Obligations**

1. *Staff Training*
2. *Know-how Transfer*
3. *Preservation of the Interests of Receiver which are not related to the Contract*
4. *Obligation of Respect for the Philosophy and the Scope of the Enterprise*
5. *Obligation of Recipient's Integration in Provider's Business Networks*

### **CHAPTER D: BILATERAL OBLIGATIONS**

#### **I. Obligation of Confidentiality**

#### **II. Obligation for Provision of Information**

#### **III. Prohibition of Rights and Liability Transfer from the Agreement for Assignment of**

#### **IV. Business Management Responsibilities**

#### **V. Collaboration Obligations**

#### **VI. Non-Competition Obligation**

### **CONCLUSIONS**

### **SOURCES**

#### **APPENDIX A: DIAGRAM OF THE OBLIGATIONS FROM MANAGEMENT CONTRACTS ANALYSIS UNDER A RELATIONAL CONTRACTS THEORY FRAMEWORK**

#### **APPENDIX B: MATRIX OF OBLIGATIONS AND NORMS' APPEARANCES**

## **NOTES ABOUT INTRODUCTION**

Management contracts are agreements by which a company assigns its management – partially or entirely- to another company, in order that the latter will exercise it for the benefit of the first, while the latter will receive a payment for the provision of such services.

Management contracts belong to the broad category of business (B2B) agreements and to the sub-category of services' provision B2B contracts.

They have a significantly long-term character and by them the management provider acquires the role, powers, duties –fiduciary as well- and responsibilities of the board of directors of the recipient, while the latter contributes to the contractual relationship the whole or part of its undertakings. On the other hand, in modern management contracts, the provider also invests in the relationship capital, know-how, significant human resources and most importantly its own brand name. The relationship between the parties is characterised by a strong cooperative element, by great interdependence, as the whole relationship is based on a win-win strategy and by a highly customised content and structure. Management contracts are always explicit –written- and very detailed contracts –due to their scope, nature and the interests involved in them-, although a large set of contractual terms and obligations is frequently implicit and while the content of specific terms –explicit or implicit- is under constant negotiation, follows the relationship's evolution and depends on different changing factors. Moreover, there are no standard management contract terms, as each contract's terms depend also on specific variables. Generally, the content of management contracts is frequently complimented by other contracts –the nature of which depends on the specific scope of each management contract-, deriving from the primal one, which functions as the framework of rules that govern a more complex relationship (incomplete contracts).

Relational Contracts Theory is a theory mainly developed by Iain MacNeil in U.S.A. some decades ago and has been the object of theoretical research in common law jurisprudence ever since. This theory contrasts legal formalism to a certain extent and is based on the assumption that all the contracts can fall along a relational range from discrete –mere transaction- to highly relational, although no relation can be totally separated from

relational elements; the isolation of the contract from a relational context and the complete and exact planning of the relationship *ex ante* (presentation), although having a great importance for contracts law, cannot explain totally modern contractual relationships. Highly relational contracts are these, the effect of which is strongly based on a specific social and economic context, on an ongoing relation (usually of trust) between the parties, which influences the scope and content of the contract. This entire context that “hides” behind the contract may help us understand and explain the contractual content. MacNeil’s work was supported by other researchers, who contributed to the relational contracts theory and it had a significant impact on economic literature. Some other major points of that theory is the effect of constant (re)negotiation, the resolution of conflicts between the parties, the interaction between agents in modern business contracts (as the contracted parties are mostly companies governed by agents), the importance of the concept of the “exchange” as the terminus for modern contracts and of course the contractual norms.

According to relational contracts theory, relations are governed by a set of common characteristics (norms) that play an important role, regarding the content of the relation, the formation of parties’ obligations and the actual operation of the contracts. These norms are based on a set of internal values and the broad context social and economic factors, related to the relation. According to MacNeil, there are ten norms common for all kinds of contracts: role integrity, reciprocity, implementation of planning, effectuation of consent, flexibility, contractual solidarity, the ‘linking norms’ (restitution, reliance and expectation interests), creation and restraint of power, propriety of means and harmonisation with the social matrix<sup>1</sup>. There are also five norms (additional or the same as these of common contracts), responding in an intensive way to contracts with a highly relational character than conventional contracts: role integrity, preservation of the relation (expansion of contractual solidarity), harmonisation of the relational conflict, supracontract norms and propriety of means.

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<sup>1</sup> MacNeil also suggests one norm that enhances discreteness and presentation, applying mostly to conventional-transactional contracts. *New Social Contract*, 60.

Other authors, such as Austen-Baker, although supported the concept of norms, proposed simpler and more comprehensive norms models.

Relational contracts theory, according to the literature, can constitute –among its other scopes- a valuable tool, in order to describe and explain the operation and the content especially of the contracts, which could be defined as highly relational. Furthermore, it seems quite interesting to try to apply this theory to a specific kind of relation. The general goal of this work is to test whether the theory of the norms can be actually used, in order to approach a type of contractual relation and whether the norms can be actually related to the content of a type of contract. Management contracts include some characteristics that make us choose them as a paradigm for the application of relational contracts theory and specifically of the theory of the norms. They are long-term and highly customised, they concern B2B relations and they are characterised by close cooperation and interdependence.

Management contracts and specifically the content of the parties' obligations in management contracts will constitute the object of our research, while relational contracts theory and specifically the theory of the norms will constitute the methodological tool that we will use, in order to explain and define the content of these obligations.

This research is designed to test the application of the norms theory to management contracts' obligations.

Our main research question is the following:

*“Is it possible to relate the parties' obligations deriving from a management contract to specific norms?” or “Is it possible to explain the content of these obligations by using the norms theory?”*

The above key question can be analysed in some specific subsidiary questions.

Two of them refer to relational contracts theory and are examined in the relevant chapter:

- a) Which different models of norms exist in modern relational contracts theory?
- b) Which are the contractual norms and what is their individual content and scope?

Two of them refer to management contracts and are examined in the relevant chapter:

- c) What is the content of the relation between the parties in a management contract and which are the factors that govern this relation?
- d) Why do the management contracts have a high relational element?

The other five subsequent questions are examined in the main chapter of our research:

- e) What norms apply to each obligation and why?
- f) What norms apply solely to unilateral or bilateral obligations and what norms apply to the total range of obligations of a management contract and why?
- g) How often does each norm appear in these obligations and which norms appear more or less? (Which norms are mostly related to the content of these obligations?)
- h) How these results change if you used an alternative norm model and to which conclusions does this fact lead us? Do some norms overlap or is their content often absorbed by other norms?
- i) How effectively do the norms succeed in conveying each obligation's content?

Regarding our specific methodology, we have to note that we examine management contracts as a paradigm for the actual application of norms theory. Specifically, we examine management contracts as an example of business contract in which the element of close and long-term cooperation between the parties, their interdependence and general correlation of interests are very strong (we will explain in the relevant chapter why this is the case). So, by examining then relation between norms and management contracts, we try to investigate the significance of the norms theory in contracts in which cooperation and interdependence are highly apparent.

Moreover, by examining the obligations of the parties in management contracts, we actually examine the overall content and the terms of this relation. By distinguishing between unilateral and bilateral obligations, we try to find out if the value of the norms is limited to one category or the other –meaning whether the norms apply to the contractual terms that concern both parties or apply to terms referring to each party's individual role- and whether different norms apply to different sets of obligations. Furthermore, we choose to apply the extensive MacNeil's model instead of a simpler model of fewer norms, in order to secure an extensive norms-based analysis and avoid any failure in depicting slight differences between different obligations' relation to certain norms (i.e. although a norm of a simple model may appear in two obligations, a specific norm of the extended model –that belongs to the simple norm- may not appear in both cases), although we also present our results by using a simpler model as well. Besides, we do not

use in our norms model some concepts such as linking norms and presentiation, because of their very broad –and maybe obscure as well- and therefore non-practical for such an analysis, meaning, their content’s absorption by other norms and the fact that according to some authors they cannot be assumed as stand-alone norms. On the other hand, we use flexibility, although Austen-Baker assumes it as an “essential component in all the norms”<sup>2</sup>, as we try to test his assumption. We also use for our analysis 12 obligations, which are very common in management contracts, while we do not use management obligation, for practical reasons, which we will explain before the analysis. We do not claim that all these obligations exist in every management contract or that there may not be more special obligations, however we chose this set on the grounds that they are firstly easily distinguishable and second very common (and surely for reasons of briefness as well).

Our analysis’ structure is the following: we present each obligation separately, we briefly explain its content and then we relate it to each of the applying (to it) norms. Our results are presented in the relevant table-Appendix, in which we also “translate” the results by using the simple model’s norms. Then we restate our results in a different way, as we present each norm’s appearances in every obligation, set of obligation and totally, also using the simple model’s norms as well.

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<sup>2</sup> Austen-Baker, R., "Comprehensive Contract Theory: A Four Norm Model of Contract Relations" (2009) 25 Journal of Contract Law, 219-220



The table below depicts the structure of our research and related it to its goal and questions.

<b>GOAL</b>	<b>STRUCTURE</b>		
<i>To test whether the theory of the norms can be actually used, in order to approach a type of contractual relation and whether the norms can be actually related to the content of a type of contract</i>	<p style="text-align: center;">THEORY PRESENTATION  (METHODOLOGY)</p>	<p style="text-align: center;">LITERATURE REVIEW  (OBJECT)</p>	<p style="text-align: center;">ANALYSIS  (APPLICATION)</p>
<p><b>KEY QUESTION</b> <i>“Is it possible to relate the parties’ obligations deriving from a management contract to specific norms?” or “Is it possible to explain the content of these obligations by using the norms theory?”</i></p>	<p style="text-align: center;"><b>RELATIONAL CONTRACTS THEORY AND CONTRACTUAL NORMS</b></p>	<p style="text-align: center;"><b>THE RELATIONAL CHARACTER OF MANAGEMENT CONTRACTS</b></p>	<p style="text-align: center;"><b>ANALYSIS OF THE OBLIGATIONS FROM MANAGEMENT CONTRACTS UNDER A RELATIONAL CONTRACTS THEORY NORMS FRAMEWORK</b></p>
<p><b>SUBSIDIARY QUESTIONS</b></p>	<p><i>a) Which different models of norms exist in modern relational contracts theory?</i> <i>b) Which are the contractual norms and what is their individual content and scope?</i></p>	<p><i>c) What is the content of the relation between the parties in a management contract and which are the factors that govern this relation?</i> <i>d) Why do the management contracts have a high relational element?</i></p>	<p><i>e) What norms apply to each obligation and why?</i> <i>f) What norms apply solely to unilateral or bilateral obligations and what norms apply to the total range of obligations of a management contract and why?</i> <i>g) How often does each norm appear in these obligations and which norms appear more or less? (Which norms are mostly related to the content of these obligations?)</i> <i>h) How these results change if you used an alternative norm model and to which conclusions does this fact lead us? Do some norms overlap or is their content often absorbed by other norms?</i> <i>i) How effectively do the norms succeed in conveying each obligation’s content?</i></p>

## CHAPTER A: RELATIONAL CONTRACTS THEORY AND CONTRACTUAL NORMS

### First Approaches towards Relational Contracts

Gilmore, in "The Death of Contract"<sup>3</sup> presents his central thesis that the law of contracts, at least as it existed in the 20th century United States was almost artificial. According to Gilmore, changes in the business practice are occurring more rapidly than changes in contract law theories and this reality may make the theoretical foundations of contract law out of date. According to this theory a contract cannot be assumed as a separate idea and the breach of contract could be regarded just as another tort.

As opposed to the above, a new trend in contract law was gradually developed by scholars, who thought that contracts still have a reason for existence, as they play an important social and economic role, in the general context of social relations. Relational Contracts Theory appears to grow out of the empirical work by Macaulay<sup>4</sup> and Beale and Dugdale and by the theoretic legal research of I.R. McNeil, who is accredited with the initial use of the term "relational contract".

Macaulay investigated the issue of non-legal norms in certain industries and finds that contract law is often ignored in business transactions. The parties often choose not to use a "complete" contract, as the counterparty has become a necessary partner during the evolution of the relation. Therefore, bargaining power is something that alters and changes, as a relationship develops and exchanges may be adjusted informally during the life of the contractual relationship<sup>5</sup>. Furthermore Macaulay states<sup>6</sup> that in relational transactions the parties prefer not to terminate the contract, but to re-arrange it as to make continuation of performance feasible. Negotiation has a primary role in business relations, as adjustment of exchange relationships and dispute settlement by litigation is costly. The non-legal norms mentioned by Macaulay may be interpreted as part of the

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<sup>3</sup> G. Gilmore, *The Death of Contracts* (Columbus, Ohio: Ohio State UP, 1974)

<sup>4</sup> S. Macaulay, "Non-Contractual Relations in Business: A Preliminary Study", (1963) 28 *American Sociological Review*, 55

<sup>5</sup> *ibid.* 58

<sup>6</sup> *ibid.*, 63

occupational morality of businessmen and under some circumstances some of these emerging non-legal norms may supersede the law of contract.

Beale and Dugdale's<sup>7</sup> later empirical research confirmed the above. It showed that parties used to agree expressly only on their primary obligations, while tacit planning prevailed concerning the details of their relation. Detailed planning for contracts was assumed as expensive, contract law was often ignored concerning planning their relationship and trust between firms and reputation were seen as essential. Mutually accepted norms were used more often than contract law and legal remedies were avoided as inflexible.

The above researches were conducted independently –although almost simultaneously– from McNeil's work and offered an empirical material for the latter's theoretical approach.

### **McNeil's Relational Contracts Theory**

#### *The core of McNeil's Theory*

##### *McNeil's Focus*

On the other hand, McNeil developed a theory, according to which the traditional "classical" and neoclassical approach of doctrinal contract law in the common law countries, focuses on the discreet character of contracts, viewed more as specific spot deals, distinguished from the overall environment in which they evolve<sup>8</sup>. He also argues that under current contracts law, every specific type of contracts is governed by its own specific rules, while general theory is only implemented in new and novel contractual situations.

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<sup>7</sup> H. Beale and T. Dugdale, "Contracts between Businessmen: Planning and the Use of Contractual Remedies", (1975) 2 British Journal of Law and Society, 45

<sup>8</sup> I. R. Macneil, "Restatement (Second) of Contracts and Presentiation", (1974) 60 Virginia Law Review, 589

MacNeil mainly focuses more on the exchange phenomenon and on behavioural aspects of contracting. He avoids treating any governance models of exchanges (such as other relational theories mainly introduced by economic theories) and the core of his work is related to the social environment and the norms of behaviour that exist within every framework of exchange.

### *Transactions & Relations*

MacNeil firstly distinguishes between “living contracts”, meaning the actual contractual relations and “contracts at law”, the legal tools used in order to govern relations and disputes<sup>9</sup>. He suggests that contracts should better not assumed as mere transactions but as belonging in the complex context of some overall exchange relations.<sup>10</sup> However, he underlines that some relations are far more relational than others. Contract relations fall along a relational range from the highly relational, such as long-term employment contracts to the almost discrete, which concerns largely transactionalized relations, such as spot purchases of commodities. Even in these occasions, however, these discreet transactions are attached to a general environment of social relations, thus a relational element is always present, in order to manage to explain a contract and almost no contract should be assumed as totally discrete. Most of the modern exchange relations are characterised by<sup>11</sup>:

- a) close personal relations, where reputation, a sort of morality and interdependence play a crucial role
- b) the involvement of many individual and collective poles of interest
- c) significant duration
- d) an object that includes both measurable and non-measurable quantities

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<sup>9</sup> I. R. Macneil, “Relational Contract Theory: Challenges and Queries”, (2000) 94 Northwestern University Law Review, 877, 901

<sup>10</sup> I. R. Macneil, “The Many Futures of Contracts” (1974) 47 Southern California Law Review, 691

<sup>11</sup> I. R. Macneil, “Restatement (Second) of Contracts and Presentation”, 595.

- e) a more common sharing and a less common allocation of relational responsibilities, risk and benefit
- f) a limited bindingness

Macneil, in order to offer some indicators of the contrast between transactions and relations, presents twelve axes that vary from extremely relational to extremely transactional:

- 1) overall relationship type
- 2) measurability and actual measurement
- 3) basic sources of socio-economic support
- 4) duration
- 5) commencement and termination
- 6) planning
- 7) degree of future cooperation required in post-commencement planning and performance
- 8) incidence of benefits and burdens
- 9) obligations undertaken
- 10) transferability
- 11) number of participants
- 12) participant views<sup>12</sup>.

The above axes show some important descriptive elements of a contractual relation of any type.

As appears, MacNeil mainly focuses on business relations and commercial exchanges, however the above ideas are totally related to the whole spectrum of contracts law. According to MacNeil, the law of contract roles and legal positions allows modern people to choose among positions and behavioural standards, created and safeguarded by the state.<sup>13</sup>

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<sup>12</sup> *ibid*, 738-740

<sup>13</sup> *ibid*, 743

### *Towards a Relational Contracts Theory*

In this way, this theory, which is named after its core –relations-, as a relational contracts theory (or essential contracts theory) opposes legal formalism theory, which focuses mainly on the express terms of a contract and almost ignores every issue arising from the overall context of the contractual relation, except of some issues that may be the basis for a limited series of implied terms. On the other hand, this approach is also opposed to the theory about "death of contract", which was described above. MacNeil himself describes the relational contracts law as a system that does not exist in U.S.A., which replaces the neoclassical system. We should however note that by using the term "relational" MacNeil means two different things. Firstly, he means that every contract may be related to a given social context, a context that is very simple but even apparent even in mere transactions. Secondly, he means that some contracts, especially these concerning business relations, may involve a complex and on-going relationship between parties, a relationship that unavoidably influences the function of these contracts.

MacNeil's theoretical approach starts with "Whither Contracts", a paper presented before the annual meeting of the Association of American Law Schools in 1967 or 1968. By this paper MacNeil opposes Grant Gilmore's ideas about the "death of contracts" as then promoting the view that there was no such thing as 'contracts'. By stating that "contract exists<sup>14</sup>", Macneil's bases his relational contract theory on the argument that contracts should neither be subsumed into torts, nor assumed as individual entities. Concerning the second conclusion, MacNeil underlined the essential bankruptcy of conventional contract theory and stated that we should focus on the contracting as a phenomenon and not on separate exchanges and that there can be no unique law that could govern every contract .

Having determined the core of MacNeil's arguments, we further proceed to the main aspects of his theory.

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<sup>14</sup> I.R. Macneil, "Whither Contracts?" (1969) 21 Journal of Legal Education 403, 418-419.

## *The Main Aspects of MacNeil's Theory*

### *Presentation*

Firstly, one key aspect of MacNeil's work has to do with the ideas of presentation and discreteness. In "Restatement..."<sup>15</sup> he argues that presentation has a great importance for overall contracts law<sup>16</sup> and that it is a tool for the examination of traditional contract systems<sup>17</sup>. Actually the entire conventional doctrine of contracts law is based on presentation, thus on the idea that the initial contractual agreement has to be as complete as possible in order to be able to resolve and answer by itself to any future problem. MacNeil describes discreteness as "the antithesis" of the integration into a relation<sup>18</sup> and a discrete transaction system as a system in which a resolution of the conflict between stability and flexibility results to the fall of risks on suppliers of goods and services. According to MacNeil discreteness and presentation mean that an exchange is totally consented, planned and isolated from any other aspect of the present and future social and relational context. It may be possible to presentiate in transactions with a powerful discreet and transactional element; however it is very difficult to achieve this when the contract is more relational, as the original agreement will be difficult to answer every problem about the ongoing relation. The conventional English contract law has developed the idea of implied terms, in order to "rescue" the idea of presentation, thus enables the solution of problems in more "relational" relations, without rejecting the original deal between the parties, by assuming that although their agreement did not include such terms, they actually implied them; therefore these terms also constitute a presentiated part of the original agreement.

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<sup>15</sup> According to Oxford Dictionary presentiate means "to make or render present in place or time, to cause to be perceived or realised as present".

<sup>16</sup> I. R. Macneil, "Restatement", 592

<sup>17</sup> *ibid*, 592.

<sup>18</sup> I.R. Macneil, 'Contracts: Adjustment of Long-Term Economic Relations under Classical, Neoclassical and Relational Contract Law' (1978) 72 *Northwestern University Law Review*, 858.

## *Relational Contracts*

In “The Many Futures of Contracts”<sup>19</sup>, MacNeil defines transaction as “an event sensibly viewable separately from other events accompanying it temporally – one engaging only small segments of the total personal beings of the participants.”<sup>20</sup> in “Restatement” contract as ‘a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty’ and promise as a “manifestation of intention to act or refrain from acting in a specified way”. In another article, McNeil redefines contract as “relations among people who have exchanged, are exchanging, or expect to be exchanging in the future”<sup>21</sup>, a definition that shows the McNeil’s focus on contracts as generators of future exchanges. McNeil, by referring to promise is actually referring to contracts at law that are distinguished from living contracts, which are related to the general context of social relationships.

According to McNeil, nowadays relation prevails against transaction<sup>22</sup>, as far as contractual behaviour is concerned. All kinds of relations belong to a broader social context with which the contractual relations have to be harmonized, in order to be successful. In “The New Social Contract”<sup>23</sup> McNeil suggests a model, which can adapt the conventional contracts model to relational contracts. This model is analyzed in eight parts:

- 1) measurement and specificity
- 2) sources of contractual solidarity
- 3) planning
- 4) sharing and dividing benefits

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<sup>19</sup> “The Many Futures of Contracts” is the second article by Macneil about relational contract and it constitutes along with “The New Social Contract” his best-known works on relational contracts.

<sup>20</sup> I. R. Macneil, “The Many Futures of Contracts”, (1974) 47 Southern California Law Review, 691, 693

<sup>21</sup> I. R. Macneil, “Relational Contract Theory as Sociology: A Reply to Professors Limberg & de Vos.”, (1987) 143 Journal of Institutional and Theoretical Economics, 272, 274

<sup>22</sup> I. R. Macneil, “The Many Futures”, 694

<sup>23</sup> I.R. Macneil, *The New Social Contract*, (New Haven, Conn. USA: Yale UP, 1980)



- 5) obligations
- 6) transferability
- 7) attitudes
- 8) power, hierarchy and command.

According to another article of MacNeil<sup>24</sup>, the formulation of a more relational context would demand to base in certain core propositions. First, that every transaction is embedded in complex transactions; second understanding any transaction requires understanding all essential elements of its enveloping relations; third, effective analysis of any transaction requires recognition and consideration of all essential elements of its enveloping relations that might affect the transaction significantly; fourth, combined contextual analysis of relations and transactions is more efficient and produces a more complete and sure final analytical product than does commencing with non-contextual analysis of transactions.

#### *Contracts' "Primal Roots"*

Third, MacNeil argues that contracts have four "primal roots". The first one is 'specialization and exchange', two ideas that are correlated. The second one is a "sense of choice"<sup>25</sup>, which means the freedom to select a behavior between a specific behavioral range, the third is the 'conscious awareness of past, present and future' <sup>26</sup> and the fourth is 'the social matrix'<sup>27</sup>, which means the overall social and linguistic background to which contracts and promises can be attached

#### *Relational Adjustments, Negotiation and Conflicts' Resolution*

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<sup>24</sup> I. R. Macneil, "Relational Contract Theory: Challenges and Queries", (2000) 94 Northwestern University Law Review, 877, 881

<sup>25</sup> I. R. Macneil, "The Many Futures", 701

<sup>26</sup> I. R. Macneil, "The Many Futures", 706-710

<sup>27</sup> *ibid*, 710ff

Fourth, Macneil identifies the importance of adjustments and continuous negotiation in the relational contracts. Although the written parts of the relations may play a constitutional role for them, their importance depends on their compatibility with current relational circumstances and if they become dysfunctional for the ongoing of the relation they should not influence it much<sup>28</sup>. He underlines the role of certain hierarchies that exist in relational contracts and that show the variable importance of certain aspects of the relations for each single party. The longer the relation is the more complex it becomes and the conventional model of adjustments may not result to adequate solutions<sup>29</sup>. McNeil uses dispute resolution as an example of contrast between conventional and relational contract<sup>30</sup>, emphasising it much as a valuable tool that can function well in the governance of relational contracts.

### *Agents & Principals*

Fifth, another key point of McNeil's work is the element of involving agents rather than principals in a contractual relation<sup>31</sup>. In modern –mostly commercial- contracts law, most contracts are rather made by agents as the principles are mainly firms Macneil emphasizes this element as contract becomes much more complex and 'relational' where those engaging in contracting activity are acting on behalf of legal entities, such as corporations.

### *McNeil's Contractual Norms*

#### *The concept of Norms*

Sixth, the core of MacNeil's thoughts concerns a number of "norms in a positivist sense", which govern contracts and may replace rational self-interest as the governing norm of

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<sup>28</sup> I. R. Macneil, "Contracts:Adjustment", 854-857, 894

<sup>29</sup> *ibid*, 900

<sup>30</sup> *ibid*, 891

<sup>31</sup> I.R. Macneil, *The New Social Contract*, 78-84; P. S. Atiyah, *Essays on Contract*, (New York USA:OUP, 1986), 352

contracts<sup>32</sup>. By that term, Macneil tries to describe a number of norms that can be observed in the practice and operation of contracts, thus constituting norms in fact. This kind of norms has to be distinguished from normative norms, which are suggested by positive economics theories. Two very important matters are related to these norms. The first one has to do with actual legal doctrine's compliance with these norms, as this compliance is crucial for the law's ability to successfully regulate contractual relations. The second has to do with extent to which a specific exchange relation abides by these norms, as this issue is related to the extent to which the relation will meet longevity, the parties will earn more benefits from it and the overall relational spectrum will succeed. In "New Social Contract", he describes a norm as a 'pattern or trait taken to be typical in the behavior of a social group'<sup>33</sup> and whose role is to determine "the behaviour that does occur in relations, must occur if relations are to continue, and hence ought to occur so long as their continuance is valued."<sup>34</sup>.

#### *The List of Common and Relational Norms*

In "Many Futures", Macneil also suggests for the first time five contract norms. He believed that the acceptance of these norms could be the cornerstone for the establishment of a single general theory of contracts, which could apply to all sorts of contracts and lead to a unified law of contract. These are:

- 1) reciprocity
- 2) role effectuation
- 3) limited freedom of exercise of choice
- 4) effectuation of planning and
- 5) harmonizing with the social matrix.<sup>35</sup>

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<sup>32</sup> R. Stone, *The Modern Law of Contracts*, (London: Cavendish, 6<sup>th</sup> ed., 2005), 9

<sup>33</sup> I. R. Macneil, *New Social Contract*, 37-38

<sup>34</sup> *ibid*, 64

<sup>35</sup> I. R. Macneil, "The Many Futures", 809

In "The New Social Contract"<sup>36</sup>, MacNeil increases these norms to thirteen and distinguishes them into two categories. The first set of nine norms<sup>37</sup> concerns all the contracts, while another set of four norms are intensified in relational contracts. In other articles he changes the name of some norms and adds one more, propriety of means<sup>38</sup> to the first set, which he also adds –in later works- to the initial four relational norms. Finally, the first set of ten norms consists of:

1. role integrity
2. reciprocity (or 'mutuality')
3. implementation of planning
4. effectuation of consent
5. flexibility
6. contractual solidarity
7. the 'linking norms' (restitution, reliance and expectation interests)
8. the power norm (creation and restraint of power)
9. propriety of means
10. harmonization with the social matrix<sup>39</sup>.

The second set of the five "relational" norms consists of two norms that are same as above (common norms) and three more:

1. role integrity
2. preservation of the relation
3. harmonization of relational conflict
4. supracontract norms
5. propriety of means<sup>40</sup>

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<sup>36</sup> I. R. Macneil, *New Social Contract*, 37-38,

<sup>37</sup> "Intermediate norms"

<sup>38</sup> I. R. Macneil, "Values in Contract: internal and external", (1983) 78 *Northwestern University Law Review*, 340

<sup>39</sup> I. R. Macneil, "Values in Contract", 340

<sup>40</sup> K. Blois and B. Ivens, "Measuring Relational Norms: Some Methodological Issues", (2006) 40 *European Journal of Marketing*, 352 (also at <http://www.impgroup.org/uploads/papers/4668.pdf>), 357

On the other hand he suggests one more norm that fits more into conventional-transactional contracts, the norm that enhances discreteness and presentation<sup>41</sup>. Therefore, while he sets-up a model of norms for all contracts he distinguishes between contracts with a more conventional or relational character, pointing out that there are some other special norms for them or that some of the common norms are more important in relational contracts. A key issue about MacNeil's arguments about these sets of norms has to do with the idea that the specific role, content and significance of every norm depends on the extent to which relational or discreet elements prevail in the specific relation.

### *The Common Norms*

Concerning the 'role integrity norm'<sup>42</sup>, we should note that it is an idea already apparent in Macaulay's work, who assumes that the parties of a contractual relation "seek to overcome formal rationality to achieve goals"<sup>43</sup>. The parties will be rather based on certain anticipation standards about what their counterparties are going to do and how they are going to fulfil their obligations, according to the idea that they perceive about them<sup>44</sup>. Especially in more relational contracts, parties tend to overcome the formal rules in order to serve their goals by a more functional and efficient way. However, in order to achieve it, they have to trust the other party and expect that it is going to behave properly and fulfil their respective obligations in an adequate –depended on the image that they have about them- way<sup>45</sup>. Thus, expectations about the other party's behaviour are a fundamental for the establishment, development and continuation of every relation and

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<sup>41</sup> I. R. Macneil, *New Social Contract*, 60

<sup>42</sup> I. R. Macneil, *New Social Contract*, 40-44

<sup>43</sup> S. Macaulay, "An Empirical View of Contract", (1985) *Wisconsin Law Review*, 465, 468.

<sup>44</sup> B. Misztal, *Trust in Modern Societies*, (Cambridge: Polity Press, 1996), 121

<sup>45</sup> R. Graf, J. Perrien, "The Role of Trust and Satisfaction in a Relationship : The Case of High Tech Firms and Banks", (2005) *EMAC (Presentation)*, 4-5

especially of a long-term and complex one<sup>46</sup>. In general, role integrity describes complex, long-term behaviours that involve diverse obligations and more personal relations<sup>47</sup>.

The norm of 'reciprocity' is a very important norm of social relations in general and has to do with the reasonable anticipation of every party that their counter-party is going to give them something back in correspondence to their own contribution to the relation<sup>48</sup>. In other words, every party assumes that it will earn a benefit because of its own behaviour in the relation and specifically that the other party will respond to it. This kind of expectation is fundamental for building trust and succeeding longevity especially in long-term contracts, however is also essential for every kind of contract and exchange relation in general. This social exchange of obligations leads the parties to undertake future obligations of content not necessarily clarified in advance. Actually in every aspect of exchanges and contracts, there exists the "quid pro quo" rule, according to which every party's provision is matched by the other party's counter-provision. Although reciprocity norm may not be as apparent as it is in discrete exchanges, because of the complex and multileveled character of the parties respective provisions (for example a party may prefer to receive a later benefit by its partner because of the nature of the relation), it is evenly important in relational exchanges as it forms the basis for trust, self-commitment and (especially long-term) cooperation.

McNeil initially referred to this norm as "mutuality", something very important as mutuality should characterise every aspect of a continuous relational exchange and benefits and risks should be allocated in a way that permits every party to anticipate that the counterparty will reciprocate its own overall behaviour. In relational contracts, reciprocity does not only concern quantified and measurable provisions but refers to the overall behaviour anticipated from one party concerning the other. According to McNeil reciprocity "calls not for equality but for some kind of evenness"<sup>49</sup>, meaning that under relational circumstances (far more complex than the give and take strategy in discreet

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<sup>46</sup> I. R. Macneil, "Values in Contract: internal and external", 340-418

<sup>47</sup> I. Prim-Allaz I., J. Perrien (2000), « Présentation d'un document de travail : The Relevance of Macneil's Relational Norms to Understand the Exit of an Interorganizational Relationship », (2000) First Nordic Workshop on Relationship Dissolution (Kuusamo, Finlande), 4

<sup>48</sup> I. R. Macneil, "Contracting Worlds and Essential Contract Theory", (2000) 9 Social & Legal Studies, 431, 432.

<sup>49</sup> I. R. Macneil, New Social Contract, 44.

exchanges), reciprocity should not be defined as a norm that necessarily calls for an exact balance concerning the parties' contributions to the relation (given the fact that such a balance is difficult to be achieved because of the non-quantified character of many aspects of the relation) but should better be perceived as the need for securing that every counterparty will take from the other something adequate in compensation for their behaviour. What is the character and content of this "adequate compensation" depends on the nature of the relation, the behaviour of every party towards the other and the position of the parties within this relation. Reciprocity is also related to fairness in contracting<sup>50</sup> and bargaining<sup>51</sup>.

'Effectuation of consent' is another norm, according to which in every exchange the exercise of a choice involves the sacrifice of other opportunities, as a party's behaviour constitutes a consent that allows the other to limit the freedom of the first one. This norm is related to the primal root of "sense of choice"<sup>52</sup>. The foundation and the reason of such a limitation are based on the consent of the first party and according to the degree of this consent the above limitation obtains its special content. In relational contracts, this effectuation is distinctive as this limitation that refers to future actions is not determined in advance but depends on a number of factors referring to the ongoing relation. We could describe the core of that norm as a rule according to which, the parties' obligations in a relation are determined by their initial and ongoing consent, by commitments undertaken at the beginning of the relation or subsequently and by facts that they knew since the beginning of the relation or are necessary results of the relation<sup>53</sup>. Effectuation of consent along with implementation of planning are two norms that combined together form the normative framework of discreet transactions (enhancing discreteness and presentation), as any activity and behaviour related to the exchange concerns the effectuation of a formal agreement.

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<sup>50</sup> R. Austen-Baker Richard, "Consumer Supplier Relations, Regulation and Essential Contract Theory", (2008) 24 *Journal of Contract Law*, 60, 71

<sup>51</sup> According to MacNeil, classical contract law is not mainly concerned about reciprocity, except of cases of fraudently obtained bargains, which courts often refuse to enforce. *New Social Contract*, 85.

<sup>52</sup> R. Austen-Baker, "A Relational Law of Contract?", (2004) 20 *Journal of Contract Law*, 125, 134

<sup>53</sup> *ibid*, 135

'Implementation of planning' is related to the parties' action to determine commitments that are going to be fulfilled in future, by a present agreement and planning. MacNeil emphasises the element of planning in his overall work, as he assumes that the relational contracts theory is useful for contract planning. Planning refers to the content of the contract and to the processes followed in the relation. This norm is also linked with the axis –mentioned above– about 'Obligations undertaken', which constitutes the content of the contract. Therefore, this norm is significant in discreet transactions, but it has a different character according to the relational element of each exchange. The source of content in transactions is expressively communicated, the specificity of content and obligations is high and the sources of obligations are external. Mutual and individual planning is done at the beginning of the transaction, is concerned about the dispute-resolution definition, the subject of the exchange is totally defined and the basic parameters of the contract are mostly quantifiable and thus pre-defined as completely as possible. On the other hand, in relational contracts the content is partially determined by the relation itself, the specificity is low and the sources of obligations are both external and internal, as they refer to the relation itself. There is more focus on process planning and on the performance of the relation, some part of the planning is left for the future, planning has a much more mutual character and involves less conflict and more mutual allocation of risks and benefits. In most of the relations planning involves both transactional and relational characteristics, as some objects of planning need to be defined with specificity, although there is always "an element of tentativeness", which limits specificity to a certain degree<sup>54</sup>, while standardised planning may break down<sup>55</sup>.

Flexibility as a norm may be assumed as a counter to "implementation of planning"<sup>56</sup>, as the first focuses on the parties' ability to reconstruct the content of their relation, while the second focuses on how they can pre-define it. Flexibility is related to uncertainties always existing in every exchange and get more important in long-term relations and exchanges with a far more relational scope and to the necessary adjustments made in order to achieve it. In discreet transactions, every future adjustments aiming at achieving

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<sup>54</sup> I. R. Macneil, *Many Futures*, 763.

<sup>55</sup> S. Macaulay, "Non-Contractual Relations in Business: A Preliminary Study", 58-59

<sup>56</sup> P. Vincent-Jones, *The New Public Contracting: Regulation. Responsiveness, Relationality*, (Oxford, OUP, 2006), 6.



flexibility are planned outside the actual exchange<sup>57</sup>, as flexibility is achieved by entering or refraining from entering a contract; while in relational exchanges the flexibility is achieved inside the relation and is determined by the parties' actions, planning and behaviour within the relation. Thus we understand that flexibility and implementation of planning are two norms not so far from each other; however flexibility has a much different and broader scope, referring to every other norm. Flexibility is a prerequisite for the relation's solidarity, a means for every party to continue to play its role in the relation and a means for parties in order to resolve their relational conflicts that may be caused by unpredictable events; a need also requested by the overall social matrix of the relation; an element related to the consent and creation of power as the parties tend to change their priorities within the relation, thus asking for a change of the content of their or their counterparty's commitments because of an alteration of parameters of the ongoing relation; the parties also anticipate that their counterparties are going to work continuously on achieving flexibility and they also assume as fair and proper to be able to alter the content of the relation according to uncertainties, because otherwise they could result bound to prior commitments that are not related to the present situation, something that could also result to exploitative and unfair consequences. Thence, although flexibility is a characteristic norm of MacNeil's relational theory, we could suggest that it is not actually a norm but a prerequisite for the effectuation of all other norms<sup>58</sup>.

Macneil defines solidarity as "no more than the norm of holding exchanges together"<sup>59</sup> and means that parties usually tend to select behaviours that facilitate the relations' stability and allow the relation to continue. According to Macneil, contractual solidarity has a great importance for every contract as it constitutes the expansion –in contracts- of the general idea that within a society, everyone is interdependent and every party's behaviour has to operate according to a set of rules, which are accepted by the large

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<sup>57</sup> I. R. Macneil, *Contracts: Adjustment*, 859.

<sup>58</sup> R. Austen-Baker, "Comprehensive Contract Theory: A Four Norm Model of Contract Relations" (2009) 25 *Journal of Contract Law*, 216, 241

<sup>59</sup> I. R. Macneil, *New Social Contract*, 52.

majority, while it is very important for long-term relations as business partnerships, alliances and cooperation. This interdependence is presented in contracts by the fact that even the parties' selfish interest may lead them to the choice of preserving the contract. Actually, the parties understand that cooperation is the only way in which every party's individual interest may result to the benefit of the other as well, as actions that decrease the other party's interest endanger the relation, thus threatening the first party's long-term interest as well<sup>60</sup>. Although Campbell argues that 'this co-operative attitude makes the notion of the individual utility maximiser inappropriate to relational contracts'<sup>61</sup>, it is understandable that both parties continue to serve their own interests by cooperation in a way so profitable that encourages them to give priority to long-term benefit, for the sake of which they prefer to sacrifice a short-term benefit that derives from mere opportunistic behaviours. According to this opinion, people cooperate, not due to altruism, but in order to increase their own utility<sup>62</sup> and a cornerstone of contractual solidarity and cooperation lies in the parties' self-interest<sup>63</sup> as their individual long-term interest conflicts with short-term interest<sup>64</sup>.

Macneil underlines that contractual solidarity is a norm of contract law, as law enhances the contractual stability in two ways. Firstly, it enhances our anticipation that our counter-parties will fulfil their obligations, not because we actually intend to use the solution of litigation but only because law offers us such an opportunity. Thus, legal mechanisms play a pre-emptive role against any breach and in that way it facilitates trust and cooperation<sup>65</sup>.

The 'linking norms' are restitution, reliance, and expectation interests. Although, according to other authors, such as Austen-Baker, are not assumed as actual norms, MacNeil assumes that they are necessary for adjustments of the relation after the initial agreement. Restitution is important when one party earns an unfair benefit against the

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<sup>60</sup> I.R. Macneil, 'Economic Analysis of Contractual Relations: Its Shortfalls and the Need for a "Rich Classificatory Apparatus"' (1981) 75 *Northwestern University Law Review* 1018, 1034.

<sup>61</sup> D. Campbell (eds.), *The Relational Theory of Contract: Selected Works of Ian Macneil* (London: Sweet & Maxwell, 2001), 17.

<sup>62</sup> I. R. Macneil, *New Social Contract*, 96-97.

<sup>63</sup> I. R. Macneil, "Whither Contracts", 405

<sup>64</sup> I. R. Macneil, 'Exchange Revisited: Individual Utility and Social Solidarity' (1986) 96 *Ethics* 567, 578-579.

<sup>65</sup> *ibid*, 93.

interests of the other, reliance is important in order to add actual bindingness to non legally binding agreements and promises and expectation actually constitutes the party's perception about what the counterparty has promised. Hence, these principles are essential –according to MacNeil- in order to determine the content of every adjustment of the relation that is undertaken as a response to unforeseen circumstances.

The 'power norm' has to do with the creation of power of a party on another and the restraint of its own powers for the benefit of the other, a phenomenon that occurs in every contractual relation<sup>66</sup> and has a main importance under more "relational" circumstances, because of the duration of the relation and the parties' interdependence. The reason for that creation and restraint of power is that a contractual relation and the overall cooperative context imposes on us certain obligations that limit our behaviour and our freedom of acting and give to the counterparty rights of intervention in a field of our interest, while respectively we receive corresponding rights on it<sup>67</sup>.

'Propriety of means' is a norm that according to some authors fits in both the ten common and the specific relational norms<sup>68</sup>. According to MacNeil it is "... the ways relations are carried on as distinct from more substantive matters, including not merely formal and informal procedures, but such things as customary behaviour, often of the most subtle kind"<sup>69</sup>. It means that when we get into a relation with another party, we have to choose certain behavioural patterns that seem appropriate, given the whole social context and the specific nature of every relation. By the relation, the parties certainly pursue some individual goals; however they are not free to accomplish them by any mean –no matter the cost for the counterparty- and without keeping any standard of substantial fairness. This norm has also a specific relational dimension, as the specific propriety and acceptability of means depends on the nature of each specific relation and the special parameters concerning the scope of the relation, the parties' profile and their individual and collective needs and goals. So, the notion of propriety has to be adapted to the

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<sup>66</sup> I. Prim-Allaz I., J. Perrien (2000), « Présentation d'un document de travail: The Relevance of Macneil's Relational Norms to Understand the Exit of an Interorganizational Relationship », 4-5

<sup>67</sup> R. Austen-Baker, "Comprehensive Contract Theory: A Four Norm Model of Contract Relations", 235.

<sup>68</sup> J. Nevin, "Relationship marketing and distribution channels: Exploring fundamental issues", (1995) 23 Journal of the Academy of Marketing Science, 327, 329

<sup>69</sup> I. R. Macneil, "Contracting Worlds and Essential Contract Theory", (2000) 9 Social and Legal Studies, 431, 432.

specific parameters of each relation and apart from some common standards, we can describe a complete model of proper means fitting into any relation.

'Harmonisation with the social matrix' is related to the relevant primal root of contracts – mentioned above- and means that the relation has to comply with the overall set of factors that define exchanges in a given society, including legal enforcing mechanisms, communication protocols, trade, metric, transporting and monetary systems and procedures of trading and bargaining and that every exchange is developed to the extent to and in the way in which the social matrix permits this to happen. According to MacNeil the social matrix consists of everything necessary for an exchange to occur<sup>70</sup> and the relation is integrated in it, thus being influenced and taking elements by it. This norm equally applies to all kinds of contracts no matter how discreet or relational they are; as they unavoidably incorporate elements referring to some commonly accepted standards.

### *The Relational Norms*

According to MacNeil "preservation of the relation" is just an intensification and expansion of the norm of contractual solidarity"<sup>71</sup> and includes both individual (preservation of members of the relation) and collective (preservation of the whole relation) preservation. According to other points of view, this norm constitutes an expansion on the field of relational contracts of the common norms of contractual solidarity and flexibility. According to a third point of view<sup>72</sup>, this relational norm is based on the two common norms above, however reciprocity, creation and restraint of power and the linking norms also are minor contributors to it.

'Harmonisation of relational conflict' is a norm also related to the preservation of the relation<sup>73</sup>. However the reason why MacNeil treats it as a distinct norm lies in the fact that in modern contractual relations, it is possible that there exist conflicts between the internal and external relations within the relationship and measured and non-measured

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<sup>70</sup> I. R. Macneil, Values in Contract, 344

<sup>71</sup> *ibid*, 66.

<sup>72</sup> K. Blois and B. Ivens, "Measuring Relational Norms: Some Methodological Issues", (2006) 40 European Journal of Marketing, 352 (also at <http://www.impgroup.org/uploads/papers/4668.pdf>), 357.

<sup>73</sup> P. Vincent-Jones, The New Public Contracting, 7 note 16.

aspects of the relation. The importance of the harmonisation of such conflicts is so important for the survival of the relationship and for the parties' behaviour that must be treated separately<sup>74</sup>. According to another point of view<sup>75</sup>, this norm is related to the need for flexibility and to the norm harmonization with the social matrix, a point of view with which we do not agree, as we believe that this common norm has a much broader meaning and influences much more parameters of the overall social context than the relational conflicts and that the harmonisation of the relational conflict is mostly related to the overall solidarity and preservation of the relation. This norm is highly related to the establishment of a framework that helps dispute resolution and constant adjustments of the exchange relationship<sup>76</sup>.

Supracontract norms constitute factors of the relation that derive from contractual relations and frameworks of a larger scale that may form 'minisocieties and ministates'<sup>77</sup>, under circumstances when the exchange occurs within a behavioral framework largely accepted and they do not have a particular contractual nature.

Supracontract norms are those factors in relations that are not particularly contractual in nature<sup>78</sup>, for example factors arising from large contractual relations forming or broad norms such as distributive and procedural justice, liberty, human dignity and social equality and inequality<sup>79</sup>. This norm is related to the harmonisation with the social matrix<sup>80</sup>.

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<sup>74</sup> I. R. Macneil, *The New Social Contract*, 69.

<sup>75</sup> K. Blois and B. Ivens, *Measuring Relational Norms*, 352-365, Figure 1

<sup>76</sup> Look also to S. Macaulay, "Non-Contractual Relations in Business: A Preliminary Study", 59-60

<sup>77</sup> I. R. Macneil, *The New Social Contract*, 70.

<sup>78</sup> For the distinction between "particularly contractual" and "supracontractual" norms look to I. R. Macneil, "Values in Contract: internal and external", 350.

<sup>79</sup> I. R. Macneil, *The New Social Contract* 70

<sup>80</sup> K. Blois and B. Ivens, *Measuring Relational Norms*, 357

## Other Literature about Relational Contracts Theory

### *Acceptance and Application of MacNeil's Theory*

Based on the theoretical approaches of MacNeil's work, other authors established interesting arguments about the relational element that is apparent in contracts and especially in contracts based on the interdependence and cooperation of the parties mainly in business transactions.

Bird<sup>81</sup> applies relational contract theory to employment contracts and he defines employment as a relational contract forged by the parties' behaviour. He also emphasizes the importance of norms in such contracts, mentioning that almost every aspect of the employment relation that falls outside the explicit content of employment contracts and the statutes, such as corporate culture, office politics, trust, future planning, and the complex social matrix of organizational life are the exclusive domains of norms.

Austen-Baker<sup>82</sup> discusses the issue of the application of MacNeil's theory about contract norms to consumer law, in order to examine certain presuppositions of consumer law. He examines a) the consumer-supplier relation b) consumers as the vulnerable and disadvantaged party in a consumer-supplier relation c) regulation (intervention of the state) as essential for consumers' protection. The above statements are rejected by the author, after testing them by using the contractual norms of solidarity, reciprocity, role integrity and propriety of means and "the agents without principles" theory. Therefore, the author proves the norms-based approach practical value as a means, in order to analyze and understand the content, orientation, and the factors defining a certain relation.

Lisa Bernstein's work<sup>83</sup> is also related to MacNeil's theories, especially as far as norms and business relations are concerned, as she studies industries that have opted out of the

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<sup>81</sup> R. Bird, "Employment as a Relational Contract", (2005) 8 University of Pennsylvania Journal of Labour and Employment Law, 149

<sup>82</sup> R. Austen-Baker Richard, "Consumer Supplier Relations, Regulation and Essential Contract Theory", (2008) 24 Journal of Contract Law, 60

<sup>83</sup> For Bernstein's relative work look to: L. Bernstein, "Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry," (1992) 21 Journal of Legal Studies 115

public legal system and have replaced it with privately drafted commercial codes and arbitration tribunals to resolve disputes and how contractual relations in certain industries result to the rules, norms and institutions that constitute the industry's private legal system and manage to create value for transactors. Her work examines the legal and extralegal aspects of contracting relationships, which generate conditions that are conducive to the creation, maintenance and restoration of cooperative contracting relationships. Bernstein also underlines that the social and informational infrastructures of trade form reputation-based non-legal sanctions, which play an important role in the structure of some industries and whose availability allows transactors to create value-enhancing contract governance structures that are unavailable if the transactions were governed by the public legal system. Bernstein applies the theoretical approaches of relational contracts in the reality of modern business structures and underlines the value of certain basic norms in the regulation of relationships even by private regulation systems, proving their applicability and catholicity.

David Campbell<sup>84</sup> also tries to use relational theory to justify efficient breach of contract, and to rationalize the rules limiting both specific performance and compensatory damages. Furthermore, McNeil's literature -especially as far as norms are concerned- has been examined in relevance to the extent to which they are supported by English case law or statutes. Austen-Baker<sup>85</sup> argues that role integrity, effectuation of consent, creation and restraint of power, linking norms, propriety of means and harmonization with the social matrix are strongly supported, while he mentions that the discrete norm is obviously fully supported. Reciprocity is also supported but in a less obvious and strong way, while flexibility is supported by the fact that implementation of planning is an obvious part of contract law and that the conventional doctrines of waiver and promissory estoppel provide for the variation of contract terms by mutual consent<sup>86</sup>.

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L. Bernstein, "Social Norms and Default Rules Analysis", (1993) 3 Southern California Interdisciplinary Law Journal, 59

L. Bernstein, "Private Commercial Law in the Cotton Industry: Creating Cooperation through Rules, Norms, and Institutions", (2001) U Chicago Law & Economics, Olin Working Paper No. 133

<sup>84</sup> Campbell D., "The Relational Constitution of Remedy: Co-operation as the Implicit Second Principle of Remedies for Breach of Contract", (2005) 11 Texas Wesleyan Law Review, 455

<sup>85</sup> R. Austen-Baker, "A Relational Law of Contract?", (2004) 20 Journal of Contract Law, 125

<sup>86</sup> *ibid*, 134, 137-138

On the other hand, other scholars rejected McNeil's theories. Specifically, Posner, although he recognized that there are certain problems and opportunities for the parties when they have a continuing relationship, he believes that economics literature is much more capable of handling such problems<sup>87</sup>.

Despite of the above, relational contract theory received a wider acceptance in management scholarship, while McNeil's work was assumed as difficult to understand and apply in legal scholarship.

### *Other Arguments and Approaches towards Relational Contracts*

#### *Definition of Relational Contracting*

Regarding the definition of relational contracts, we should note that although several have to date been offered<sup>88</sup>, none appears to be universally accepted. McNeil highlights the importance of two principles of behaviour: solidarity and reciprocity<sup>89</sup>. Goetz and Scott<sup>90</sup>, talk about the tendency to equate the term "relational contract" with long-term contractual relationships and state that this is due to the fact that a contract is relational "to the extent that the parties are incapable of reducing important terms of the arrangement to well-defined obligations". They<sup>91</sup> argue that what makes a contract relational is that there are some contracts where obligations cannot be ex ante defined. Whereas the literature on long-term contracts focuses on the problems which arise because of incompleteness and the potential for renegotiation, the theory of relational contracts focuses on the relationship between the contracting parties which ensures that opportunistic behaviour does not arise and the way in which cooperation can be secured. Mitchell<sup>92</sup> distinguishes between two different and often incompatible 'worlds' within which contractual relationships can be developed, a distinction deriving from sociolegal

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<sup>87</sup> D. Campbell, "Ian Macneil and the Relational Theory of Contract", (2004) CDAMS Discussion Paper 04/1E, 30-31

<sup>88</sup> M. A. Eisenberg, 'Relational Contracts', in J. Beatson and D. Friedmann (eds.), *Good Faith and Fault in Contract Law*, (Oxford: Clarendon Press, 1995)

<sup>89</sup> I. R. Macneil, "Relational Contract Theory as Sociology: A Reply to Professors Limberg & de Vos.", (1987) 143 *Journal of Institutional and Theoretical Economics*, 272, 274-275

<sup>90</sup> C. Goetz, and R. Scott, "Principles of Relational Contracts", (1981) 67 *Virginia Law Review*, 1089, 1091

<sup>91</sup> *ibid*, 1093

<sup>92</sup> C. Mitchell, "Contracts and Contract Law: Challenging the Distinction between the 'Real' and 'Paper' Deal", (2009) 29 *Oxford Journal of Legal Studies*, 675



scholarship, which is based on the assumption that legal reasoning might be improved by more attention to the real world of contracting at the expense of the artificial world of documents and classical doctrine.

### *Reputation & Long-Term Relations*

Hviid<sup>93</sup> recognizes a strong relation between long term cooperation and relational contracts<sup>94</sup>. Contracts should be examined as a combination of legally enforceable and self-enforceable obligations, as some obligations need to be self-enforceable because third parties cannot verify the facts giving rise to a particular obligation and others need to be self-enforceable because of the transaction costs of using the legal system. He underlines the effects of renegotiation on the relation<sup>95</sup> and insists on the importance of the reliance of the parties to each other's good faith and of the proper allocation of risks and liability, in order to resolve unforeseen problems concerning the relationship.

According to Baird<sup>96</sup>, if having the reputation of either keeping to a contract term, or modifying or bargaining to fill a gap in good faith, the law is not needed to enforce this term. In a relational contract, the parties rely on each other to behave in a cooperative manner for the duration of the contract, rather than exploiting any opportunity which may appear.

### *Contract Enforcement and Remedies in Relational Contracts*

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<sup>93</sup> M. Hviid, "Long Term Contracts and Relational Contracts", in B. Bouckaert. and G. De Geest (eds), *The Encyclopaedia of Law and Economics vol. III: The Regulation of Contracts*, (Cheltenham: Edward Elgar, 2000), also at (<http://www.scribd.com/doc/239254/LongTerm-Contracts-and-Relational-Contracts>)

<sup>94</sup> Look also to R. Scott, 'Conflict and Cooperation in Long-Term Contracts', (1987) 75 *California Law Review*, 2005, who correlates relational contracts with repeated games theory. Repeated Games are also used to model relational contracts by numerous authors. Look to: D. Baird, R. Gertner, R. Picker, "Game Theory and the Law", (Cambridge, MA: Harvard University Press, 1998), 159; D. Campbell, D. Harris, 'Flexibility in Long-term Contractual Relationships: The Role of Co-operation', (1993) 20 *Journal of Law and Society*, 166; M. Hviid, (1996), 'Relational Contracts and Repeated Games' in D. Campbell, P. Vincent-Jones (eds.), *Contract and Economic Organisation: Socio-legal Initiatives*, (Aldershot UK: Dartmouth, 1996), 125; M. Hviid, 'Relational Contracts, Repeated Interactions and Contract Modification', (1998) 5 *European Journal of Law and Economics*, 179; S. Hackett, 'Is Relational Exchange Possible in the Absence of Reputations and Repeated Contract?', (1994) 10 *Journal of Law, Economics, and Organization*, 360; R. Sloof, J. Sonnemans, "The interaction between Explicit and Relational Incentives: An experiment", (2009) University of Amsterdam, Tinbergen Institute, Discussion Paper 09-030/1, available at <http://www1.fee.uva.nl/pp/bin/951fulltext.pdf>

<sup>95</sup> Look also to D. Yavuz, "Reputation, Network Effects and the Theory of the Firm: A Renegotiation-Proof Approach" (2007), available at SSRN: <http://ssrn.com/abstract=994662>, who emphasises the importance of reputation as a factor that prevents major alterations in the relation due to renegotiation.

<sup>96</sup> D. G. Baird, "Self-Interest and Cooperation in Long-Term Contracts", (1990) 19 *Journal of Legal Studies*, 583-596

Klein<sup>97</sup> argues that court enforcement and private enforcement need not be alternative contract enforcement mechanisms, but may be complements. The former may on its own generate too much rigidity, making it possible for one party to 'hold-up' the other when conditions change radically while the latter generates too much flexibility.

Jennejohn<sup>98</sup>, although accepts that contextualist contract enforcement retains its importance in non-collaborative contract schemes, he also proposes a hybrid approach that should integrate both formalism and problem-solving judicial intervention and that could constitute an adequate basis for explaining how modern firms define their relationships.

Scott<sup>99</sup>, examines the role of courts and state in the regulation of relational contracts especially as in relational contracts, parties have incentives to breach by exploiting gaps in the contract, although enforcing the verifiable terms and trying to fill in the gaps by interpretation gives a partial solution. According to the author, the application of the common law plain meaning and parol evidence rules can preserve the value of predictable interpretation and common law formalism plays an important role in expanding the variety of standard form terms<sup>100</sup>, which could reduce contracting costs the parties and this formalist approach not only supports the effective interpretation of contract language but it also generates standardized and adequately tailored clauses<sup>101</sup>.

Another interesting approach<sup>102</sup> points out that MacNeil's work focused only on the limitations of formal remedies within the framework of the relational theory of Contract and that relational contracts theory has focused on extra-legal or informal devices for the regulation of long-term contractual relations and the frequent use of Alternative Dispute

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<sup>97</sup> B. Klein, "Why Hold Ups Occur: The Self Enforcing Range of Contractual Relationships", (1996) 34 *Economic Inquiry*, 444-463.

<sup>98</sup> M. Jennejohn, *Governing Innovative Collaboration: A new Theory of Contract*, (2006) Columbia Law and Economics Working Paper 319 (available at <http://ssrn.com/abstract=1014420>)

<sup>99</sup> R. Scott, "The Case for Formalism in Relational Contract", (2000) 94 *Northwestern University Law Review*, 847, (also at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=215129](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=215129))

<sup>100</sup> S. Macauley, "The Real and the Paper Deal: Empirical Pictures of Relationships, Complexity and the Urge for Transparent Simple Rules" in D. Campbell, H. Collins, J. Whiteman (eds.), *Implicit Dimensions of Contract: Discrete, Relational and Network Contracts* (Oxford UK and Portland Oregon USA: Hart, 2003), 61

<sup>101</sup> According to other researchers formal and relational contract are not substitute to each other and each offers its own advantages. Look to S. Carson, A. Madhok, T. Wu, *Uncertainty, Opportunism and Governance: The Effects of Volatility and Ambiguity on Formal and Relational Contracting*, (2006) 49 *Academy of Management Journal*, 1058.

<sup>102</sup> M. Gelbard, Y. Adar, "The Role of Remedies in the Relational Theory of Contract - A Preliminary Inquiry", (2010) 6 *European Review of Contract Law* (forthcoming), available at <http://ssrn.com/abstract=1416750>.

Resolution mechanisms (as Bernstein argued). It examines how the remedial response to the breach of a long-term relational contract should differ from the ordinary or traditional legal response to contract breach. The European Draft Common Frame of Reference includes certain remedial provisions that could fit for relational contracts' specificities and that it could constitute the basis for a relational contracts' remedies law.

### *Suggestions for a Simpler Contractual Norms' Theory*

MacNeil's theory about norms may be criticised as too complex and difficult to understand, explain and use, a fact that constitutes an obstacle for its practical implementation. Austen-Baker, based on MacNeil's norms, sets-up a four-norm model, which names as "comprehensive contracts theory", by merging some of MacNeil's norms and substituting them by four universal contract norms that apply both to relational and common contracts<sup>103</sup>.

The first one is the norm of preservation of the relation, which includes contractual solidarity, preservation of the relation and harmonisation of relational conflict; the second one is the harmonisation of the social matrix, which comprehends harmonisation with the social matrix, and supracontract norms; the third one is the norm of satisfying performance expectation, which integrates implementation of planning and presentation, effectuation of consent to presentation, role integrity and the creation and restraint of power; and the fourth one is the substantial fairness, which includes propriety of means, reciprocity and creation and restraint of power (also included in the previous norm). Flexibility is considered as "an essential component in all the norms", the linking norms are not assumed as norms by the author, as they constitute interests that are not very relevant to the contract<sup>104</sup>, and discreteness, although it is involved in every contract, cannot be assumed as a norm, as it cannot be assumed as universal<sup>105</sup>. On the other hand, the author accepts that presentation alone could be a part of satisfying performance expectations norm.

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<sup>103</sup> R. Austen-Baker, "Comprehensive Contract Theory", 216-243.

<sup>104</sup> *ibid*, 219-220

<sup>105</sup> *ibid*, 241-243

## CHAPTER B: THE RELATIONAL CHARACTER OF MANAGEMENT CONTRACTS

### General Content of Management Contracts

#### *Historic Evolution of Management Contracts*

A management contract is an agreement under which a company assigns its own management to another company, which offers such services in return for a fee.

According to Cunill<sup>106</sup>, Schluter and Martinek, the method of management contracts was developed firstly in British Empire in the late 19<sup>th</sup> in the form of “managing agencies”<sup>107</sup>, as in colonies in south-eastern Asia there was a lack in experienced staff and management agencies were specialised in undertaking management industrial enterprises in these overseas territories, on behalf of domestic British enterprises. At the beginning of 20<sup>th</sup> century, management agreements were widely spread in USA, mainly in the energy sector, as a form of know-how transfer while later management agreements transformed from a means of cooperation into a means of administration, as the small companies entering these administrative schemes (konzern) were losing their structural independence. Management agreements continued being used as a means of cooperative development between companies in other fields, such as rail industry, insurances, machinery construction industry, mining and ores processing industry, publishing companies, hotel companies<sup>108</sup>, etc, while they grew much after WWII as a means of know-how transfer from developed countries to developing world enterprises (international management agreements) and as an alternative to the gradual privatisation of state owned enterprises and public utilities<sup>109</sup>.

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106 O. M. Cunill, *The growth strategies of hotel chains: best business practices by leading companies*, (New York: Haworth Hospitality Press, 2006), 127

<sup>107</sup> A. Schluter, *Management - und Consulting -Verträge*, (Berlin: Walter de Gruyter, 1987), 18 and M. Martinek, *Moderne Vertragstypen II: Franchising, Know-how-Verträge, Management- und Consultingverträge*, (München: C. H. Beck, 1992), 277

<sup>108</sup> J. Dunning, S. Lundan, *Multinational enterprises and the global economy*, (Cheltenham UK: Edward Elgar Publ., 2<sup>nd</sup> ed., 2008), 280.

<sup>109</sup> D. Pannier, S. Schiavo-Campo, “Corporate Governance of Public Enterprises: The Comparative Experience” in D. Pannier (eds.), *Corporate Governance of Public Enterprises in Transitional Economies*, World Bank Technical paper

## *Object of Management Contracts*

The object of management contracts (or management agreements, as they are referred elsewhere) is the transfer of the management of an enterprise or corporation or business unit or facility from the owner institution (called recipient) to another external institution, usually referred as Management Company (or provider), which is usually paid for the management services that it offers.

Attempting to define the meaning of management, we could use one of the following definitions: “A system of actions for achieving the objectives of a social group by effectively exploiting specific resources” or “The set of processes and checks by which maintenance of organisational structure and the objectives of a group of people towards a specific result are ensured”. According to Wheelen and Hunger<sup>110</sup>, management leads the people of a company, meaning it is responsible to select, motivate, lead, instruct, control and coordinate the executives and employees of a company, in the framework of its organisational structure, aiming at the achievement of its objectives and at a productive and effective operation.

Management contracts belong to the family of outsourcing contracts<sup>111</sup> (management is viewed as a separate corporate function that can be outsourced) and the largest family of business partnership schemes, incorporating the element of business services’ provision. They are a type of new business governance structures (such as business networks, joint ventures, co-production agreements) in which a part or the whole of activities management of the collaborating parties is performed according to a common objective achievement, which is the focal point of the cooperation and in order to be achieved central coordination is required that is fulfilled via collective management or management by a central body of all activities.

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No 323, (Washington DC: The World Bank, 1996), 23-25; W. Megginson, *Financial Economics of Privatization*, (New York: Oxford University Press, 2005), 59-61

110 T. Wheelen and D. Hunger, *Concepts in Strategic Management and Business Policy*, (Upper Saddle River, NJ: Pearson Prentice Hall, 10<sup>th</sup> ed., 2006), 88

<sup>111</sup> C. Fill, E. Visser., “The outsourcing dilemma: a composite approach to the make or buy decision”, (2000) 38 *Management Decision*, 43-50.

### *Management Contracts as Reciprocal Contracts*

A “management agreement”<sup>112</sup>, is usually concluded between a company in the form of legal private or public body and a company of the same or similar business activity with international reputation. Focusing on the legal part of this agreement, the company receiving management services assigns the company of international reputation the business management on their behalf. At the same time, the management company undertakes the obligation to manage the assigning company either completely, or for specific sectors, under the name, on behalf and at risk of the company receiving management services and for an agreed period of time. Therefore, according to a typical management agreement, the management company performs any material and legal actions concerning the fulfilment of business purpose, like day to day management and company representation to third parties.

The breadth of management company’s responsibilities is specified in the agreement concerned, depending on its context. Some of them are, for example: personnel recommendation for management positions of the company; personnel management (both those recommended and those already employed in the client-company); economical, financial, accounting management and support; management of production and other departments; conclusion of contracts that are common and necessary for normal everyday operation of the company; arranging the installation, expansion and monitoring of IT systems and more.

Management contracts can be categorised according to several factors. The management company may manage a company either wholly or only several sectors<sup>113</sup>, like production or marketing department. Depending on the type and level of responsibilities assigned to the management provider, according to the management agreement content<sup>114</sup> that expresses the will of the parties, management agreements are separated into limited or extended agreements. According to the place where the

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<sup>112</sup> The term may also appear, as: a) administration agreement or b) management contract.

<sup>113</sup> Martinek, *Moderne Vertragstypen II*, 289

<sup>114</sup> G. Westring, “Construction and Management Contracts” in N. Horn and C. Schmitthoff (eds.), *The Transnational Law of Commercial Transactions* (London: Kluwer, 1982),152

managerial services are delivered, meaning whether both the provider and the recipient operate in the same country or not, management contracts are distinguished between national and international respectively<sup>115</sup>.

Since the management company runs the management receiving company under the name and on behalf of the latter, it means that the only beneficiary of profits, damages, rights and liabilities, emanating from the manager's administrative-managerial activity, is the company receiving management services. However, the manager is entitled to management costs and of course payment. The assigning company also takes the risk for the success or failure of management. In case, however, it is specifically stated that the manager's payment will be determined according to management results, the manager will also be indirectly and partly responsible for any business risks. The explanation that the company receiving management services is mainly the one responsible of any risks lies in the fact that any business activity is materialised with their own resources and concerns tangible and intangible assets of the company. Even when the management company grants personnel to the client-company, since there is a payment for it, such human resources are thought to be coming from the assigning corporation and, therefore, the risk still belongs to it. However, when it comes to know-how, management and sometimes, mainly in cases of false management, to goodwill or to certain industrial rights or copyrights, then such resources definitely come from the manager.

### ***Benefits of Management Contracts for the Parties***

Benefits of a management agreement belong to two categories, unilateral and bilateral benefits<sup>116</sup>. The recipient profits by the reputation and credit worthiness of the

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<sup>115</sup> I. Doole, R. Lowe, *International marketing strategy: analysis, development and implementation*, (London: Cengage, 5<sup>th</sup> ed., 2008), 243; M. Brooke, *International management: a review of strategies and operations*, (Cheltenham UK: Hutchinson, 3<sup>rd</sup> ed., 1996), 87-89

<sup>116</sup> United Nations Centre on Transnational Corporations, *Management Contracts in Developing Countries: An Analysis of Their Substantive Provisions: A Technical Paper*, (New York : United Nations, 1983)

provider, obtains know-how<sup>117</sup>, becomes more efficient and increases its credit rating and ability of attracting investments and loans. Furthermore, the recipient achieves a severe cost reduction concerning management, production and distribution costs, due to the cooperation with the provider. The providers benefit not only from the management fees<sup>118</sup>, but from the relation itself as well, as according to Martinek<sup>119</sup> it functions as an indirect investment. They participate in the recipient's earnings without involving capital and assuming extended risk and cost and while they expand their management skills, their knowledge and their brand name strength in new markets; thus, these contracts function as an alternative to direct foreign investment<sup>120</sup>. However, modern management agreements are based on a more even allocation of risk, as providers are also obliged to contribute to initial working capital and their stable fees are being replaced by based on performance incentive fees. Both parties have the opportunity to increase their business reputation and goodwill and the efficiency of R&D processes, because of economies of scale. Concerning networking<sup>121</sup>, the main benefit of the recipient relates to its participation in networks of suppliers, customers, distribution, technological, research and scientific cooperation and generally any type of business cooperation. However, the provider through this process also develops and strengthens any cooperation networks that is a part of and sometimes even controls.

### **The special characteristics of the Parties' Relation within a Management Contract**

Management contracts constitute a legal tool of severe strategic importance for modern business, as they focus on the building of links between corporate entities, in order to succeed strategic objectives of mutual interest (low cost, enhancement of know-how, growth with low risk etc). Given the object (corporate management), usual length,

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<sup>117</sup> A. Wint, Corporate management in developing countries: the challenge of international competitiveness: The Challenge of International Competitiveness, (Westport CT USA: Quorum Books, 1995), 140-145

<sup>118</sup> For an indicative list of the benefits of a management contract for the provider in A. Schluter, Management - und Consulting -Verträge, 32 – 34 and M. Martinek, Moderne Vertragstypen II, 280.

<sup>119</sup> Martinek, Moderne Vertragstypen II, 279.

<sup>120</sup> T. Cavusgil, P. Ghauri, M. Agarwal, Doing business in developing countries: Entry and Negotiation Strategies, (London: Sage, 2002), 98

<sup>121</sup> W. Dymrza, "Successes and Failures of Joint Ventures in Developing Countries: Lessons from Experience" in F. Contractor, P. Lorange (eds.), Cooperative Strategies in International Business, (Oxford UK: Elsevier, 2002), 410-411



objectives to be accomplished, effects on the parties and other elements of such contracts, it is obvious that a certain relation is developed between the contracted parties, a relation that is distinguished by certain key characteristics, defining its special nature.

### *The complexity of the Contract's Object*

Firstly, this relation is determined by the special role and function of corporate management. Management not only is the controlling and major activity of every corporation, always linked with its institutional self-existence, but it also constitutes a very complex activity related to every aspect of a corporation and affecting every matter of it. The relation between the parties involves issues concerning asset control, separation of control and ownership, roles in decision making, allocation of risk, link of provider's fees and recipient's results, careful planning, transfer of know-how and intangible assets, integration of provider's staff in the recipient's structure, allocation of responsibilities, obligations and liability. Thence, every management contract is characterised by a controversy: it can never be complete enough as the management's object cannot be fully determined in advance, while it must have a detailed content that should try to cover as much as possible aspects of the relation. Nevertheless, in every case, the object of transfer should be limited to a more or less extensive degree, as it cannot reach the full separation of the recipient from its own management. Furthermore, the actual value of the exchanges that the relation involves cannot be easily quantified and measured<sup>122</sup>. The measurement and evaluation of the provider's performance is a very difficult task and it is usually approximately conducted; that is a matter directly affecting the need for detailed initial planning of the relation as it could evolve to a source of future conflict.

### *Principals and Agents in a Management Contract's Relation*

Second, such agreements take place only between corporate entities and not between individual entrepreneurs (the employment of a manager cannot be viewed as a

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<sup>122</sup> This fact underlines the highly relational character of these contracts. I. R. Macneil, "Restatement (Second) of Contracts and Presentiation", 595.

management contract<sup>123</sup>). So, this relation is based on agents' interactions<sup>124</sup>, negotiations, understanding, cooperation, tolerance and approval. Their role for the relation is important especially in terms of the actual development and implementation of a functional and efficient organisational structure and of constant cooperation and reliance.

### *Private and Exclusive Character of the Relation*

Third, above relation is strongly characterised by privacy and exclusivity. Both parties expect to the fulfilment of the contract by their counter-party itself and rarely tolerate or agree to a substitution. This feature is related to the special nature of management as a core business function and of each party's incorporation in the corporate structure and networks of the other, which do not permit an easy transfer of rights and obligations to third parties. The whole relation is concentrated on the specific roles that the specific counter-party has to assume in order that the relation can function and its stability and preservation is based on how the parties will accomplish their expected roles.

### *Interdependence between the Parties*

Fourth, the relation is always characterised by a great interdependence between the parties. Not only the recipient's management is controlled by the recipient, thus the recipient becomes dependent of the provider's decisions, but the provider's interests become greatly attached to the recipient's as well, not only because of the management fees, which are mainly determined by the recipient's results, but also because of the recipient's integration in the business networks of the provider. Such interdependence can also be observed in other outsourcing and inter-organisational structures<sup>125</sup>, however the special function of corporate management as the "brain and controlling hand" of entrepreneurship, gives a special significance to the interdependence under management contracts.

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<sup>123</sup> A. Schluter, Management - und Consulting –Verträge, 52

<sup>124</sup> D. Carmichael, Contracts & International Project Management, (Rotterdam:Balkema Publ., 2000), 91

<sup>125</sup> T. Laaksonen, K. Pajunen, H. Kulmala., "Co-evolution of trust and dependence in customer-supplier relationships", (2008) 37 Industrial Marketing Management, 910

## The Fiduciary Element in Parties' Obligations

### *The Merge of Structures and Management*

Therefore, a great link appears between the contracted parties, a link that is the result of the separation between ownership and management and concerns risk and profit as well. This link forms a triangular relation between the venture, the owner and the manager. Despite of the mostly one-sided allocation of risk in initial management agreements, the recent competition factors have imposed to the provider increased obligations of active and even financial participation in the recipient's ventures.

In management agreements, the legal link is spread over the whole corporate activity, as the object of the contract is not a mere business activity, but the controlling activity of all other business functions. So, this link is established on the centre of corporate existence of the parties, in a way that results to a partial merge of management. Parties not only devote assets, tangibles and intangibles, but they also accept a common administrative structure and decision centre (controlled by the provider), in order to succeed common objectives, in a way that resembles joint venture's results. However, the special feature of management contracts is that this merge is not succeeded by the use of methods of corporate but of contracts law, therefore it products similar results, however with much less time, cost, risk and permanence and in a much more flexible way.

### *The nature of Fiduciary Duties between the Parties*

As a result of all the above, another key element of management contracts arises and it has to do with their fiduciary content. As both parties tend to share common structure and common goals and the provider assumes the role of manager of the recipient, the whole relation is characterised by the fiduciary element to a great extent and both parties' obligations towards each other –however mostly the provider's obligations towards the recipient- are related to fiduciary duties. Trust, loyalty to other party's interests, reliance, acting in good faith and confidentiality are essential elements

of the relation and the fiduciary duties constitute a determining factor of the relation's content. The duty of extended care that characterises fiduciary relations constitutes the orientating factor of the anticipated behaviour in every aspect of the relation, from both parties and mainly affects the overall expected conduct of them, which can be specified in many particular aspects and obligations.

This fiduciary element varies according to the dependence of the other party, the duration and the significance of the specific relation. Especially the provider's role combines elements of a financial or managerial advisor and of the administrative body of the recipient. As the provider actually acts as a substitute body of the regular recipient's administration, assumes identical rights and duties as well. Furthermore, the whole relation partially resembles partnership and the relationship between trustee and beneficiary.

However, it would be rather right to attribute this fiduciary character to the specific nature of the relation and to the extent and kind of powers that are assigned mainly to the provider. According to *Frame v. Smith*<sup>126</sup>: *"Relationships in which a fiduciary obligation have been imposed seem to possess three general characteristics: the fiduciary has scope for the exercise of some discretion or power; the fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests; and the beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power."* All these three elements appear in management contracts, as we analyzed above. The mainly vulnerable party in the relation is the recipient for explicit reasons and as already identified, this vulnerability is related to its dependence on the provider and to the sui-generis nature of management as a business function. Moreover, according to the same case-law *"As well, it has frequently been noted that the categories of fiduciary relationship are never closed"* and according to *Ben-Israel v Valcare Medical*<sup>127</sup>: *"There are, however, other situations in which the duty arises, based on the particular situation and relationship of the parties"*.

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<sup>126</sup> *Frame v. Smith*, [1987] 2 Supreme Court of Canada, 99

<sup>127</sup> *Ben-Israel v Valcare Medical*, [1997] 78 CPR 3d 94

This fiduciary duty can be generally determined as a duty to adopt the objectives of the principal and this duty distinguishes such fiduciary relations from common relations, in which service providers act on behalf of others<sup>128</sup>. In management contracts, as described above, not only the parties adopt each other's objectives, but their own individual benefit depends on the benefit of the other. Therefore, the whole spectrum of its obligations is determined by a strong fiduciary element. This element and the duties of loyalty and care define explicit obligations and produce implied terms as well, terms that could be described as fiduciary duties<sup>129</sup>.

For reasons of certainty, parties tend to describe and include such obligations of fiduciary character in the contract; however such an attitude is not always followed, while some other obligations are rarely included. For example, although a non-competition and confidentiality clause is a usual part of such a contract, its specific details usually remain unclear, while the obligation of acting with loyalty to the recipient's long-term interests, while usually mentioned in the preface of such agreements, can only be specified by its own nature, in practice and the obligation of respect for the philosophy and the scope of the recipient's enterprise is almost never included. Therefore, the fiduciary character of the relation produces a series of obligations mostly for the provider, which derive by mutual trust, confidence and loyalty and as these obligations are not always mentioned or explicitly determined, they tend to be implied, in order to enhance fairness in the relation. Implied terms in management contracts however, do not serve only reasons of fairness, but they can also play a role in enhancing efficiency and flexibility of the relation, mainly concerning the specific way in which the management is

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<sup>128</sup>A. Laby, "The Fiduciary Obligation as the Adoption of Ends", (2008) 56 Buffalo Law Review, 99 (also at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1124722](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1124722)), 167

<sup>129</sup> Fiduciary duties are implied terms, usually imposed by courts and to which the parties would have agreed if they had the time and inclination to bargain. See F. H. Easterbrook and D. R. Fischel, *The Economic Structure Of Corporate Law*, (Cambridge MA: Harvard University Press, 1991), 34 according to which "*The fiduciary principle . . . fills in the blanks and oversights with the terms that people would have bargained for had they anticipated the problems and been able to transact costlessly in advance.*"; L. E. Ribstein, "Are Partners Fiduciaries?", (2005) University of Illinois Law Review, 209, 215: "*Fiduciary duties are a type of contract term that applies, in the absence of a contrary agreement, where an 'owner' who controls and derives the residual benefit from property delegates open-ended management power over property to a 'manager.'*"; J. D. Hynes, *Freedom of Contract, Fiduciary Duties, and Partnerships: The Bargain Principle and the Law of Agency*, (1997) 54 Washington and Lee Law Review, 439, 443: "*The special status of fiduciary duties, as important as it is, should be of a default nature only.*"; and J. R. Macey, "Fiduciary Duties as Residual Claims: Obligations to Nonshareholder Constituencies from a Theory of the Firm Perspective", (1999) 84 Cornell Law Review 1266: "*Fiduciary duties are the mechanism invented by the legal system for filling in the unspecified terms of shareholders' contingent contracts.*".

going to be performed<sup>130</sup>. Therefore, informal agreements and the practice of both parties set-up an implied framework (based on cooperation and mutual information and consent) in which management is performed.

### *Fiduciary Duties in relation to Mutuality, Parties' Roles and Relational Planning*

Either the implied in fact terms refer to the fairness or to the efficiency of the relation, they actually abide by the planned role of each party in the relation, a role that is related to certain obligations and consists of a certain expected behaviour. Such expectations can be reasonable to the extent to which they are linked with the contract's function, planning, mutual goals and implementation.

By such contracts, both parties aim at common goals, and only if these common goals are accomplished (e.g. the maximisation of profits for the recipient) both parties can benefit from the relation. Therefore, we can deduct the other key element of management contracts, which is mutuality. Mutuality is spread over the whole range of the relation and concerns benefits, risk, costs and managerial effort. Mutuality has to be taken into consideration in every step of the relation, from the initial planning to the allocation of responsibilities and profit, while a various range of mutual obligations derives from it. Of course, opportunistic and exploitative behaviour cannot be excluded mainly by the provider and can result not only to the destruction of the relation but to the economic failure of the recipient as well. However, in modern management contracts such behaviour is less usual, because of the competition in the management services sector and the increasing bilateral and interdependent character of such relations, which make management contracts highly reputation-based.

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<sup>130</sup> Fiduciary duties are based, according to some authors, on a cost-benefit analysis and on the norm of wealth maximisation, as particularly in long-term relations it may be too costly to try to include every possibility and specific obligation in the written contract.

See F. H. Easterbrook and D. R. Fischel, *Economic Structure*, 90: "If contracts can be written in enough detail, there is no need for 'fiduciary' duties as well."; and F. H. Easterbrook and D. R. Fischel, "Contract and Fiduciary Duty", (1993) 36 *Journal of Law and Economics*, 425, 426: "Because the process is contractual—because both principal and agent enter this understanding for gain—the details of terms such as 'duty of loyalty' should be those that maximize that gain, which the contracting parties can divide."; *ibid.* 446: "When transaction costs are too high, courts establish the presumptive rules that maximize the parties' joint welfare."

This focus on reputation, observed in the stage of the selection of a management provider and in the stage of the relation's continuation as well, is also related to the necessity for both parties to resolve their problems by proper means and avoid a behaviour that may temporarily benefit them, but is certain that in future it will be the cause of failure of the whole relation, the importance of which (failure) can only be estimated in the framework of the usually multi-levelled and complex total relation. From this fact, a series of obligations, concerning the specific obligations of both parties to each other arise. They are related to the fact that the object of the contract is of such a high importance, that both parties should be very cautious. Because of managerial activities' sensitive character and of the parties' interdependence, a relation of trust and reliance between the parties is developed. Cooperation<sup>131</sup>, trust, reliance, interdependence, mutuality, resolution of problems by consent, constitute the foundation of the relationship and the source for many specific obligations of the parties, written or implied and related to the fiduciary character of the relation. Improper and exploitative behaviour in matters such as information of the other party, decision making, human resources relations, consideration of its individual structure, philosophy and institutional and strategic goals, focus on mere one-sided short-term profits and efforts for the other party's one-sided and permanent (even after the contract's termination) dependency on the other, may result to a great negative impact on both parties.

### **The Incomplete Character of Management Contracts**

#### *Constant Negotiation and intended combination of Completeness and Incompleteness*

Thus, we reach another key feature of management agreements, which is their highly cooperative character. Active cooperation is a result of mutuality and a prerequisite for the contract's success. Cooperation may be a difficult goal to be

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<sup>131</sup> "...Behaviour characterised by a willingness and ability to work with others...", I. R. Macneil, *Contracts, instruments for social cooperation*, East Africa: text, cases, materials, (South Hackensack, N.J.: F. B. Rothman, 1968)

permanently accomplished, because of the parties' different views on certain issues<sup>132</sup>, of their concern about post-contract issues and the natural difficulty for the management teams of the parties to adapt to each other's philosophy and methodology. However, cooperation is a fundamental as the parties' structure is partially integrated, thus common organisational goals are established and they have a great importance for both parties' individual profits, especially as such contracts are developed in the framework of win-win strategies.

The nature of the link and the interdependence between the parties mean that the relation is of high importance for both parties. The termination of such a contract is not an easy process and may involve great risks and losses for both parties, while usually these agreements' results are only observed after years of cooperation. The managerial restructuring that these agreements involve cannot be accomplished in short times and the usually very lengthy duration of these contracts is indicative. Therefore, the preservation of such agreements and the solidarity of the general framework of cooperation that they set up is a priority for the parties. However, as the relation involves complex issues of assets and control allocation, major disputes may arise, so the parties assume the efficient initial planning as an issue of great significance. So, the management contract has to rely on a strong initial contractual basis, in order to function well and its solidarity can only be the result of an active and permanent cooperation between the parties. Planning of the relation is even more significant than in other similar forms of inter-corporations commitment and it involves a detailed due diligence process. However, because of the agreements' nature and of the objectives pursued, such agreements have also to be adaptable to the changes of environmental factors that define the business efficiency of the parties. So, these agreements by their own nature combine flexibility with a detailed contractual basis, and although the initial contract has to be

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<sup>132</sup> The first stage in a management agreement is a report presented by the provider, concerning the actual situation of the recipient company. Management Company usually prefers to under-evaluate the recipient's situation, in order to emphasise later the significance of its decisions, while the recipient prefers to glamorise existing problems, in order not to be exposed to its shareholders.



complete as much as possible, it has to leave space for future adjustments and changes, in order that the relation retains its efficiency<sup>133</sup>.

This cautious combination of completeness and intended incompleteness is a feature determining the special nature of management contracts. Negotiation between the parties is constant and comes along with cooperation and mutual consent, while the parties mainly prefer to harmonise their conflicts and resolve their problems by informal methods and mainly by inter-organisational communication. For example, issues about the managerial strategy to be implemented are a subject of constant renegotiation between provider's and recipient's strategic management groups and cooperation is essential for the formation of a basis of mutual consent for the management of the recipient.

### *Management Contracts as Frameworks for Future Obligations*

Another element of management contracts' nature has to do with their function as frameworks of general commitment and future obligations rather than as totally complete regulators of every aspect of parties' relation<sup>134</sup>. Management is indeed a very complex activity and it would be totally inefficient if the parties tried to regulate their relation by a single contract. Moreover, management contracts are frequently related to a various list of other contractual relations, ranging from licensing to BOT. Their ability to combine with other forms of cooperative relations is a distinct feature, as they can play the role of the general regulatory framework for the whole spectrum of inter-parties cooperation, but a platform for negotiation as well<sup>135</sup>. Hence, management contracts can actually play the role of umbrella contracts<sup>136</sup>, under which a whole range of different contractual

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<sup>133</sup> I. R. Macneil, "Contracts:Adjustment", 894-900

<sup>134</sup> S. Mouzas, M. Furnston, 'From contract to umbrella agreement', (2008) 67 Cambridge Law Journal, 37, 38

<sup>135</sup> S. Mouzas, "Negotiating Umbrella Agreements", (2007) 22 Negotiation Journal, 279.

<sup>136</sup> "Umbrella agreements" or "Umbrella contracts" or "Framework contracts" constitute a contract framework with terms and conditions that take in potential possibilities within a contract's lifetime and beyond. They are contracts that set up the basic legal relationship between parties that have an ongoing relationship, such as that of product supplier and customer, or service provider and customer. Such agreements set out the necessary framework in terms of basic principles, rules and procedures for the implementation of its scope of application, as well as for the protection of any third parties operating within the institutional framework established by it. P. Lenney, G. Easton, S. Mouzas, 'Umbrella agreements as commitment framing devices', (2008) 24th IMP Conference (Uppsala University, Sweden); S. Mouzas, S. Henneberg, P. Naudé, 2007, 'Trust and reliance in business relationships', (2007) 41 European Journal

relations, all falling under the key relation that management contracts define, can emerge. On the other hand, we should admit that management contracts are very detailed and may not have the general and open content of regular umbrella contracts, which intend to set up the framework that will be completed by future agreements. Nevertheless, management agreements can constitute the fundamental platform on which future specialised contracts can be integrated, while given the nature of management as a corporate activity, they can never be complete enough and as indicated above their detailed character is not controversial to their function as framework agreements.

### **The various factors affecting the Relation's Content**

Another characteristic of management contracts is that their exact content is determined by many and various different features of the relation that the parties plan to set up by these contracts; so they differ a lot from each other. We present an indicative list of factors and variables, on which the exact content of management agreements depends, without meaning that they are the only:

1. the industry to which the contract refers and in which the recipient exists<sup>137</sup>
2. the extent (less or more limited) to which recipient's management is assigned
3. the nature of duties (more consulting, less decisive or totally decisive/ financial management, production management, total management) that are actually assigned to the provider<sup>138</sup>
4. the territorial (national/international, in one or all the enterprises of the recipient) and qualitative (strategic management, functional management, total management) definition of assigned management

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of Marketing, 1016; S. Mouzas, D. Ford, 'Contracts in asymmetric relationships', (2007) Proceedings of the 22nd IMP Conference (University of Bocconi: Milan); S. Mouzas, D. Ford, 'Managing Relations in Showery Weather: The role of Umbrella Agreements', (2006) 59 Journal of Business Research, 1248.

<sup>137</sup> "Social Context", the 4<sup>th</sup> primal root of contracts. R. Macneil, "The Many Futures", 706-710

<sup>138</sup> Look to MacNeil's axe No 1.

5. the nature of the relation between the provider and the recipient before the contract (subsidiary-parent companies, independent companies, companies belonging in the same network or partnership)
6. the financial value of the contract (e.g. referring to a venture of 2m. \$) and the size of the parties (recipient or the provider is bigger than each other, or they both are of medium or great size etc) <sup>139</sup>
7. the special financial and managerial purposes at which the contract aims (domestic or international growth, stabilization, costs reduction, know-how transfer etc)
8. the more or less permanent character of the relation and its intended duration <sup>140</sup>
9. the isolated or belonging to a broader spectrum of inter-corporate cooperation, character of the contract (in a business network or a sub-construction relation etc) <sup>141</sup>
10. the number of parties involved in the contract and the number of parties involved in the broader framework into which the contract is integrated (e.g. network) <sup>142</sup>
11. if the contract concerns just a pure managerial assignment or concerns other forms of obligations (licensing, co-production, know-how transfer) or is combined with other contracts
12. in case of the above, if the feature of managerial assignment is the key and distinctive feature of the specific inter-parties relation or is subsidiary to another key feature, in order to facilitate goals of a different nature (e.g. the accomplishment of a large-scale project for a third client).

Hence, we can safely conclude that management contracts are not determined by a single model and only a few common standard clauses can be included in them. They actually contain clauses usually included in other types of contracts (e.g. BOT, co-

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<sup>139</sup> Look to MacNeil's axe No 2.

<sup>140</sup> Look to MacNeil's axes No 4 and 5.

<sup>141</sup> Look to MacNeil's axe No 7.

<sup>142</sup> Look to MacNeil's axe No 11.

production, know-how transfer etc), elements of which are included in them. Actually, just their basic orientation is similar in all these contracts (mainly referring to cooperation, confidentiality, methods for the calculation of the provider's payment etc and of course to the transfer of management), while the specific content is determined by relational variables. Moreover, only a part of their content remains stable, while it is gradually completed by parties' behaviour, later special agreements, developing practice, inter-organisational structure and philosophy and other factors. In this way, they demonstrate that they could not easily be categorised into a distinct group of contracts (or possibly it would be wrong to use such a methodology in order to examine at least contracts referring to corporate cooperation), but they should rather be examined with a consideration of the specific relation into which they fit. Furthermore, management agreements are highly dependent on the constantly changing and evolving character of inter-parties relations and different environmental factors. Thus, their content can only be examined in the framework of the multiple, various and changing aspects of the specific total relation and could not be separated from it.

It is obvious that management contracts and every issue concerning them cannot be examined as a contract concerning a mere transaction, as by its own nature, it is so open and highly relational that could be viewed as a paradigm for the implementation of relational contracts theory. Its relational character is also underlined by the fact that management contracts cannot be viewed as a totally homogeneous category of contracts with standard terms and clauses, as their specific content depends on a series of different factors concerning the exact nature of every specific relation, which they are created to govern.

# ANALYSIS OF THE OBLIGATIONS FROM MANAGEMENT CONTRACTS UNDER A RELATIONAL CONTRACTS THEORY NORMS FRAMEWORK

We examine a series of obligations of the parties of a management contract, unilateral or bilateral, concerning either the provider or the recipient or both. We do not include the provider's obligation for management of the recipient, because of its complexity, of being divided to several other obligations, of its content's diversification and of involving an application of corporate law and management science.

We examine these obligations under the framework of the contractual norms, as depicted by MacNeil's work<sup>143</sup>. We preferred to use this extended set of norms<sup>144</sup>, instead of other shorter versions (such as Austen-Baker's four norms<sup>145</sup>) –valuable for the understanding of norms' use and role-, in order to investigate the issue of norms' application to management contracts more thoroughly. We do not claim that the matching of obligations and norms is exact or completely accurate or includes all norms involved (it is almost certain that the exact matching will continue to be a matter of debate), however we believe that this matching, generally speaking, is close to reality and can be justified in a rational way.

We distinguish between unilateral and bilateral obligations, while we refer to the relevant Diagram (Appendix), which also includes a short summary for each obligation's relation to certain norms.

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<sup>143</sup> Above 11-22.

<sup>144</sup> For reasons analysed above, we may use "contractual solidarity" and "preservation of the relation" norms alternatively, as the second is an intensification and expansion of the first.

<sup>145</sup> R. Austen-Baker, "Comprehensive Contract Theory", 216-243

## CHAPTER C: UNILATERAL OBLIGATIONS

The parties' obligations under a management contract can be distinguished between unilateral and bilateral. Unilateral obligations are distinguished between recipient's and provider's obligations. Some of these may concern terms that are explicitly included in the contract and directly refer to the relation's actual object and implementation –such as fees, know-how transfer etc-; others –which are more usually implied- concern the behaviour and practices that are expected by the parties, due to their role and the scope of the relation and are essential for the accomplishment of the first obligations and the promotion of cooperation and trust between the parties.

### **Recipient's Obligations**

The recipient is mainly obliged to fulfil all the prerequisites, in order to help the work and mission of the provider and facilitate the latter achieve the goals of the relation. Therefore, most of the recipient's obligations are bilateral (also refer to the provider as well) and concern duties deriving from the mutual effort for the achievement of common goals and the interdependence between the parties. Nevertheless, there are two major obligations that concern only the recipient. The first one is the payment of the provider and constitutes the most important obligation of the recipient as it characterises the whole nature of management contracts, as contracts by which the management of a corporation is assigned to another corporation -in order that the latter will exercise it for the benefit of the recipient- in exchange for payment. The second concerns the major prerequisite for the provider to be legally and practically allowed to exercise the recipient's management and this prerequisite can only be accomplished by the recipient.

## *Fee Payment*

We have already mentioned that the main obligation of the assigning company towards the management company is the fee payment, which is actually an allowance for the management services provision by the latter. This fee in management contracts is usually mentioned as "compensation"<sup>146</sup>. Payment, even though initially does not comprise a component of the agreement, it is not a conceptual element, as in certain cases such an assignment may be agreed free of charge, especially when interests of the management company are also served through the agreement. However, in most management agreements the fee payment is the counter-provision of the recipient that corresponds to the provider's provision of management services and the obligation that matches the provider's obligations, in order to form a reciprocal contract. When fee payment is not a contract's term, then the provider earns different benefits from the relation (e.g. collects information about a new market) as a compensation for its services. Moreover, these fees respond to the reasonable anticipation of the provider that their counter-party is going to give them something back in correspondence to their own contribution to the relation, i.e. their managerial services<sup>147</sup>. For that reason, this obligation apparently expresses the reciprocity norm in the management contract relation.

On the other hand, fees are not the only obligation of the recipient under a management contract. Nevertheless, it is true that payment of fees constitutes the main, traditional and characteristic provision and contribution of the recipient to the relation and it constitutes a characteristic element that distinguishes management contract from other forms of managerial cooperation between two different corporate entities: as mentioned in the first chapter a management contract is a contract under which the management of the recipient is assigned to an external entity and the latter receives fees in return. A management contract can still exist without this element; however this case is

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<sup>146</sup> UN-Centre on Transnational Corporations, *Management Contracts*, 71

<sup>147</sup> I. R. Macneil, "Contracting Worlds and Essential Contract Theory", 432.

very limited and concerns special specific relations. Thence, fees' payment not only defines the nature of the overall relation but the role of the recipient as well.

In most management contracts, there is not a complete agreement in advance for a specific amount of fees, but the fee or at least part of it depends on specific results that have to be achieved and specific conditions<sup>148</sup>. More specifically, the compensation is normally analysed into smaller fees that is not obligatory to be mentioned in every agreement. Thus, fees could be assumed as one of the most "relational" obligations of a management agreement as they are characterised by apparent "incompleteness"<sup>149</sup> and adjustments and renegotiation play an important role<sup>150</sup>. The basic fee and the incentive fee are usually mentioned; the fee for professional commitment and the completion fee are usually mentioned in agreements with clauses on constructions; special fees usually appear in hotel management agreements or agreements with clauses on know-how transfer, while in every management agreement there are terms on remedy for expenses of the managing company. In detail, the compensation may include:

- a basic management fee, which is the management company fee for fulfilling its main duties, as they are determined in the agreement
- a commitment fee, that is usually paid upon signing of special pre-agreements or when the agreement includes clauses on constructions, after the conclusion of an agreement and before construction works start, which generally operates as an advance payment
- a termination fee, paid upon termination of the agreement or with the termination of construction period, when this is included in the agreement and acts as a safety clause by the assigning company, in case the management company does not comply with its obligations
- special services fees, for services provided within the framework of agreement for administrative responsibilities assignment, but do not correspond to the basic management part, but in additional special services,

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<sup>148</sup> Especially in international management agreements, terms about the currency of the fee payment often appear, as currency is an important factor for determining the cost of the agreement.

<sup>149</sup> Look above to 11 and notes 26-28.

<sup>150</sup> For a discussion about the importance of adjustments in relational contracts look to I. R. Macneil, "Contracts:Adjustment", 894; C. Goetz, R. Scott, "Principles of Relational Contracts", 1093.



such as performing construction works, leasing of specific rights of industrial property, provision of maintenance services and technical support, public relation services and advertising, mediation for loan credits, etc.

- an incentive fee, which functions as an incentive for the management company in order to achieve better results and it is usually determined as a profit percentage
- remedy of any expenses and costs made by the management company during the agreement period and due to business management services provision by it, which we will analyse further below.

Therefore, fees could be categorised into three large categories: fixed or stable fees, variable fees –depending on the provider’s performance- and compensation of provider’s expenses.

Actually, the provider’s performance and the extent to which the parties will fulfil their initial goals, defines the measurement of the relation’s performance. The correlation of the providers’ fees with the degree to which they will manage to succeed their goals leads to the fact that both parties’ benefits become related to the overall relation’s performance and no potentially expected benefit remains standalone from the entire relation’s evolution and results<sup>151</sup>.

Recent trends to management contracts emphasise more and more the second category of fees, almost substituting the first category<sup>152</sup>. In most recent contracts, the provider’s fees are defined as a certain percentage of the recipient’s earnings or of the earnings of the recipient’s sector, which is the object of the contract. In other cases, especially when management is not the only service provided (e.g. transfer of a special know-how), or the management assignment refers to a part of the recipient’s business or the recipient’s earnings cannot be totally assumed as a result of the provider’s performance (e.g. when the recipient has a good performance before the contract but needs to acquire a better

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<sup>151</sup> Look about a focus on such a correlation in relational contracts at I.R. Macneil, ‘Economic Analysis of Contractual Relations’, 1034; I. R. Macneil, *New Social Contract*, 96-97.

<sup>152</sup> A. Schluter, *Management - und Consulting –Verträge*, 33

managerial know-how in order to improve it even more), this percentage is a part of the total (incentive) fees.

Besides, the incentive fees are usually related to certain pre-set standards and goals, defined at the beginning of the relation<sup>153</sup>. Generally, it is difficult to quantify the whole spectrum of a management contracts' goals<sup>154</sup>. Financial results, gross or net profit and turnover are the most common indexes about the relation's performance and the factors that define the amount of incentive fees. When the scope of the specific relation focuses on some more special aspects of management, such as cost-cutting or an increase of market share, there can be used other and more special indexes and factors, related to the exact purposes that the relation is designed to serve<sup>155</sup>.

Therefore, fees are adjusted to every specific relation's objectives, as defined in the initial – or on-going<sup>156</sup> - planning<sup>157</sup>. As no management contract can exist without some pre-set –although not necessarily fully defined- goals and a certain plan, fees are integrated into this total plan of the relation and are linked with the initial commitments of both parties – the provider to succeed some objectives and the recipient to compensate for these and at the degree to which they are accomplished-. Furthermore, in this way the recipients can plan not only their own goals but their actual obligations as well, as they know in advance what they will have to pay, according to the circumstances. Thus, the incentive fees can be assumed as a pure form of reference to the implementation of the parties' planning.

On the other hand, relating fees with performance is a valuable tool for enhancing flexibility as well. Firstly, adjusting somebody's obligations to the benefits that he/she receives is an essential element of flexibility – and reciprocity as well-. Moreover, apart from setting some initial goals, parties tend to re-negotiate their relation and especially re-examine their goals and their expectations –as their needs and relationship evolve-

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<sup>153</sup> I. R. Macneil, *Many Futures*, 763.

<sup>154</sup> The difficulty in evaluating the performance is an indication that the norm of preservation of the relation is strong. Look to R. Austen-Baker, "Comprehensive Contract Theory: A Four Norm Model of Contract Relations", 225, Diagram. The issue of difficult measurability as an element of relational contract is also mentioned by I. R. Macneil in his twelve axes. "The Many Futures of Contracts", 738-740.

<sup>155</sup> Balanced Scorecard is a widely used system for such an evaluation.

<sup>156</sup> above 17 and notes 52-53.

<sup>157</sup> above 41.

from the relation. As they change priorities, they also change the indicators of managerial success, thus the parameters of the provider's fees, so they can re-negotiate the overall relation in a much more flexible way, emphasise new factors and adjust the relation to their needs and priorities<sup>158</sup>. Furthermore, in this way, the parties – and especially the recipients- can be protected from uncertainties<sup>159</sup>, referring to the provider's performance or external events, as they know that the fees will be always adjusted to the actual – and not just planned- results of the relation. If the providers' performance exceeds initial expectations, then they will be adequately rewarded – and this is surely a good motive-, if the performance will not meet these expectations, the recipient will not be bound to a serious financial commitment –unrelated to its own expectations and planning- without reason. On the other hand, the contract usually leaves space for some unpredicted costs that may occur for the provider and usually provides for their covering by the recipient apart from the actual fees. Finally, the termination fees –meaning fees paid at the end of the relation and according to the final overview of the overall relational performance- is a good tool that supports flexibility, as it relates this obligation not to the initial expected result of the relation but to the final –maybe revised, renegotiated and altered- final expected result.

The emphasis on incentive fees links the providers' performance with their own benefit from the relation, gives to them incentives for better results and relates their potential benefit with a certain amount of risk and securing the recipient's position, as it constitutes the party that assumes most risk and cost as well within the management contract's relation; thus makes the relation much more fair and allocates in a more even way risk and profit between both the parties.

This allocation helps parties and mainly the recipient to build trust bonds between them and follow a co-operative and win-win strategy, as no counter-party is going to earn profit if the other will not earn either. In this way, conflicts that emerged under older practices –that focused on fixed fees- are avoided, as the recipient does not fear that the

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<sup>158</sup> K. Blois, B. Ivens, "Relational Exchange Norms in Marketing: A Critical Review of Macneil's Contribution", 10-11.

<sup>159</sup> above 17-18 and I. R. Macneil, *Contracts: Adjustment*, 859.

provider is going to exploit the relation in order just to receive the fees without providing serious managerial effort and support<sup>160</sup>. Besides, the fact that both parties' interests are linked in this way helps them improve the co-operation and communication between them, avoid conflicts and resolve disputes under a conciliatory spirit and maybe with less litigation. In other words, because of the way in which fees are calculated, the provider acquires a strong motive for the preservation of the relation and this motive is linked with a relevant motive for the avoidance and efficient resolution of relational conflicts. In this way the fees' payment and its dependence on the relation's performance is an element that promotes co-operation, mutuality, fairness and relational stability.

Therefore, fee payment is characterised and defined by the norms of implementation of planning, role integrity, contractual solidarity, harmonisation of the relational conflicts and reciprocity.

### *Obligation for Provider's Integration into the Recipient's Structure*

One of the basic consequential obligations of the management recipient refers to the help it has to provide, in order for the management company to become part of its structure. As we have already mentioned, the subject and scope of a management agreement is undertaking the management of another company and this is the reason why the basic provision of a management agreement is performance of managerial responsibilities of a company by another on behalf of the former. Therefore this integration is an essential prerequisite for the evolution of the relation and directly refers to the recipient's role within the relation, as the party, which assigns its own powers and duties to the other; which "tolerates" the provider's intervention within its own structure and which allows the relation to acquire a strong personal character and bond<sup>161</sup>. On the other hand, the fulfilment of this obligation, is anticipated as implicit by the provider, thus constitutes a rational expectation about its counter-party behaviour –besides, it is rational to expect that the recipient is interested in promoting such a relation- and it cannot be promoted

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<sup>160</sup> This argument underlines our previous argument that the harmonisation of relational conflict norm is related to the contractual solidarity. above 21 and note 71.

<sup>161</sup> I. R. Macneil, "Restatement (Second) of Contracts and Presentation", 595.

without this integration. As this integration responds to the provider's anticipation standards about how the recipients are going to fulfil their obligations, according to the idea that they perceive about them, this obligation also responds to role integrity norm<sup>162</sup>. Within a management contract's relation there is always an issue of exchange of powers. As already stated<sup>163</sup>, an exchange and a subsequent limitation of power are apparent in every contract, but this element strongly appears in relevance to this obligation in management contracts, in the following way. Provider takes over some of the recipient's power and the extent of this power is constantly renegotiated within the relation. New rights of intervention and obligations of tolerance are created as the provider is integrated as managerial agent in the recipient's structure with decisive powers and this transfer of power<sup>164</sup> is the reason for the development of the provider's fiduciary duties towards the recipient; therefore the role of power norm is underlined considering this obligation.

Undertaking such managerial responsibilities cannot be done with a simple contract, but in order for the managing company to legally acquire any responsibilities provided in the management agreement, certain actions by the recipient need to be performed, which will give the provider the opportunity to manage the company on their behalf, i.e. to legally represent and manage their company. This type of legal establishment for the managing responsibilities to the management company that only the recipient company may grant, can be identified as integration of the provider in the recipient's structure. This integration comes into stages, in any of which, the recipient actively gives over parts of its own powers to the provider, while these stages constitute a complete and continuous procedure, under which the provider obtains control of the recipient and it specifically obtains it, based on the recipient's initial and continuous consent.

This ongoing consent is justified by the recipient's presumable will to play its own role in helping the achievement of the relation<sup>165</sup>. On the other hand, this consent is limited to a certain degree, beyond which the provider is not going to tolerate any further intervention in its own structure and any further assignment of power to the provider.

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<sup>162</sup> Look also above 14.

<sup>163</sup> above note 64.

<sup>164</sup> About this transfer of power in relational contracts look to I.R. Macneil, *The New Social Contract*, 56-57.

<sup>165</sup> R. Austen-Baker, "A Relational Law of Contract?", 135

The extent of this assignment depends on every specific relation's individual goals, duration, qualitative characteristics –such as mutual trust- and specific planning, done in advance or during the on-going relation<sup>166</sup>. Anyhow, the recipients consent to give up some of their rights in advance; hoping for a prosperous evolution of the relation and this transfer of power is something that they eagerly accept since the early stage of initial planning till every other on-going planning.

First, the managing company providing management services as a provider's managing body has to be determined as a legal representative body of the board of directors by the provider. The recipient is obliged to perform all necessary legal actions –even a modification of its articles of association- in order for the management company to be legally assigned with managerial and representative powers. By signing a management agreement, the recipient undertakes implicitly to safely complete all necessary legal procedures for the assignment of managerial responsibilities to the provider<sup>167</sup>.

The second stage refers to facilitating actual, inclusion of the managing company in the recipient's organisational structure as a result of its active initial and ongoing consent for the results of the contract. The recipient has to assume any effort, in order to prepare its staff, managers, partners, organisational chart and decision making system, in order to be able to provide practical authorisation to the management company to perform its duties<sup>168</sup>. Failure in any of the above stages<sup>169</sup> may comprise a reason for termination of the agreement, as a violation of the recipient's obligations for cooperation with the provider for an efficient implementation of the agreement.

Therefore, we observe that the procedure of provider's integration follows a specific planning from the beginning of the relation, a planning which defines the framework of future cooperation between the two companies. This integration constitutes a primary obligation undertaken<sup>170</sup> by the recipient and the way in which this obligation is

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<sup>166</sup> Look about the limits of specificity in initial planning and the planning during the relation in relation contracts at I. R. Macneil, "Many Futures", 763.

<sup>167</sup> A. Schluter, Management - und Consulting –Verträge, 41

<sup>168</sup> *ibid* 42.

<sup>169</sup> Integration may not be completed due to reactions by shareholders or employees.

<sup>170</sup> Look to MacNeil's twelve axes, "Many Futures", 738-740

accomplished expresses the implementation of planning norm<sup>171</sup>, as it constitutes a prerequisite act from the recipient, in order that the provider can pay off.

We consider that as opposed to the obligation of payment, the recipient's obligation to include the provider in its structure is not just a provision but it may result in an obvious condition on which depends the whole relation. Without the fulfilment of such a condition, the parties neither can co-operate effectively nor can achieve the relational objectives. Their trust to each other falls, as falls their confidence that they can accomplish their goals and serious tensions may frequently arise, which may retract the holding together of the relational exchanges<sup>172</sup>. Therefore, provider's integration in the recipient's structure is an essential factor for contractual solidarity and for the preservation of the relation. On the other hand, as parties share powers and duties and their individual structures are merged, they build a strong basis for future constant co-operation, a basis that promotes the relation's stability<sup>173</sup>. The integration of structures links their interests, makes parties understand that disputes may harm them individually, enhances trust between them and promotes the mutuality and sustainability of the relation.

Therefore, the norms of implementation of planning, contractual solidarity, role integrity, effectuation of consent and creation and restraint of power play a major role in the formation of the content and scope of this recipient's obligation.

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<sup>171</sup> above 17.

<sup>172</sup> I. R. Macneil, *New Social Contract*, 52.

<sup>173</sup> above 35-36.

## Provider's Obligations

Some of these obligations are related to the provider's fiduciary duties, while others refer to the mission and the exact goals that the provider explicitly assumed to achieve by the contract or constitute implicit means in order to achieve the goals of the relation. We preferred to examine in this chapter the obligations that can only apply to the provider, although there are some other obligations that mainly refer to the provider, however are of a bilateral character as they can also refer -to an extent- to the recipient as well. We do not examine the key and characteristic obligation of the provider for the management of the recipient, as this obligation is mainly regulated by corporate law and the provider's role as a substitute of the recipient's board of directors –so the range of its obligations is regulated by corporate law's provisions- and as the exact spectrum of management duties is highly diversified and depends not only on the specific contract or relation but on actual situations and managerial issues as well. So an examination of the content of the corporate management as a contractual obligation could be very difficult to be examined, on the grounds of a contract law and norms-based analysis and should involve an extended application of management science and corporate law, issues that are irrelevant to the scope of our work.

## *Staff Training*

One of the most important reasons for drawing up a management agreement is the undertaking of responsibilities by well-trained and experienced executives of the management company and the provision to the assigning company of people with skills, knowledge and qualifications that its own staff lacks of. This is why one of the first actions performed by the management company after signing the agreement, as mentioned below, is the selection, detachment and placement in the assigning company of the competent managerial and administrative staff (field staff). All the above become even more obvious in international management agreements, when in the agreement objectives, even if it is not expressly mentioned, the transfer of administrative and



productive know-how by the management company, which usually comes from the developed world, to the assigning company is included up to a point.

The reason for that can be found in the fact that the main and central goal pursued by the relation of the parties in management contracts, refers to the achievement of all the prerequisites for the recipient to succeed better management performance. One key aspect of this effort and one key aspect of the provider's role in the relation with the recipient are the acquisition and training of staff capable to perform in a more efficient way. The improvement of the recipient's performance is not limited in the time frame of the relation with the provider, but the recipient expects that its own management will be improved in a permanent way after the end of the management contract and without the constant need for the provider's directions. In order that the recipient's management will be permanently improved the recipient expects that after the end of the management contract, its own staff will be of better quality. This expectation is even more important when a key element of the relation concerns know-how transfer; in order that this transfer could mean something for the recipient, it should have permanent results. So, the provider has to prepare the recipient's structure and staff, in order to accept, integrate into their own enterprise and be able to take advantage from the transferred know-how and technology in a permanent way in future. All the above result to the fact that staff training is a sine-qua-non obligation of the provider, an obligation deriving from its own role in the relation –as the party that offers experience, management skills and know-how to the recipient and from the rational expectations of the recipient that the provider is going to fulfil its role in a complete way. Roles in the management contract's relation are adapted to the nature of the relation, the common pursued objectives and the objectives that every party tries individually to pursue on behalf and for the benefit of the counterparty<sup>174</sup>. And the procedure of providing adequate staff and training it in order to become able to contribute to the recipient's management is crucial for every such relation and directly refers to the provider's role. Besides, the recipient chooses a provider, according

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<sup>174</sup> Role can be defined as "...a pattern of behaviour expected of a person occupying a given social position when he interacts with those that occupy other given positions. T. Caplow, *Sociology*, (Englewood Cliffs NJ: Prentice Hall, 2<sup>nd</sup> ed., 1975), cited in I. R. Macneil, *New Social Contract*, 40 and in R. Austen Baker, R. Austen-Baker, "A Relational Law of Contract?", 126. This definition underlines the relative content of the role and its dependence from different factors, concerning the parts of the relation and the relation itself.

to its assumed managerial skills<sup>175</sup>; these skills necessarily refer also to the field of human resource management and so, the recipient expects that the provider will take care that these skills are going to be “transplanted” to its own structure.

Moreover, the provision and training of staff is usually a prerequisite for the fulfilment of the objectives of the management contract’s initial business plan. Any such business plan involves the improvement of the recipient’s managerial efficiency, the transfer of special technological or managerial skills and the achievement of some performance-related objectives by the recipient; all these goals cannot be reached without appropriate staff and appropriate staff is a major factor for the accomplishment of the goals included in the initial planning.

The provision of staff to the assigning company that used to belong to the management company may be in favour of the latter, as this way it can ensure that the undertaken project will be completed in the smoothest possible and most effective way. This solution is also cheaper, in comparison to training from scratch the existing staff of the assigning company, something that would again demand participation by the management company staff, but it would delay the implementation of the agreement<sup>176</sup>. However, in practice, due to special legal regulations by the countries receiving management services and laws about tax incentives, parties are obliged, even when the assignment is about a specific project of high know-how level, to employ staff belonging to the assigning company and in fact domestic staff, something that is really noticeable in management assignment of public utility companies<sup>177</sup>. On the other hand, keeping the staff of the assigning company or employing domestic staff may be in the interest of the assigning company, which may keep this staff after the agreement is terminated, while the staff of the management company will be withdrawn. This way it will be able to integrate the knowledge gained by the management services of the managing company. Moreover, cooperation between the staff of the management company and that of the

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<sup>175</sup> Look about the relation of role integrity to performance standards at R. Austen-Baker, “A Relational Law of Contract?”, 126-127

<sup>176</sup> UN-Centre on Transnational Corporations, Management Contracts, 44

<sup>177</sup> UN-Centre on Transnational Corporations, Management Contracts, 44

assigning company might prove positive, as through such cooperation the assigning company's staff is practically trained by that of the management company.

Any dispute referring to the staff training could result to great conflicts within the relation. For example, there are some occasions when management companies neglected training of the staff, in order that the recipient will continue to need them and will not be able to end the relation without losing great benefits. However, such a practice could be assumed as exploitative and could result to limited trust between the parties and endangers the whole relation. Trust and expectation that the provider will follow a most efficient as possible behaviour, in order to secure the recipient's benefits from the relation are cornerstones for the relation's stability<sup>178</sup>. On the other hand, if the provider refuses to fulfil such an obligation, the justifiable discomfort of the recipient and the difficulty in achieving the relation's objectives may lead the relation to an end. Furthermore, the preparation of the recipient's staff in order that the recipient's management will become more efficient is usually an essential part of the recipient's business plan's implementation, an implied objective at which the recipient aims and a criterion according to which it chooses the provider.

We should note that the management company's responsibilities include the obligation to gradually replace their staff with staff of the assigning company before the agreement expires and often also undertakes the obligation to hire and train staff on behalf of the assigning company.

In any case, according to the norms of contractual solidarity, role integrity and implementation of planning, even if the agreement does not provide for a specific training programme of the assigning company's employees, the management company should provide them with training and undertakes the obligation to improve the level of the assigning company's staff after the agreement expires.

### *Know-how Transfer*

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<sup>178</sup> MacNeil defines solidarity as "*a belief in being able to depend on another*" I. R. Macneil, "Values in Contract: internal and external", 348.

One of the common objectives of an agreement for assignment of management responsibilities is the transfer of know-how from the management company to the assigning company. Such an agreement usually includes a special appendix about the terms and procedures for transfer of know-how, while quite often know-how not only is transferred from one company to the other, but both companies seem to share their know-how. In any case, know-how transfer necessarily includes its integration in the assigning company ensuring that the latter will be able to productively utilise it.

However, a special fee can be agreed on for know-how transfer, while transfer may be agreed as non-definite and terminate upon management agreement termination<sup>179</sup>.

The degree to which such obligations exist in a given management contract relation depends on the specific cause and scope of it and on facts related to the specific parties<sup>180</sup>. If a software laboratory in a developing country assigns its management to a renown foreign company, we could easily assume that it anticipates from the provider to provide technological know-how and R&D support, so that it could use it after the end of the contract. In this case, technology transfer is incident upon the role, competence and skills of the provider and upon the needs and expectations of the recipient.

Transfer of know-how may be achieved in two ways, directly and indirectly; in the first case it is expressly provided by the relevant agreement between the parties, the obligation of the management company to provide the assigning company with a specific level of know-how as determined by the contract, while in the second case, transfer is not expressly provided by the contract, but it emerges by the obligations of the management company as a whole and by the scope of the agreement<sup>181</sup>.

In direct know-how transfer, the know-how element is the core of the specific relation and the ultimate goal of it; it is also the main provision of the provider. It is clear that the provider is selected upon its technological competence and that there is one –at least- specific technological section, where the provider has a special knowledge and

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<sup>179</sup> above 49.

<sup>180</sup> Look to MacNeil's axes No 1 "overall relationship type", 4 "duration", mainly 6 "planning" and 12 "participant views".

<sup>181</sup> H. Gunter, O. Nass, Management Know-How Transfer by multinational Corporations in South-East Asia, (Braunshweig: Technischen Universitat, Inst. fur Wirtschaftswiss, 1996), 23.

which is the main object of the relation<sup>182</sup>. The role integrity norm in such circumstances is apparent as apparent is the “implementation of planning” norm. The parties mutually design an initial plan for this transfer, as this process can only be fulfilled in several subsequent stages, in order to be effective. Due to the nature of technology transfer such a procedure has to be planned in advance, by the technical and scientific decision-making units of both parties in cooperation together, and it includes many clearly technical aspects. The assigning company and the management company agree in advance that the former provides the latter with any necessary information, knowledge, technical skill and technical support for a smooth integration of all the above knowledge, together with appropriate staff training, so that this know-how to be productively used by the latter<sup>183</sup>. In many cases, when transfer of know-how is the main subject of the agreement for assignment of administrative responsibilities, there is great cost and it is very important for the assigning company, either an appendix agreement is drawn or a special contract for technology transfer, provision of rights of industrial property and technical support<sup>184</sup>.

Moreover, the management company undertakes to provide the assigning company know-how upgrading based on developments in science and technology, even after the agreement termination and is also obliged to provide any useful information on know-how exploitation, even when this is not included in the contracted know-how transfer. The management company may often be obliged to organise, provide with staff and train the research and development (R&D) department of the assigning company.

We have to note that the management company, in such cases and especially in cases of enterprises with modern technologies, also undertakes the responsibility that the technology provided to the assigning company is consistent, at least at the time the agreement terminates, with all modern scientific and technological developments worldwide<sup>185</sup>, or else the whole relation will be endangered, as there will be no real benefit for the recipient.

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<sup>182</sup> *ibid*, 27.

<sup>183</sup> UN-Centre on Transnational Corporations, Management Contracts, 41.

<sup>184</sup> Therefore, under such circumstances the terms about know-how transfer are rather explicit, predefined, complete and less “relational”.

<sup>185</sup> UN-Centre on Transnational Corporations, Management Contracts, 42.

On the other hand, as mentioned above, the management company undertakes mainly the obligation to train the staff of the assigning company, so that they are able to effectively perform their duties even after the management company withdraws. This way, when the management agreement also refers to the technological upgrade of productive and administrative processes of the assigning company, it is through staff training that indirect know-how transfer emerges<sup>186</sup>. In any case, such an obligation must be taken for granted, since the meaning and the usual scope of a management agreement have to do with the upgrade, via assignment to an external body, of skills, competitive advantages and strengths of the assigning company, through the special administrative on a first level and on a second level productive and technological know-how and experience of the managing company. Besides, managerial skills –even not of strictly technical nature- can be assumed as a sort of know-how that has to be transferred in order that the contract's objectives could be fulfilled. So, following the same ratio, used concerning staff training we can result to the conclusion that role integrity and implementation of planning impose relevant obligations to the provider.

However, management companies often suppress the terms about know-how transfer, even when it is the main subject and scope of a particular agreement, in order to protect their own interests. In such cases, even though there cannot be any obligations for know-how transfer according to the agreement text, it has to be accepted under the agreement meaning that such obligations arise according to the circumstances from the subject and scope of the agreement and productive reasons for its conclusion, at least from the part of the assigning company<sup>187</sup>. If not, there could be serious danger that the recipient's trust will fall, the relation will be assumed as exploitative and it could easily result to a pre-mature end. As the know-how transfer issue is very sensitive for both parties, they should be extremely careful with the management of this transfer process, in order to avoid conflict and secure contractual solidarity.

The norms of contractual solidarity, role integrity and implementation of planning are apparent as well, concerning both direct and indirect know how transfer.

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<sup>186</sup> H. Gunter, O. Nass, *Management Know-How Transfer by multinational Corporations in South-East Asia*, 33.

<sup>187</sup> UN-Centre on Transnational Corporations, *Management Contracts*, 41

### *Preservation of the Interests of Receiver which are not related to the Contract*

Within the framework of the confidential and cooperative character of the management agreement, it would be wrong to consider that contracting parties' duties are limited only in their strict contractual undertakings and obligations, which are mentioned in the agreement and define the relations between the parties.

This contract is characterised by an intense bonding between the participating enterprises<sup>188</sup>. The obligations for both parties and the areas of cooperation, solidarity and mutual caring are much more and even not predefined, but they are open and are determined by any needs and problems that may arise.

More specifically, the obligations of the parties have to do with the obligation of preservation of the other party's interests, even when they are not part of the strict agreement scope.

This means that initially the management provider and -to an extent- the client, are obliged to take any necessary action in order to protect and promote the other party's business activity.

This obligation derives from the duty of the parties to preserve their counter-parties interest and becomes vital due to the agreement's confidential character<sup>189</sup>. From another point of view it derives from implied principles within the contract about promoting full and constant cooperation. Furthermore, both parties seek for a common scope and they benefit from mutual success and it is to their own interest if the other party's interests are also promoted<sup>190</sup>. A strong partner may prove really helpful for our enterprise and a benefited and successful client is the best guarantee for our own success as their managers.

The above obligation mainly refers to the provider's role within the relation, as the party with the strongest managerial and consulting abilities and the party that assumes the

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<sup>188</sup> above 35.

<sup>189</sup> Look to *Bristol and West Building Society v Mothew* [1998] Ch 1 at 18

<sup>190</sup> I.R. Macneil, 'Economic Analysis of Contractual Relations: Its Shortfalls and the Need for a "Rich Classificatory Apparatus"', 1034

management, direction and protection as well of the other. It is true that as the providers assume powers of the recipient and rights of intervention and control, they also assume a protective role towards the recipient<sup>191</sup>. This role reflects what the recipients anticipate from their counter-party and its own reasonable expectations from the relation and forms a rational base of trust and confidence that the providers will act as efficiently as possible in order to protect the general recipient's interests –and not only those related to the specific scope of the contract-. In other words, as the providers act as managers, agents and consultants of the recipient<sup>192</sup>, they are expected to fulfil a role similar to this of the board of directors or internal managers; thus they assume fiduciary duties<sup>193</sup> and high standards of care<sup>194</sup> are expected from them, while their relation with the recipients is this of a(n) –fiduciary- agent towards a principal. And this is the reason why, although the above obligation is rarely explicitly mentioned in such contracts, which usually just include a general clause about confidentiality, it still exists as an implied term.

The obligation of preserving business interests that may be out of the scope of the agreement has a passive and at the same time active perspective. Concerning its passive perspective, each enterprise has to withdraw from any of its activities or participate indirectly or directly in somebody else's activity that may damage the other, even reflectively. An aspect of this is the obligation of non-competition, which we will analyse below. Concerning its active perspective, it may range from the obligation of each enterprise to provide any information that becomes aware of and concerns the other, until provision of help with crucial issues, even when this is not mentioned in its contractual obligations.

Such examples<sup>195</sup> exist in cases of facilitation of the client, for finding temporary staff, in case of strikes in its enterprise, delivery of crucial information about competitors, which is gathered randomly through its out of office activities -without of course being able to reveal other clients' business secrets- and consulting for important issues that may be

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<sup>191</sup> Compare to UK Companies Act 2006 S 172 par. 1.

<sup>192</sup> *McKenzie v McDonald* [1927] VLR 134

<sup>193</sup> *Ben-Israel v Valcare Medical*, [1997] 78 CPR 3d 94 , above 37

<sup>194</sup> According to Model Business Corporation Act, Section 8.30 (a): "Each member of the board of directors, when discharging the duties of a director, shall act: (1) in good faith, and (2) in a manner the director reasonably believes to be in the best interests of the corporation."

<sup>195</sup> Martinek, *Moderne Vertragstypen II*, 292.



related to the client, out of the agreement scope if there is a need for it. Within the framework of cooperation the provider has to do everything possible in order to help towards the recipient's business success.

Such obligations may be implied by the provider's fiduciary role, but the agreement may also include clauses according to which the management provider undertakes a general obligation to help in any issue that its client requests help<sup>196</sup>, clauses that call for support for any activity of the provider<sup>197</sup>.

In any case, the obligation for preservation of business interests of the other party, stresses the close cooperation and the intended unification and coexistence of the two different bodies, in terms of action for a common cause<sup>198</sup>. Besides, trust and confidentiality are essential prerequisites for the preservation of a relation in which one party transfers its own powers to the other. Provider's negligence to protect its recipients and promote their own general benefit and interests is a factor of tensions within the relation, decreased trust and co-operation. Thence, this kind of provider's obligation is closely linked with the norm of contractual solidarity. The existence of such a strong obligation distinguishes management contract from other forms of business partnerships and underlines the contract's transformation into a complete and multileveled relation.

Furthermore, this obligation is closely linked not only with the norms of role integrity and contractual solidarity –as shown above– but with the norm of reciprocity as well.

This obligation derives from the apparent mutuality of benefits, risks and objectives and is related to the integration of the partners' structures. The recipient not only assigns the exercise of its own rights and powers to the provider but pays fees to it as well; fees that usually are related to the recipient's profits. It is rational to expect that the counter-party will do as much as possible to improve the recipient's profits and general situation, it is rational to anticipate an extended degree of care concerning its full benefit, instead of just "doing what the contract mentions", in order to receive the payment<sup>199</sup>. And we should

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<sup>196</sup> M. Martinek, *Moderne Vertragstypen*, 304

<sup>197</sup> Reverse clauses can also be included, which will oblige the client to provide support and help in any problems that the provider might face.

<sup>198</sup> above 36, about the merge of structures of the parties.

<sup>199</sup> This anticipation derives from the common long term individual interest of the parties. I.R. Macneil, 'Economic Analysis of Contractual Relations: Its Shortfalls and the Need for a "Rich Classificatory Apparatus"' 1034.

admit that the recipient after integrating the provider and paying the fees has little to do in order to help the improvement of its own situation apart from co-operating with the provider. All the rest responsibilities are assumed by the latter and the norm of reciprocity explains why these responsibilities should be assumed as concerning a much broader list of issues than those explicitly mentioned in the contract.

In fact, what is required by the management company (to a greater degree) is nothing more or less than what is considered obligatory by a member of the Board of Directors or a management executive of the enterprise in terms of their special role in it, which however means taking any positive measures in its favour, even outside the framework of its typical duties. We should not forget that the basic task for the management company is to maximise the value of the managed company<sup>200</sup> and this has to be done in any available medium and way. Therefore, we observe, that solidarity and reciprocity are indeed linked<sup>201</sup> as this obligation shows.

### *Obligation of Respect for the Philosophy and the Scope of the Enterprise*

Any decision and action of the management company, according to the above obligation, may not be against the objectives of the managed company as they are defined in its articles of association.

Moreover, the business policy and any actions of the management company should comply with the general philosophy and some key aspects of the long term policy<sup>202</sup> of the managed company.

The management company has to respect any business particularities, such as if it is a public utility company, its social objective dominates, which must be considered by the former, or in the case of a tourist enterprise, its local character and traditions should be

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<sup>200</sup> Shareholder Concept. . Look to C. Moyer, J. McGuigan, W. Kretlow, Contemporary Financial Management, (Mason, OH USA: Cengage 11<sup>th</sup> ed., 2009), 5-6. Compare to UK Companies Act 2006 S 172.

<sup>201</sup> "...solidarity—a belief in being able to depend on another—permits the projection of reciprocity though time", I. R. Macneil, "Values in Contract: internal and external", 348

<sup>202</sup> M. Martinek, Modeme Vertragstypen II, 289.

respected, or in the case of an enterprise with strong social responsibility or ecological character.

Furthermore, the provider should not alter radically the recipient's enterprise scope – such as transforming a productive enterprise into a holding company- without the explicit consent of the recipient, despite of the fact of achieving better financial results by such a decision. Although a decision like it could seemingly promote the recipient's interest and the objectives of the relation it could actually lead to negative long-term consequences for the recipient. In any relation of this kind, the provider should take into account that the relation's object is the recipient's own property and that the recipient's consent for intervention is limited as already mentioned to a certain degree, no matter what the results are. The provider can play just a consultative role regarding such changes and may not be granted the power to decide for them.

The above obligation is linked with the role of the provider as a fiduciary towards the principle-recipient<sup>203</sup>. It is actually the result of the fact that the providers –given the powers assigned to them by the relation- are indeed actually able to alter the scope and philosophy of the recipient, in order to adapt it to their standards of production<sup>204</sup>, while this power transfer leaves the recipient weaker and less able to react to such actions. So, the provider should not take advantage of its own advantageous and powerful position in the relation, in order to alter elements of major importance for the recipient's corporate identity and should fulfil its duties carefully and in the less harmful way for the recipient. This is the reason why such obligations, although rarely mentioned in the contract, are implied.

We should mention that such practices of providers, which alter the scope and philosophy of the recipients, are common in international management contracts and especially in developing countries<sup>205</sup>.

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<sup>203</sup> above 39-40.

<sup>204</sup> V. De Stefano, 'Smuggling Flexibility: Temporary Working Contracts and the "Implicit Threat" Mechanism,' (2009) ILO Working Document No 4, 14.

<sup>205</sup> Look for some relevant cases of management contracts in developing countries, at O. Bouin, A. Michalet, *Rebalancing the public and private sectors: Developing Country Experiences*, (Paris: OCDE, 1991), 136-140. In many cases the provider proceeded to great changes in the recipient's enterprise, such as radically abolishing lists of local suppliers, implementing massive firings without the consent of the recipient, replacing production units, substituting old products (specifically in contracts in the agricultural sector, it is common that the management companies replaced

Therefore, the providers should always take into consideration that any recipient is not only function as a cash cow but it is integrated in a given social and economical environment, is related to specific stakeholders and constitutes an entity with its own individual philosophy and structure. These relations and this position of the recipient cannot be harmed due to a short-term profit –mainly for the provider. So, any management contract should be planned and implemented with a sense of respect towards the recipient’s environment, stakeholders<sup>206</sup>, employees, values and principles and the relation should integrate any element of the given social context. Furthermore, the general value of respect to the stakeholders of a company and the respect to the philosophy of the recipient –as an expression of respect towards its own autonomy– constitute a platform of supracontractual and external to the contract broad values that implicitly bind the provider<sup>207</sup>.

Moreover, such a respect is a prerequisite for the trust of the recipient towards the provider and its consent towards the transfer of managerial powers. Disrespect towards the non-financial priorities of the recipient will lead to severe tensions of the relation, negative reactions from the recipient’s internal and external environment, stakeholders, employees and shareholders and all these may result to dangerous relational conflicts that may endanger the contractual solidarity and the preservation of the relation<sup>208</sup>. For example, there may arise severe strikes or pressure towards the recipient against the provider that will cause a great conflict between them, which will be difficult to resolve in a co-operative way<sup>209</sup>; these factors will force the relation towards an end. Besides, such a practice on behalf of the provider will also imply a continuous relational conflict,

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traditional crops with more profitable agricultural products, in a way that usually resulted to a decrease in major local agricultural goods and even to local famine) or applying new production methods that destroyed local environment.

<sup>206</sup> Stakeholder Concept. T. Donaldson, L. Preston, "The Stakeholder Theory of the Corporation: Concepts, Evidence, and Implications", (1995) 20 *Academy of Management Review* 71. Compare to above note 153. Look also to UK Companies Act 2006 S 172, par. 1 b, c, d, e.

<sup>207</sup> I. R. Macneil in *The New Social Contract* 70, includes a list of general values that constitute supracontractual norms. These values may be related to values as environmental protection, social sensitivity, protection of the employees etc.

<sup>208</sup> There is a strong relation between harmonisation of the relational conflict and preservation of the relation. P. Vincent-Jones, *The New Public Contracting*, 7 note 16.

<sup>209</sup> I. R. Macneil, *The New Social Contract*, 69.

concerning the priorities of the relation and a disagreement towards the parties' individual interests and objectives.

Therefore, the fulfilment of this obligation by the provider constitutes an essential prerequisite for the development of a harmonious and stable cooperation and the tolerance of its intervention by the recipient<sup>210</sup>. As analysed above, this obligation is related to the norms of preservation of the relation/contractual solidarity, harmonisation of the relational conflict, harmonisation with the social matrix and supracontract norms.

### *Obligation of Recipient's Integration in Provider's Business Networks*

It is very common in management contracts, that the provider assumes the obligation to incorporate the recipient into its own business networks, strategic alliances and partnerships. These collective business schemes involve distribution or supply channels, R&D exchange partnerships, partnerships in collective projects and co-production networks, financial, marketing, promotion or advertisement networks and function according to their own rules<sup>211</sup> as "minisocieties"<sup>212</sup>. This integration aims at the cost reduction for the recipient (economies of scale) or at the accomplishment of a know-how transfer or at the improvement of the recipients' sales or at the improvement of the recipient's credit worthiness and financial status. Therefore, the above obligation is not only important for the interests of the recipient but highly related as well to the goals of the relation and the accomplishment of the provider's mission.

During the phase of choice of provider and initial negotiation of the contract, the recipient takes into account the potential provider's ability and consent to provide access to such networks. The provider's participation in such networks is counted as an important feature of the provider's general standing in business world and its suitability

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<sup>210</sup> Harmonisation of the relational conflict is highly related to contractual solidarity, above 23. According to MacNeil this norm is a norm in its own right but also an intensification of contractual solidarity. R. Austen-Baker, "Comprehensive Contract Theory: A Four Norm Model of Contract Relations", 225.

<sup>211</sup> Look to Bernstein's arguments and research about private legal systems. Above 23-24, especially note 63. Look mainly to L. Bernstein, "Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry," 115.

<sup>212</sup> I. R. Macneil, *The New Social Contract*, 70. This argument about 'minisocieties and ministates' is related to MacNeil's explanation about supracontract norms.

as manager and constitutes an advantage for the choice of a specific provider, given that the recipient will be benefited from this situation. It is assumed that as the provider will assume the control of the recipient in order to achieve certain business goals and improve the recipient's performance and competitiveness, it will use its own networks for the interests of the latter. As the provider's mission is to secure the recipient's permanent managerial improvement it is assumed that the first will work for the recipient's stable integration in these networks and that this integration is an inherent aspect of its overall role in the relation –no matter what the other aspects of the provider's role are-, even if the provider will not earn immediate profit from this integration<sup>213</sup>. Therefore, role integrity is a major factor that defines this obligation.

Moreover, at the initial stage of the relation, when the parties together plan their mutual long-term goals and strategy, they take into consideration such networks as means for their common strategy's implementation and success. Sometimes, they explicitly refer to these networks in their contract –especially when the participation in these networks is crucial for the relation, such as in marketing management contracts-, while in some other cases they explicitly exclude the recipient's access to them –especially when these networks are not related to the goals of the relation-. In most cases the parties do not refer explicitly in the contract to the networks, however they assume that the provider will choose the best solution including the use of the networks, in order to implement the relational strategy<sup>214</sup>. Therefore, the recipient's inclusion in the provider's strategic business networks is an efficient means for the implementation of the relational planning. By the recipient's integration, new rights –concerning the network- and duties arise, concerning not only the recipient but the provider and the rest parties of the network as well. For example, the parties of the network will be obliged to sell to the recipient raw material at low costs or the recipient will be obliged to use the network's distribution channels or the provider will have to share know-how with the parties of the network. The free choice of the parties about their goods' distribution and promotion, sales policy

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<sup>213</sup> So, all three aspects of role, according to MacNeil, i.e. consistency, conflict and complexity appear in this obligation. I. R. Macneil, *The New Social Contract*, 41-43.

<sup>214</sup> For example, in a hotel management agreement it is implicitly expected that the hotel manager, by providing its brand cover to the recipient-hotel, will also include it in its e-reservations platform.

and counterparty's selection will be limited, according to the network's rules and the parties may be obliged to offer a preferential treatment or tariff for their goods to the network's parties or an option of preferential service in comparison to non-included in the network third parties. In some cases, all the parties of the network will be under a management contract with the central provider and in each of these contracts there will be a provision about the parties' integration in the network and their rights and duties as parts of it. However, it may not be obligatory for the management contract to provide these rules as they can be of non-contractual nature<sup>215</sup>. Then, the bilateral obligations between provider and recipient are expanded towards all the parties of the network and both parties have to comply with the network's rules, which they possibly have to accept at the management contract's signing. The parties' decisions, strategy and policies are defined not only by the individual relation between provider and recipient but by the multilateral relation and the general rules of the network as well<sup>216</sup>. So, the individual relation between the recipient and the provider and the overall relation between the network's parties will be defined by creation of new powers and restraint of others and by supracontract norms, referring to the network's rules.

Furthermore, this integration and especially the rise of new duties and rights for the parties, effectuates the relative initial consent of them; concerning the provider to integrate the recipient in its own network and concerning the recipient to accept the rules of network, respectively.

As the whole planning of the relation and the selection of provider will be influenced by the recipient's integration in these networks, this integration becomes crucial for the long survival of the relation. If the provider neglects this inclusion or encumbers the recipient's practical integration or refuse to offer the privileges of the network to the recipient, then the relational goals will be endangered, the trust and cooperation between the parties will be undermined and the recipient may doubt about the provider's eagerness to share powers, privileges and competitive advantage. Therefore, the practical

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<sup>215</sup> I. R. Macneil, *The New Social Contract*, 70

<sup>216</sup> This may be related to broad supracontractual values as well. However, just the fact that these rules are not particularly contractual, i.e. not parts of the specific contract, can characterise them as supracontractual.

integration of the recipient into the network constitutes a prerequisite for the contractual solidarity and the preservation of the relation.

Finally, this obligation is related to reciprocity as it constitutes part of the provider's counter-obligation in exchange for the recipient's payment, assignment of rights and powers and concession of control to the provider. As mentioned above, this integration is a means for the accomplishment of the provider's role as a paid manager and a fair return for the recipient's trust, cooperation and payment. Although, the two counter-provisions, integration into the network and cooperation and payment cannot be compared, the first can be assumed as an even and rationally anticipated return for the latter<sup>217</sup>.

So, implementation of planning, effectuation of consent, role integrity, creation and restraint of power, contractual solidarity, preservation of the relation, supracontract norms and reciprocity are the norms that mainly define this obligation.

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<sup>217</sup> I. R. Macneil, *New Social Contract*, 44.



## CHAPTER D: BILATERAL OBLIGATIONS

Bilateral obligations are of equal importance as unilateral, especially as most of these obligations refer to behaviours expected by both parties, given the mutual effort for the achievement of common goals –defined by the relation- and the respect of the interdependence between them. Moreover, bilateral obligations are mainly related to fiduciary duties, especially concerning the provider, deriving from its special role as entrusted manager of the recipient. Most of the bilateral obligations mainly concern the provider as the party that plays the role of the manager of the recipient; however we prefer to assume these obligations as bilateral, because they concern to a secondary extent the recipient as well, whose behaviour, given the circumstances, can be crucial for the provider's interests and for the relation's success as well.

### *Obligation of Confidentiality*

The trusted relation created by the management agreement imposes on both parties and mainly on the management company the obligation of confidentiality. This means that it has to keep in secrecy any confidential information known due to its status, always act in its client's interest, perform no action that could damage these interests and mainly not try to benefit against the assigning company either on its own account or on third parties' account, of the confidential information received while performing their duties. Such an obligation is essential in order to preserve the overall relation as the relational scope and the formation of parties' roles have to do with the promotion of both parties' general interests. Any breach of confidentiality results to reduced trust and lack of cooperation and harms the foundations and the stability of the relation. The above obligation is also related to the obligation for omission of competitive action and especially an action on their behalf or actions on behalf of third parties that relate to the scope of the company, unless a special permit has been granted by the company.

Although confidentiality is a common explicit term in most management contracts, this obligation of confidentiality derives from the fact that the provider acts as a manager of the recipient and assumes the role of the board of directors of the latter<sup>218</sup>. Furthermore, the providers are also major business partners of the recipients and to a certain extent they contribute sources (skills, knowledge, staff and sometimes working capital) to the recipient's branch or enterprise that falls within the management contract, acting also in a way similar to this of a strategic investor, however in a much more special way; so the provider's specific role indicates the latter as a fiduciary of the recipient. Thus, we can deduct the existence of a fiduciary relation between providers and recipients, inspired by many kinds of fiduciary relationships<sup>219</sup>, in which the parties' role resembles these within a management contract relation. Confidentiality is a primal fiduciary duty, closely linked with the general duty of loyalty and a confidentiality obligation binds the directors and managers of a corporation<sup>220</sup>. Duty of Loyalty requires fiduciaries to put the corporation's interests ahead of their own<sup>221</sup>, especially when conflicts of interest arise<sup>222</sup>. Corporate fiduciaries breach their duty of loyalty<sup>223</sup> when they divert corporate assets, opportunities, or information for personal gain<sup>224</sup>. This gain may concern the gain of another recipient with which the provider has a management contract relation; so the provider is obliged not to transfer information between its different recipients<sup>225</sup>, apart from the case of recipients that share information and are included in a network.

Moreover, it is usual that specific Non-Disclosure Agreements (NDAs) accompany the contract between an individual manager and a corporation. On the other hand, we prefer to characterise this obligation as bilateral as the recipient as well, under specific

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<sup>218</sup> above 31

<sup>219</sup> *Re Saul D Harrison & Sons plc* [1995] 1 BCLC 14, [1994] BCC 475

*Regal (Hastings) Ltd v Gulliver* [1942] UKHL 1, [1942] 1 All ER 378, [1967] 2 AC 134

*Peoples Department Stores Inc. (Trustee of) v. Wise*, [2004] 3 S.C.R. 461, 2004 SCC 68

*In Plus Group Ltd v. Pyke* [2002] EWCA Civ 370

*Guth v. Loft, Inc.* [1939], Del. Ch., 5 A. 2d 503

<sup>220</sup> *Guth v. Loft, Inc.* [1939], Del. Ch., 5 A. 2d 503

<sup>221</sup> Look also to UK Companies Act 2006 S 175.

<sup>222</sup> For a definition of conflict of interest look to Section 8.60 of the Model Business Corporation Act, American Bar Foundation 3<sup>rd</sup> ed., 2003.

<sup>223</sup> Although UK Companies Act 2006 does not refer to a duty of confidentiality, the codification of the duties in the Act is not exhaustive so their general duties of confidentiality remain unchanged according to previous case law.

<sup>224</sup> A. R. Palmiter, *Corporations: Examples and Explanations*, (New York: Aspen, 6<sup>th</sup> ed, 2009), 192

<sup>225</sup> This case constitutes a conflict of interest as both recipients are the provider's clients. Look to UK Companies Act 2006 S 175.

circumstances, may come in touch with specific confidential information concerning the provider. For example, the recipients learn much about the providers' know-how and although this know-how may be an object of transfer to the recipient, it must be kept confidential towards third parties. However, as the most common case is that the confidential information concerns the recipient, the confidentiality obligation mainly refers to it.

Therefore, the whole social and legal context of the management contract relation recognise the fiduciary role of the parties within a management contract and requires that the parties fulfil the duty of extended care and loyalty and the duty of confidentiality towards each other as a result of the assignment of administrative duties<sup>226</sup>. And these duties derive from the parties' role in the relation, in relation to each other<sup>227</sup>. This legal and social context, the specific scope, objectives and general nature of the relation and the role of the parties within it, indicate confidentiality as an appropriate and fair behaviour that should followed by both parties, as they get to trust each other and reveal their confidential information to each other in order to promote their cooperation, preserve the relation and improve the accomplishment of their common and individual goals. The fiduciaries have to avoid harming their primary's interests, such as breaching the duty of confidentiality. This is a fair return for the counterparty's trust and cooperation; a behaviour that underlines reciprocity as it is related to substantial fairness and a more general concept of evenness and fairness rather than just procedural issues<sup>228</sup>.

So, the norms of role integrity, contractual solidarity/preservation of the relation, propriety of means and harmonisation with the social context are closely related to the obligation of confidentiality.

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<sup>226</sup> We refer only to harmonisation with the social context norm and not to supracontract norms as well, as we believe that, regarding this obligation, the sense of broader values' application or of rules deriving from a broader organisational form, although apparent, is not intensified enough, in order to stand alone from harmonisation with the social matrix norm. On the other hand, management contracts are highly relational, so we could accept the opposite opinion ("...an "intensification" of the norm of harmonization, as one moves towards the relational pole. R. Austen-Baker, "Comprehensive Contract Theory: A Four Norm Model of Contract Relations", 232 ). However, as in this sub-chapter we mainly refer to specific rules of company law rather than values, we prefer to use harmonization, as a more general and broader concept.

<sup>227</sup> I. R. Macneil, *New Social Contract*, 40

<sup>228</sup> *ibid*, 44, R. Austen-Baker, "Comprehensive Contract Theory: A Four Norm Model of Contract Relations", 237-241.

### *Obligation for Provision of Information*

The nature, the goals, the general context of the management agreement and the relational framework that it creates as well, require the management company to inform the management recipient about management development and other issues arising during the management period. The provider is also obliged to provide any information related to the course of management, the financial status of the business<sup>229</sup>, to inform the managed company about any problem or difficulty that may arise during its management. On the other hand, the recipient is also obliged to provide the management company with any information referring to the object and goals of the contract, concerning the financial, managerial and structural status of the enterprise under assignment. If the provider hides information then the recipient will not be able to evaluate the provider's work and decide about the relation's future. If the recipient hides information, then the provider will not be able to set clear managerial and financial goals, decide whether it will accept or reject to assume the contract, take the right administrative decisions and negotiate its own fees and the specific terms of the relation. Any hide of information will finally result to confusion, lack of cooperation, inconsistency between measures taken and goals to be accomplished and failure. Furthermore, if any insecurity or hide of crucial information is revealed then the trust between the parties and the foundations of the relation will be shaken and damaged, as parties will show that they are eager to sacrifice the long term fate of their relationship for a short term individualistic benefit<sup>230</sup>.

The recipient has to provide information mainly at the beginning of the relation, while the provider has to inform the recipient about its intended actions at the beginning and keep the recipient informed during the relation on a regular basis and at the end of the contract. So, the breadth of information that has to be provided to each other and the timing of this provision depends on the parties' role within the relation. The provision of

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<sup>229</sup> Martinek, *Modeme Vertragstypen II*, 292

<sup>230</sup> Therefore, it will not be possible to "hold the exchanges together". I. R. Macneil, *New Social Contract*, 52.

clear and adequate information is an expected behaviour by both parties and constitutes a prerequisite for the fulfilment of the mutual planning and goals<sup>231</sup>.

In most cases, the obligation of regular updates or information provision at any time required may be included in the formal contract. However, this obligation can also be implied as a fiduciary duty, deriving by the role of the provider as a manager and director of the recipient and of the recipient as business partner of the provider, as the provision of information is a means to promote the counterparty's interests and the mutual interests as are set-up by the contract and the overall relation. It can be assumed as linked with fiduciary duty of loyalty<sup>232</sup>, as it is related to the obligation of avoiding conflicts of interest and a disclosure of information usually serves an individual interest of the party that hides information, which is against the other party's interests.

This obligation is also related to reciprocity norm. The provision of information from the provider to the recipient can be viewed as a rational reciprocation for the assignment of the recipient's administration to the provider, as the recipient anticipates that it will have the right to know whatever concerns its own enterprise, which was entrusted to the provider. On the other hand, the provision of information from the recipients to the providers is a reciprocation<sup>233</sup> for the providers' involvement in the recipients' enterprise, as the providers rationally anticipate that as they accepted or just planned to dedicate sources for the business success of the recipients, they have the right to know everything that will help them evaluate the cost, risk and potential for success of the contract and they will receive every information that will help them to structure their strategy for the benefit of both parties. Furthermore, adequate information is also a prerequisite for fair bargaining<sup>234</sup>, negotiation and efficient allocation of risks, costs, duties and powers within the relation and during its different stages. It is also linked with the element of mutuality

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<sup>231</sup> Therefore, two aspects of role integrity, consistency and conflict do appear in this context. Consistency and especially conformity with the role appears as the parties are called to meet their counterparties' expectations about them, R. Austen-Baker, "Comprehensive Contract Theory: A Four Norm Model of Contract Relations", 236. Conflict appears because by fulfilling this aspect of their role, parties serve their long term mutual interest, although they do not have an individual benefit for the nonce.

<sup>232</sup> Look also to the analysis in the previous sub-chapter about confidentiality obligation (especially above 75 and notes 202-207).

<sup>233</sup> An "adequate compensation", above 15.

<sup>234</sup> Reciprocity is linked with fairness. R. Austen-Baker Richard, "Consumer Supplier Relations, Regulation and Essential Contract Theory", 71.

existing in the contract, as information is essential in order that mutual goals can be achieved.

On the other hand, a lack of sincerity could be interpreted as an effort of the insincere party to promote its own interest against the mutual, take advantage of the other party's ignorance, use unfair means in order to succeed its goals and opportunistically exploit the overall relation in favour of its own profit. Even if the party that shows such behaviour does not intend to harm the other party or exploit it, it "plays against the rules" and does not follow the commonly acceptable patterns of behaviour, so it harms the relationship<sup>235</sup>. Prior and complete information at every stage of the relation from both parties is a procedure that is assumed as appropriate, no matter what the intentions of the parties are. Besides, sincerity is the base of trust and disclosure of any information available between the contracted parties is a proper behaviour within a relation that integrates one company into the structure of another. Therefore, contractual solidarity, role integrity, propriety of means and reciprocity are related to the obligation of provision of information.

### *Prohibition of Rights and Liability Transfer from the Agreement for Assignment of Business Management Responsibilities*

One of the most typical terms of agreements for assignment of business management responsibilities provides that contracting parties are not allowed to transfer to a third party any rights or liabilities arising from the agreement. An exception may apply in case there is an earlier written consent of the contracting party<sup>236</sup>. This clause fully conforms to the general features of such agreement, with privacy and confidentiality being one of them. On the other hand, privacy of the agreement forbids any claims by the management company towards the assigning company to be assigned to third parties.

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<sup>235</sup> I. R. Macneil, "Contracting Worlds and Essential Contract Theory", 432

<sup>236</sup> UN-Centre on Transnational Corporations, Management Contracts, 124

We need to note though, that at least in our opinion, this cannot be the case for a payment claim, since a payment is also valued in money terms.

The company undertaking management is of course allowed and usually required to use third parties (persons or corporations) for fully performing its managerial duties and implementing the business plan of the contract, as for example managing executives sent to manage the assigning company or manufacturing companies, in order to build new infrastructure. These parties however, act as agents and not as alternative service providers and their range of duties has to be limited to technical issues and not extending to administrative duties without the permission of the recipient<sup>237</sup>.

This obligation has to do with the character of management assignment as a result of the consent of the recipient for the provider's involvement in its own structure and business and the transfer of powers belonging to the recipient's administrative board to the external provider. This consent is limited to a specific entity the management company and after the recipient has taken into consideration much information referring to its capability to succeed the goals of the relation, its trustworthiness and probably goodwill and brand-name. The element of inter-parties trust and cooperation is significantly intense; therefore the relation has a personal and individual character<sup>238</sup>.

The provider is expected to fulfil the agreed goals by acting as the manager of the recipient. So it is expected to act on its own, as would be expected for a natural person-manager. The nature of their role "generates expectations of what their behaviour will and should be"<sup>239</sup>. Transferring rights and duties to third parties may not be expected if the parties have not agreed on it and such a transfer could be assumed as a negation of its own role, in the same way as if a CEO assigned its own duties and liability to another person after a contract between them<sup>240</sup>.

Furthermore, in such a close relation the identity of the parties that will perform the contractual obligations should be clear, in order to enhance mutuality, avoid confusion, lack of trust and reduced cooperation. Under a management contract relation, in which

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<sup>237</sup> UN-Centre on Transnational Corporations, Management Contracts, 125.

<sup>238</sup> I. R. Macneil, "Restatement (Second) of Contracts and Presentation", 595.

<sup>239</sup> I. R. Macneil, "Political Exchange as Relational Contract" in B. Marin (eds.), Generalized Political Exchange (Colorado USA: Frederick Praeger, 1990), 166

<sup>240</sup> UK Companies Act 2006 S 232 par. 1.

the recipient does not know which company will exercise the management and the provider does not know which company will pay its fees, no party will be eager to assume significant risk and sacrifice its own short-term profit for a mutual long-term benefit (mutuality as a term needs to refer to two or more specific persons in order to exist)<sup>241</sup>. Therefore, the prohibition of such transfers without the permission of the counter-party enhances contractual solidarity<sup>242</sup>.

On the other hand it also helps with the harmonisation of relational conflicts, as parties will be less willing to compromise in favour of the preservation of the relation, resolve their conflicts under terms of mutual understanding and avoid litigation, if such transfers occur. Besides, by such transfers internal conflicts of the relation may be transformed to external conflicts and involve several parties that will claim no commitment by the management contract. So, there will be always the fear that the relation will result to an unpleasant and harmful “game” of liability disclaimers between the parties of the relation and the third parties, use of the third parties’ involvement as a means to avoid the fulfilment of contractual obligations and exploit them for opportunistic behaviours. Trust and mutuality<sup>243</sup> are going to be lost and the parties may prefer to terminate the relation, because it will include many uncertainties. Furthermore, any renegotiation of the relation will be very difficult, as the parties will have lost their trust and the effect of this negotiation will be limited as the contract’s implementation will have to involve third parties that will negotiate their role and obligations under different individual negotiation with the management contract’s parties. Thus, by transferring rights and duties the relation will be fragmented to several individual relations, unrelated to each other as they will involve different interests, goals and parties; a fragmentation that will burden much any effort for the harmonisation of relational conflicts<sup>244</sup>.

It is easy to understand that under such a fragmentation, reciprocity will lose its sense as well, as the parties will not anticipate that the counter-party will compensate

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<sup>241</sup> “...exchange is a process of mutual benefit...”, I. R. Macneil, “Values in Contract: internal and external”, 347.

<sup>242</sup> And reciprocity as well, as we will show below. Besides, reciprocity and solidarity are closely linked. *ibid*, 348

<sup>243</sup> Trust is a prerequisite for solidarity and solidarity a prerequisite for reciprocity. *ibid*, 348

<sup>244</sup> Trust and procedural regularity are very important considering relational conflicts resolution. P. Vincent-Jones, *The New Public Contracting*, 7 note 16.



them for their contribution to the relation, as they will not be sure which party will be liable or eager for this compensation and to which party they will owe their compensation; or if they are sure, this party may be different party from this, which they anticipated their compensation from. Apart from substantive fairness (reciprocity), procedural fairness (propriety of means) is implicated as well, regarding this obligation<sup>245</sup>. The transfer of liabilities and rights from one of the parties to a third party, not only may be illicit –as we will explain below- but may seem –because of the reasons we have already explained- tricky to the counterparty and outside the normal standards of behaviour in such close relations of this kind, thus crossing beyond acceptable bounds<sup>246</sup>. So, any such transfer should always take place after an explicit and specific consent of the counterparty, in order that the transferor’s behaviour will be proper.

Besides, management contract involve a transfer of powers, by creating administrative rights for the provider and restraining the powers of the recipient on its own enterprise for the sake of the relation’s mutual goals<sup>247</sup>. Such a transfer of rights and liability will not be covered and legitimised by any consent, while it will constitute a creation of power for the third party without being a party of the relation and a further restrain of power for the party whose rights refer to the obligations transferred to the third party. It will not be able to directly exercise them, as there will be a distinction between the person that is expected to fulfil the obligation and the person that is actually going to fulfil it. On the other hand, we could view this prohibition of rights’ transfer as a restrain of parties’ freedom to exercise their powers by transferring them (it is a kind of exercise), and thus restraining their own future choices<sup>248</sup>.

Finally, we believe that no relational contract can work if new parties are allowed to enter the relation without the consent of both the initial parties, as any relation is created on the mutual consent of some parties for its formation; a consent that gives the

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<sup>245</sup> Look about this distinction to I. R. Macneil, “Contracting Worlds and Essential Contract Theory”, 432.

<sup>246</sup> R. Austen-Baker, "Comprehensive Contract Theory: A Four Norm Model of Contract Relations", 237-238.

<sup>247</sup> Without this transfer of power the other norms could not function. I. R. Macneil, *The New Social Contract*, 56.

<sup>248</sup> I. R. Macneil, “Political Exchange as Relational Contract”, 166.

counterparty the ability to take actions –even not predefined completely- that bind the parties’ own powers<sup>249</sup>.

So, reciprocity, propriety of means, contractual solidarity, harmonisation of the relational conflict, creation and restraint of power, effectuation of consent and role integrity are linked with this prohibition of rights and liability transfer from a party to a third party without the consent of the counter-party.

Regarding business networks under management contract, whole or partial substitution of the management company by a subsidiary or other affiliated company is usually observed, while there are often clauses<sup>250</sup> in the relevant contracts specifically allowing such a substitution. Such a substitution resembles an internal regulation of relations and liabilities in between the companies of the network, while when a new company enters its management is actually assigned collectively to the network<sup>251</sup>. The network’s self-organisation may impose its own individual rules and general norms and customs as well - not particularly contractual-<sup>252</sup> about rights’ and liability transfer and restrict this transfer within the companies forming the network. This prohibitions and restrictions complement the relation’s content and the contract may also explicitly refer to a collective network agreement about such issues<sup>253</sup>. So supracontract norms are apparent considering this kind of obligation<sup>254</sup>.

Furthermore, corporate law may often regulate the terms and the legitimacy of a liability transfer<sup>255</sup> and especially the transfer of managerial and administrative powers and relevant fiduciary duties<sup>256</sup>. The issue of substitution of the provider by third parties

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<sup>249</sup> H. Hakansson, I. Snehota, (1995). “The Burden of Relationships or Whose Next?”, (1995) Proceedings of 11th. IMP Conference, Manchester, 522-536.

<sup>250</sup> A. Schluter, Management - und Consulting –Verträge, 162.

<sup>251</sup> Look above to the analysis of the Obligation of Recipient’s Integration in Provider’s Business Networks.

<sup>252</sup> I. R. Macneil, The New Social Contract, 70 and “Values in Contract: internal and external”, 350.

<sup>253</sup> It also would provide that the recipient will become party of this agreement just by signing the management contract.

<sup>254</sup> And they are not absorbed by harmonisation with the social matrix norm, as the influence of the network’s specific broad norms regarding this obligation is quite significant, equally to the overall general context of the relation; therefore there is the element of “intensification” (above note 185), in order to affirm the supracontract norms’ self appearance.

<sup>255</sup> For example Unfair Contract Terms 1977, S 2 par. 2. Generally for indemnity of directors for reckless and negligent management look to *Armitage v. Nurse* [1998] CH 241, 251-256.

<sup>256</sup> Look to *ASIC v Citigroup Global Markets Australia Pty Ltd (No 4)* [2007] FCA 963. For contracting out fiduciary duties look also to R. Thompson, “The Story of *Meinhard v. Salmon* and Fiduciary Duty’s Punctilio”, (2008), No. 08-44 Vanderbilt Public Law Research Paper, available at SSRN: <http://ssrn.com/abstract=1285705>, 24-25 and especially note 116 citing some cases in which the court accepted this contracting out.

and of liability transfer to third parties is largely regulated by mandatory rules of corporate law or rules from self-organised system. Thus, the general social context of the relation and especially its legal environment (the legality of the specific contractual terms<sup>257</sup>) is crucial considering this obligation.

### *Collaboration Obligations*

We have to note that since management is related to various factors such as financial, environmental, social but also human, an agreement for assigning of managerial responsibilities cannot be dealt as provision of simple representative authority, but as participation of the provider in various roles (leading, social, informational, guiding), related to the assignee. This is why the reasons of a failure agreement usually cannot be explained immediately and responsibilities cannot be easily defined and allocated.

Therefore, there is an obligation for collaboration of both parties and especially for preparing the recipient to include the provider in the legal and business structure of business management provision. However, the meaning of collaboration obligation does not only consist of the obligation for provider's inclusion in the recipient's structure. It also includes provision of information from one party to the other. As stated above<sup>258</sup>, information must be provided both by the management company to the recipient and by the recipient to the management company; this is a compulsory term for their collaboration and for the success of the agreement.

Moreover, according to the duty of care<sup>259</sup>, which characterises the parties' fiduciary relation, especially as an assignment of such an important responsibility like management and as a means for a company to fully invest in another, it is obvious that even if such an obligation is not mentioned in the agreement, both parties are obliged to consult each other before performing any action provided by the agreement and make any possible effort for a continuous collaboration with each other, in order to take the best possible

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<sup>257</sup> R. Austen-Baker, "A Relational Law of Contract?", 143.

<sup>258</sup> Look to the analysis OF the Obligation for Provision of Information.

<sup>259</sup> A duty of care for managers is a duty to act carefully in fulfilling the important tasks of monitoring and directing the activities of corporate management. UK Companies Act 2006 S 174, the director must exercise reasonable care, skill and diligence. About general directors' duty of care look also to *Smith v Van Gorkom* 488 A 2d 858 (1985 Del.).

decision. The scope of this collaboration is that administrative decisions concerning the recipient will be made after a totally, if possible, mutual agreement of both parties.

The collaboration obligation has three main features.

Firstly, it equally concerns both parties. On the one hand, the management company is obliged to inform, communicate and be in direct contact with the assigning company, by providing any necessary explanation in relation to performing of duties on its behalf and any advice related to the actions required to be taken by the assigning company for an efficient implementation of the agreement. On the other hand, the assigning company has to provide any necessary information to the management company in order to perform its duties, effectively include it in its structure and at the same time support it reasonably in administrative level during the period of undertaking its duties and also cover any of its managing executives who can trust and may assign them managerial responsibilities. Therefore, each party's collaboration is assumed as an even return for the other party's collaboration<sup>260</sup>.

Secondly, the obligation of collaboration is continuous and necessary not only during the period of the initial management assignment, but for the whole period by the time the parties start preparing to perform the agreement up until the cooperation between them expires. As a result of prior collaboration of the counterparty, the other party has also to show a similar behaviour in future<sup>261</sup>.

Thirdly, the obligation of collaboration is not clearly predefined, it is open and may be defined according to the circumstances and needs of each case, but it always aims to the effective performance of duties by the contracting party and the best possible implementation of the agreement scope. The obligation of the parties for collaboration and ensuring of the best possible cooperation does not have to be mentioned or analysed in the management agreement, but simply arises from the interpretation of the agreement. Moreover, the existing legal context of the relation –based on good faith, fiduciary duties (usually assumed as implied terms)<sup>262</sup>, business efficacy<sup>263</sup> or strict

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<sup>260</sup> Evenness is the central concept behind mutuality/reciprocity. I. R. Macneil, *The New Social Contract*, 44.

<sup>261</sup> Although it may have the freedom to adjust the exact nature of its own collaboration. P. Blau, *Exchange and Power in Social Life*, (London: John Wiley, 1967), 93.

<sup>262</sup> above 38, note 114.

necessity<sup>264</sup> (both assumed as bases for generation of implied terms) or other legal principles depending on each jurisdiction and each different interpretation and approach may also dictate a collaborative behaviour. Besides, apart from legal rules, social mores and norms<sup>265</sup> may also favour a behaviour of collaboration and cooperation on behalf of the parties, instead of selfish and indifferent to the counterparty's opinion approaches. This collaboration constitutes a behaviour anticipated as a fair and proper means of conducting the relation<sup>266</sup>, as parties actually co-invest sources on the recipient's enterprise<sup>267</sup>. However, not only the parties anticipate this collaborative behaviour as proper<sup>268</sup>, but the overall social environment of the relation as well demands that the parties will constantly cooperate, in order to reduce the risk for the recipient that the provider will abuse its position<sup>269</sup>.

Conceptually, this obligation may not be characterised as an enforceable term but as a prerequisite for the implementation of the agreement. We could describe it not as a single and distinct obligation but rather as a total constant behaviour, anticipated by both parties.

Constant collaboration in every stage of the relation and concerning every aspect of management is essential for the stability of the relation, for the recipient's tolerance to the provider's interventions and for the promotion of trust, mutuality and cooperation between the parties<sup>270</sup>. This collaboration proves the parties' dedication to the mutual goals and to the promotion of common long-term interest instead of individual short-

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<sup>263</sup> The Moorcock (1889) 14 PD 64

*Scally v Southern Health and Social Services Board* [1992] 1 AC 294

*Attorney General of Belize v Belize Telecom Ltd* [2009] UKPC 11

<sup>264</sup> *Equitable Life Assurance Society v Hyman* [2000] UKHL 39

<sup>265</sup> Look about the relation of social mores and norms to the harmonisation with the social matrix norm at R. Austen-Baker, "Comprehensive Contract Theory: A Four Norm Model of Contract Relations", 226-228.

<sup>266</sup> However the specific content of this collaboration depends on the general relational context as well. *ibid*, 237-238 and note 87.

<sup>267</sup> Trying to follow specific steps of consultation and cooperation with the counterparty before taking and implementing any decision is both a matter of substantially fair behaviour and proper procedure (it shows respect to the counterparty).

<sup>268</sup> Therefore both substantive and procedural fairness seem to be covered. Look also above note 211.

<sup>269</sup> We observe a close link between harmonisation with the social matrix and reciprocity and propriety of means (listed together by the Comprehensive Model as substantial fairness, R. Austen-Baker, "Comprehensive Contract Theory: A Four Norm Model of Contract Relations", 242).

<sup>270</sup> I.R. Macneil, "Economic Analysis of Contractual Relations: Its Shortfalls and the Need for a "Rich Classificatory Apparatus"", 1034.

term interest and strengthens the "belief in being able to depend on another"<sup>271</sup>; therefore it enhances contractual solidarity.

Besides, harmonisation of the relational conflict is also enhanced<sup>272</sup> as collaboration in a management agreement means that the parties tend to choose communication instead of conflict and prefer to resolve their regular and non-regular disputes by compromise, mutual consent and by avoiding any means that could harm their counter-party or neglect its own priorities and suggestions, no matter what are the uncertainties that exist within the relation<sup>273</sup>. As such collaboration is implemented, both parties treat the management as an issue of common concern and the company under management as an asset of mutual interest, as they take the decisions concerning it together, acting as partners and participants in success or failure. This behaviour proves that management contract creates new types of participative powers on the company under management and effectuates the parties' consent to share duties, responsibilities and administrative powers concerning the direction of the enterprise and the implementation of the initial and ongoing mutual planning. Effectuation of consent is apparent for an additional reason, given the fact that the recipient shares its powers by its consent, however this consent depends on the provider's collaboration with the recipient, so it is limited to the extent that the provider and the recipient resolve all issues together and under cooperation with each other.

Moreover, collaboration leads to less confusion, efficient allocation of duties, powers and risks<sup>274</sup>, clearer goals for both parties and is a prerequisite for the success of the relation. Such behaviour shows that both parties respect their counter-party and aim at a win-win strategy, removing the fears about potential exploitative practices.

Collaboration also improves the ability for better design and function of the relation and more efficient decisions and management and problem-solving, as the parties join their

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<sup>271</sup> I. R. Macneil, "Values in Contract: internal and external", 348.

<sup>272</sup> We observe a link between harmonisation of the relational conflict and harmonisation with the social matrix. K. Blois, B. Ivens, "Relational Exchange Norms in Marketing: A Critical Review of Macneil's Contribution", 247.

<sup>273</sup> Look also to A. Stinchcombe, *Information and Organizations*, (Berkeley, Cal. USA: University of California Press Ltd., 1990), 207,236, cited in K. Blois, B. Ivens, "Relational Exchange Norms in Marketing: A Critical Review of Macneil's Contribution", (2004) 4 *Marketing Theory*, 239, 246.

<sup>274</sup> "*The benefits and burdens of the relation are to be shared rather than divided and allocated (a law partnership).*", I. R. Macneil, "Restatement (Second) of Contracts and Presentation", 595.

forces and management teams, share their knowledge and thus improve their brainstorming and their ability to resolve managerial problems. In this way, uncertainties are efficiently responded<sup>275</sup>, unpredictable problems are solved more easily and situations that call for flexible management<sup>276</sup> are addressed. By collaboration, the parties manage to re-adjust their planning and objectives to changing conditions<sup>277</sup> and re-design their relation and contractual obligations after formal contract<sup>278</sup>, according to external and internal environment of the relation<sup>279</sup>; therefore flexibility is enhanced.

So, collaboration obligations are linked with many norms, such as reciprocity, harmonisation with the social matrix, harmonisation of the relational conflicts, flexibility, contractual solidarity/ preservation of the relation, propriety of means, effectuation of consent and creation and restraint of power.

### *Non-Competition Obligation*

As mentioned, management agreement is a type of close cooperation between enterprises, i.e. the management provider's company and the management recipient's company. As in any other form of business cooperation, there are also in this case issues concerning competition between the cooperating companies.

Specifically, in the management agreement, the company undertaking the management of another company is informed about any strong and weak points of the latter, gains access to its intangible assets, business relationships, networks, confidential information and know-how; an access that is not allowed to other enterprises and derives from the managerial merge between the parties.

It is obvious that the management company by acquiring full access to details concerning the managed company, details that only the Directors are aware of, is found

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<sup>275</sup> I. R. Macneil, *Contracts: Adjustment*, 859.

<sup>276</sup> Flexibility is related to the satisfaction of performance expectations for a contract. R. Austen-Baker, "Comprehensive Contract Theory: A Four Norm Model of Contract Relations", 241.

<sup>277</sup> I. R. Macneil, "Values in Contract: internal and external", 363.

<sup>278</sup> S. Smitka, "Contracting without Contracts" in S. Smitka et al (eds.) *The Legalistic Organization*. (London: Sage Publications, 1994), 91, 93.

<sup>279</sup> I. R. Macneil, "Contracts:Adjustment", 894-900.

in a favourable position and, by taking advantage of such information, may be found in an extremely favourable and advantageous position in terms of competition.

Moreover, since the management agreement is a form of business cooperation, there is a common and mutual objective that both parties try to achieve. For the achievement of the objective, both parties and especially the one found in a more favourable position, which in cases of management contract is usually the management provider company, have to make several concessions and set certain limitations in their business activities. After all, through the relevant agreement, there is a certain bonding of the two companies and the actions of each party may positively or negatively affect the other. The interdependence of interests combined to the common cause both parties aim at, create a loyalty duty to both parties, as we have mentioned above<sup>280</sup>.

One of the aspects of such an obligation, which we will discuss in this sub-chapter, is the obligation of non-competition. We choose to investigate confidentiality separately, although related to confidentiality, as confidentiality obligation may arise as not related to competition issues and conflicts of interests, as for example when the provider discloses secrets of the recipient without any intention to earn profit from this disclosure.

The obligation of non-competition is a restriction of financial freedom, which is initially acceptable by law in some cases as neither party can take advantage by the relation, in order to gain a general competitive advantage against the other party.

The non-competition obligation mainly concerns the provider, as it acts as the actual manager and director of the recipient; however it has to be assumed as a bilateral obligation. The recipient as well can take advantage of the provider's know-how, organisation and other competitive advantages, in order to compete against it in future.

This obligation derives from the fiduciary duty of loyalty<sup>281</sup> and specifically the fiduciary duty to avoid conflicts of interest<sup>282</sup>. Loyalty<sup>283</sup> means that the party has to act in the best interest of the counterparty and in case of a conflict of interest that might benefit

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<sup>280</sup> above 37-38.

<sup>281</sup> In civil law jurisdictions this obligation may be linked with good faith and business ethics.

<sup>282</sup> UK Companies Act 2006 S 175. *Mertens v. Hewitt Assoc.* [1993] 508 U.S. 248, 251-252.

<sup>283</sup> Compare to the definition of ERISA 404(a) for the duty of loyalty: “[A] *fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries...*”, Employee Retirement Income Security Act of 1974 (ERISA) (Pub.L. 93-406, 88 Stat. 829



the first party more than the latter -if it ends up one way- then the first party/fiduciary is expected to act in the absolute best interest<sup>284</sup> of the latter/principal<sup>285</sup>. A fiduciary is not allowed to acquire a profit, benefit or gain<sup>286</sup> from the relationship in circumstances of conflict of duty and interest, in circumstances of conflict of duty to one person and duty to another person or by taking advantage of the fiduciary position<sup>287</sup>. If a business opportunity arises to the provider outside of its role in the relation, but as an individual, the provider is expected to refuse the opportunity and try to ensure it –if possible- for the recipient<sup>288</sup>. Furthermore, the provider is obliged not to transfer competitive advantages of the recipient to other recipients and the recipient is obliged not to transfer the provider’s know-how to related companies or partners of its own, except if the provider agrees<sup>289</sup>.

Self-dealing is a distinctive case of forbidden competition<sup>290</sup>. It is the conduct of a fiduciary who takes advantage of his/her position in the principal’s organisation, in order to act for his/her own interests rather than these of the principal, by dealing with itself in a transaction in which he/she acts on behalf of the principal<sup>291</sup>. However, we should admit that self-dealing is not only acceptable but sometimes necessary or provided by the agreement and the scope of the relation as well, within management contracts relation<sup>292</sup>. So, the extent to which self-dealing breaches the non-competition obligation, depends on the interest of the principal, the scope of the self-dealing, the intentions of the fiduciary and how this self-dealing serves the objectives of the relation.

In many jurisdictions, non-competition obligations are provided by law within the framework of certain agreements and contract types such as commercial representation

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<sup>284</sup> For an approach towards how this “best interest” can be judged look to *Mills v Mills* (1938) 60 CLR 150.

<sup>285</sup> Look also to *Guth v. Loft, Inc.* [1939], Del. Ch., 5 A. 2d 503

<sup>286</sup> *McInerney v. MacDonald* [1992] 2 SCR 138, (1992) 126 N.B.R. (2d) 271, (1992) 126 N.B.R. (2e) 271, (1992) 93 D.L.R. (4th) 415, 1992 CanLII 57 (S.C.C.)

<sup>287</sup> A fiduciary must not profit from the fiduciary relation. *Attorney General of Hong Kong v Reid* [1993] 3 WLR 1143

<sup>288</sup> *A. R. Palmiter, Corporations*, 192.

<sup>289</sup> A fiduciary’s duty must not conflict with another fiduciary duty. *Lister v Stubbs* [1890] 45 Ch D 1

<sup>290</sup> *A. R. Palmiter, Corporations*, 192.

<sup>291</sup> For more information on self-dealing look at T. Nenova, C. Hickey, “Self-Dealing: Sneaking Corporate Value through the Back Door”, (2006) 312 *Public Policy Journal*.

<sup>292</sup> *A. Schluter, Management - und Consulting –Verträge*, 112. For example, the provider may provide the recipient with equipment or raw materials and this provision may agree to the parties will when they signed the contract, in order to expand the recipient’s production line or reduce its operating cost.

contract, dormant partnerships, franchising, joint venture agreements<sup>293</sup> etc<sup>294</sup>. Besides, in many jurisdictions non-compete clauses or covenant not to compete<sup>295</sup> (CNC) are very common considering employment contracts<sup>296</sup> and other types of contracts –mainly long term and highly relational<sup>297</sup>–.

Therefore, the obligation of non-competition is not only a legally acceptable contractual obligation, when it is expressly provided by the parties as a term of the management agreement –although it is mainly a standard clause in most such agreements<sup>298</sup>–, but it can also be an implied term, arising from business ethics, fiduciary character of the relation and duty of loyalty between the cooperating contracting parties, which binds the parties even if this is not expressly provided by the agreement between them.

This obligation is acceptable<sup>299</sup> to the extent that it does not comprise an unreasonable restriction<sup>300</sup>. What can be considered as reasonable<sup>301</sup> usually is determined by the following criteria:

- duration of obligation, geographic scope and function<sup>302</sup>
- necessity<sup>303</sup>
- legitimate business interests<sup>304</sup>

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<sup>293</sup> “Joint adventurers, like copartners, owe to one another, while the enterprise continues the duty of finest loyalty.” Morton H. Meinhard v. Walter J. Salmon et al. [1928] 249 N.Y. 458, 463-464. Also Farah Constructions Pty Ltd v Say-Dee Pty Ltd [2007] HCA 22

<sup>294</sup> We should take into consideration the common law doctrine of restraint of trade that limits the enforceability of restrictions on freedom of conducting business. Gradually the enforceability of such restrictions became acceptable but under specific conditions. Look to Nordenfelt v Maxim, Nordenfelt Guns and Ammunition Co [1894] AC 535, Mason v The Provident Supply and Clothing Co. [1913] AC 724

<sup>295</sup> For the gradual acceptance of such restrictions of competition in U.K., look to Roussillon v Roussillon (1880) 14 Ch.D. 351, Mitchel v. Reynolds, 24 Eng. Rep. 347 (Q.B. 1711).

<sup>296</sup> For example (German Commercial Code) HGB par. 74. Look also about misappropriation of trade secret at U.S.A., Uniform Trade Secrets Act, National Conference of Commissioners on Uniform State Laws, (amended) 1985

<sup>297</sup> For the relational character of employment contracts, R. Bird, “Employment as a Relational Contract”, 149.

<sup>298</sup> A. Schluter, Management - und Consulting –Verträge, 144.

<sup>299</sup> Above note 276.

<sup>300</sup> Reasonableness can be viewed as a prerequisite for evenness, as an even restriction should be reasonable and proportional to the counter-party’s dependence and contribution to the relation. Look also to I. R. Macneil, The New Social Contract, 44.

<sup>301</sup> “Covenants not to compete are valid if they are reasonable in view of all the facts in a particular case.” Edwards v. Athena Capital Advisors [2007] Civil Action No. 07-2418; All Stainless, Inc. v. Colby [1974] 364 Mass. 773;E Marine Contractors. Co. v. Hurley [1974] 365 Mass. 280; Omniplex World Servs. Corp. v. US Investigations Servs., Inc., 618 S.E.2d 340, 342 (Va. 2005)

<sup>302</sup> Advanced Marine Enters., Inc. v. PRC Inc.[1998], 501 S.E.2d 148, 155; Simmons v. Miller [2001] 544 S.E.2d 666, 678

<sup>303</sup> Novelty Bias Binding Co. v. Shevrin [1961] 342 Mass. 714

<sup>304</sup> Sentry Insurance v. Firnstein [1982] 14 Mass. App. Ct. 706; Boulanger v. Dunkin’ Donuts Inc. [2004] 442 Mass. 635.

The duration of the clause validity, due to its nature and its scope, is not limited to the time that the management agreement will be valid for, but it extends to a further time period that is necessary for protecting any interests of the contracting parties, which within the framework of their cooperation have shared business secrets, know-how and resources<sup>305</sup>. This time period may be determined by the agreement, or emerge from the scope, duration and use of the agreement, as well as the business activity of the cooperating enterprises. Considering the provider, non-competition concerns the time period during and after the end of the relation, while, considering the recipient non-competition mainly concerns the period after the end of the management.

The breadth of the activities under limitation of competition has two dimensions. First, there is a spatial one, related to non-competition in specific geographical regions<sup>306</sup>. The spatial limits of the clause should be defined according to the type of activity. For example in case of an agreement for a company's management operating in the field of software production, the spatial limits of the clause should be very wide, as its product can be easily launched in the market worldwide. The other dimension refers to the type of activities for which a non-competition obligation exists. It would be extremely binding and not reasonable if the clause of non-competition is valid for all fields of corporate activity, even those that are not subject of the agreement. However, when the managed company develops its business in many fields related, connected and even interdependent to each other, the clause should be valid for all interrelated activities. So, any commitment, whether related to space, time or activities issues, has to be limited and to be defined by the nature, subject and scope of the agreement.

In relation to the existence of such clause in management agreements, we can observe the following.

As shown above, corporate law, fiduciary duties, business ethics, general legal principles, business and legal practice in relevant types of relations and the whole social context show that non-competition is a standard for management contract relations. This

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<sup>305</sup> A. Schluter, Management - und Consulting –Verträge, 144.

<sup>306</sup> *ibid*, 145.

social context shows as well which the limits and the specific dimensions of that clause should be.

In case of an agreement for a company's management assignment, the scope of justification for the clause authorisation refers to the contractual commitment of the parties, from which also derives the obligation to pursuit a common objective. The common objective, as mentioned above, is related to the appropriate and effective management of the managed company and through this company to the achievement of agreed business and financial objectives, defined in each case<sup>307</sup>.

We believe that in the management agreement, such a clause may be included for the following reasons. Firstly, due to the common objective, which fulfilment the parties are contractually bound for. This is a cooperation between independent enterprises, a cooperation that cannot be established and operate without such obligation. In other words, competition may cancel any meaning of cooperation and effort for mutual benefit<sup>308</sup>, i.e. the scope and legal grounds of the agreement. Therefore, we could claim that the obligation for non-competition derives immediately from the relational grounds of the management agreement and is highly related to contractual solidarity. Moreover, the clause is allowed because the contracting parties of the agreement are benefited by its implementation and its enhancement, which is sought through the clause implementation. Therefore, by undertaking such an obligation, they also protect their own interests.

In addition, the management provider supports its management services and the payment is what it takes in return not only for the services provided but also for the resources used for offering such services and any other action taken to the success of the agreement, with the obligation of non-competition being one of them.

The management company should also take into account during negotiations about its payment, the anticipated profit that might had, if it could benefit by operating in the same field with the assigning company, even if it had not undertaken its management. This means that by the non-competition obligation, there is some loss of profit for the

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<sup>307</sup> For an evaluation of the results of such contracts in P. Drucker, *Managing for Results*, (London: Heinemann,1964)

<sup>308</sup> I. R. Macneil, "Values in Contract: internal and external", 347.

parties, but the scope of the relation supports it and this way such an obligation is justified. So, non-competition constitutes an implementation of reciprocity. The limitation of the parties' freedom for business is imposed as an even and substantially fair<sup>309</sup> return in such relations regarding the parties' overall contribution, trust and involvement; a behavior anticipated as rational and self-evident<sup>310</sup>, given the scope and nature of the relation, its usual long-term character, the mutuality of objectives and the interdependence between the parties<sup>311</sup>.

Moreover, the contracting parties are free to develop their business activities in any other field of the market, except for the one that the managed company develops its business activities in, or in case of a partial management agreement, in the specific business sector.

The agreement does not bind the parties only in relation to performing several actions, but also for a certain behaviour, which apart from actions may also include omissions. On the other hand, this obligation does not mean that the parties have not a right to participate in the market, but that they are not allowed to compete with each other. Therefore, the object of reciprocity –limitation of competition- is closely related to factors presented above (duration, extent, scope, necessity, business interest etc) and its extent is defined, in order to be even, i.e. reasonable and adequate<sup>312</sup>.

Especially in case of a network of companies operating under a common brand name and management, the obligations of non-competition are even more bilateral due to general networks norms, as the management recipient may not operate competitively in relation to the network, where it has been developed. In this case, competition would cause problems in the company's relation to the management company and to the rest of the network, i.e. the rest of management recipients. The clause may also bind the parties of the agreement in relation to third parties, if the third parties are in any way related to

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<sup>309</sup> The reasons for non-competition obligation are related rather to substantive than procedural fairness –restraining competition is not just a matter of using the proper means but reciprocating the counterparty's trust and devotion to the relation; therefore we do not find any strong appearance of propriety of means.

<sup>310</sup> "...the sense that an expectation of reasonable return for what is given... must not be frustrated..." , R. Cotterrell, Emile Durkheim: Law in a Moral Domain, (Edinburgh: EUP, 1999), 130.

<sup>311</sup> Contractual solidarity seems again linked with reciprocity, as the parties reciprocate their counterparty's provisions to the relation –by avoiding competition-, during the long timeframe of the relation and even after it. I. R. Macneil, "Values in Contract: internal and external", 348.

<sup>312</sup> I. R. Macneil, New Social Contract, 44.

any of the contracting parties. This way competition against suppliers of the contracting parties, buyers, distributors and stakeholders in general may be forbidden. The same may also apply against corporations that are strategic investors or shareholders of any of the two contracting parties. In the above situations, the related companies usually form a structure that could fit the concept of “minisociety”<sup>313</sup>, with its own rules, the most important of which has to do with the limitation of competition between them<sup>314</sup>.

This facilitates a smooth integration of each party to the organisational and financial structure of the other and also helps to avoid arguments and problems<sup>315</sup>, which may affect non contractual relations (often interdependent relations) with key business partners, cause great trouble and cancel the scope of the agreement. In this way non competition is related to supracontract norms and to the harmonisation of relational conflict as well. Furthermore, the importance of non-competition for the harmonisation of the relational conflicts is highlighted by the fact that it is related to internal conflicts of interests within the relation<sup>316</sup>.

It is clear that the management agreement may result to various commitments, mainly for the management provider, which should be taken into consideration when it decides to draw such an agreement. It is obvious that non-competition constitutes a major restraint of the parties’ powers<sup>317</sup>, as they are obliged to avoid any financial or commercial activity falling in the spectrum of competition, thus limiting their business freedom. And the reason for such a restraint is the preservation of the relation, the enhancement of mutuality, the achievement of the relational goals and the emphasis on long-term mutual interest than on short-term individual profit.

Therefore, contractual solidarity/ preservation of the relation, creation and restraint of power, harmonisation of the relational conflict, harmonisation with the social matrix, reciprocity and supracontract norms are related to this kind of bilateral obligation.

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<sup>313</sup> I. R. Macneil, *The New Social Contract*, 70.

<sup>314</sup> Thus we find the necessary “intensification” of the harmonisation with the social context. R. Austen-Baker, “Comprehensive Contract Theory: A Four Norm Model of Contract Relations”, 232.

<sup>315</sup> Therefore permits the preservation of the relation, *ibid*, 225.

<sup>316</sup> I.R. Macneil, *The New Social Contract*, 69.

<sup>317</sup> *ibid*, 56-57.

## NOTES ABOUT CONCLUSIONS

The matrix (Appendix B) restates what we have already described in the previous chapter. Actually, the matrix presents the appearance of norms within each of the different obligations, which we examined. In order to evaluate firstly the application of norms (and therefore of norms based relational contract theory) to management contracts, second the utility of each norm in management contracts, we tried to sum up the total number of appearances for each norm in every obligation, unilateral (provider's or recipient's) and bilateral. Moreover, we examine this matching under a dual model: based on MacNeil's norms and based on Austen-baker's comprehensive model of four norms. Although we used the first model for our analysis, in order to analyse extensively the concept of norms and their application, we also take under consideration the second shorter model, in order firstly to depict the application and significance of the different categories of the norms and second to test if this model may summarise the MacNeil's model in a comprehensive and simpler way.

Examining the table above, we can reach the following conclusions:

- The obligations examined may be distinguished into two categories –apart from unilateral and bilateral-. The first one involves obligations, the content of which mainly refers to certain –usually predefined or easily assumed- actions or omissions, while the second concerns obligations, the content of which mainly refers to a specific –and more general- overall behaviour. We do not imply that some of the obligations may be accomplished just by actions or without any actions (that is impossible). For example, know-how transfer cannot be accomplished just by specific training programmes, transfer of patent rights etc, as it also involves a constant interaction between the parties; however its core mainly refers to specific actions and the overall relative behaviour has a complementary role. On the other hand, the obligation for provision of information certainly includes an obligation for specific actions (reports within prearranged periods), however it is mainly characterised by behaviour of continual and mutual information. The most characteristic obligation of the first kind is fees' payment (as

it includes nearly no behavioural aspect), while the most apparent obligation of the second category is the obligation for collaboration (as it has a very general and not easily predefined character). So, an obligation can be characterised according to the main element of it, if it is behaviour or an action. According to our opinion, obligations 1 to 5 and 12 (because non-competition agreements are mainly accomplished by predefined and specific omissions of actions) belong to the first set, while obligations 6 to 11 belong to the latter. We will not assume that the first set of obligations is more practical than the latter, or that the first refers to more discrete obligations, while the latter to more relational obligations. However, we can conclude that the first mainly refers to the specific provisions/objectives of the relation, while the latter mainly refers to the overall relational framework; furthermore the second set is also related to fiduciary duties (look to the Appendix). Moreover, we can observe that the first set concerns more obviously the unilateral obligations, while the latter mainly concerns the bilateral obligations. On the other hand, we can easily observe that the (relational contracts theory) norms apply almost equally to both groups of obligations, no matter if they concern actions or behaviours. That is rational, considering that no actions can be cut of the whole relational and behavioural framework and that shows that the relational norms theory provides a good framework for the explanation of all kinds of obligations in a business relation and is not limited to the general terms that regulate a general framework of cooperation and mutual protection of each other's interests.

- Norms equally apply to both unilateral and bilateral obligations, however the type of applying norms changes. Considering unilateral obligations implementation of planning and role integrity are very apparent, while considering bilateral obligations all norms apply apart from implementation of planning.
- Preservation of the relation and Contractual Solidarity (they coincide as we examine a relational type of contract) appear in every obligation (unilateral or bilateral). That means that they are highly significant and characteristic for this type of contractual relationship. Their coincidence also highlights that simply



speaking, contractual solidarity has the same content as preservation of the relation, when we analyse a contract with a highly relational character.

- Role Integrity is the second norm, considering its appearances in different obligations. However, it appears in almost every unilateral obligation, while it is not so dominant in bilateral obligations. This fact may mean that role integrity mainly concerns specific obligations that relate to each party's different (therefore unique) role in the relationship.
- Implementation of planning –regarding unilateral obligations- is less important than role integrity, however significantly important, although it does not appear in bilateral obligations. This may mean that implementation of planning is related to the obligations that concern each party's individual role and provision to the relation and constitute the achievement of the substantial content of the relation. On the other hand, this shows that role integrity has a much broader scope, although it mainly coincides with implementation of planning regarding unilateral obligations.
- All the other norms –except of the implementation of planning and contractual solidarity/preservation of the relation- (we leave flexibility aside) appear mainly equally in the set of bilateral obligations.
- Propriety of means appears relatively frequently in bilateral obligations, although it does not appear at all in unilateral obligations. That may be explained by the fact that this norm may mainly apply, in order to regulate the general procedural framework of the relation, while it does not fit in obligations that refer to the actual performance of it<sup>318</sup>.
- Creation and restraint of power and effectuation of consent coincide almost in every occasion; something that shows that these two norms have a complimentary to each other's content and may not easily be separated.
- Reciprocity seems equally important considering both unilateral and bilateral obligations. This shows that this norm of substantive fairness has a great

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<sup>318</sup> Look to the “Common Norms” sub-chapter about its high relation to behavioural patterns.

importance as it can cut across the whole spectrum of the relation's obligations, no matter if they are of a discrete or a relational character, unilateral or bilateral.

- Flexibility rarely appears. That is interesting considering that it is very important in the relational contracts theory. However, this fact may show that it is very difficult to distinguish its own content and scope from other norms' content; so it seems that the argument that it is not actually a norm but a prerequisite for the effectuation of all other norms<sup>319</sup> may be affirmed.
- Generally, it seems that harmonisation of the relational conflict, propriety of means and harmonisation with the social matrix are apparent mainly regarding the bilateral obligations, the role of which is highly related to the maintenance of a system that allows the constant cooperation, the fairness of the relationship, the protection of both parties' interests and the compliance to general values.
- The most frequently apparent norms (and significant as well) in the whole spectrum of obligations are preservation of the relation (contractual solidarity), reciprocity, creation and restraint of power and role integrity, as it seems that most obligations are related to these norms. Trying to explain the above, we assume that preservation of the relation is very important, as the whole relation is characterised by great interdependence and a deep link between both parties' decisions and interests, which have as a result that the relation depends on almost every decision and action of the parties. Moreover, trust is very important for the relational solidarity due to the specific characteristics of the relationship, while the fulfilment of every obligation of the parties influences the trust between them and consequently the whole relation as well. Reciprocity is also related to this issue of trust. Regarding the norms related to substantial fairness, reciprocity plays the most important role. Without the assumption that each party is trustworthy and will respond to the fulfilment of the counter-party's obligations, the relationship cannot last long. The interdependence is so great, that even the fear that the other party will not respond may affect both parties' interests. Therefore, we can also observe that reciprocity is also related to the preservation of the relation, as role

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<sup>319</sup> Austen-Baker, *Comprehensive Contract Theory*, 241

integrity also does. Role integrity secures the fulfilment of expectations about the counter-party's respective obligations, which is a very important issue, given the following factors: the great reliance of each party on its counter-party's obligations, the long-term character of the relation, the difficulty in replacing the counter-party and the very different status between each party's expertise, knowledge and power of action (e.g. the provider's integration into the recipient's structure depends totally on the recipient's power and actions, while the know-how provision depends totally on the provider). All these factors lead to the requirement of clear allocation of powers and responsibilities. If both parties will not perform well in their role, also responding to their counter-party's performance (reciprocity), the relation will easily fail. The importance of the power norm, on the other hand, can be easily explained, given the fact of the merger of control and transfer of vital powers on the undertakings under management. There must be certain factors that will help the clear allocation of control, will define and limit this power transfer.

- On the other hand, it seems that other norms appear less frequently (although not less important). Harmonisation with the social matrix, for example, is apparent, but we cannot distinguish it –as a separate appearance- in most obligations. We think that this is due to the fact that management contracts are tailor-made contracts, mostly dependent by the parties' will and goals and less by regular factors, defining common exchanges, although there still exist some obligations that directly derive from these factors. Second and most important, this norm is usually –concerning our research- covered by other norms, referring to the preservation of the relation or fairness. Moreover, it does not appear in obligations constituting the “technical part” of the relation (staff training etc). The same conclusion is even more apparent regarding supracontract norms, as they are assumed to constitute a more intense form of the previous norm, appearing in relational contracts. Effectuation of consent is also apparent, however its scope is usually covered by the power norm, as every allocation and transfer of power and control assumes a prior consent of the parties. Implementation of planning appears

strongly in certain obligations, however it does not appear frequently in the whole range of obligations; it mostly concerns obligations related directly to the goals of the relation, expressed usually explicitly and linked with specific actions of the parties, deriving from the initial technical business plan of the management contract. Propriety of means appears frequently in bilateral obligations and in obligations, which set the standard of behaviour for both parties. It does not appear as frequently in the whole contract as reciprocity, as the latter can also characterise obligations referring to specific actions (x will do this if z does that) and has a more general application. However, in our analysis is also underlined that the standard of propriety depends on the contract's specific scope (e.g. collaboration obligations). Harmonisation of the relational conflict cannot be easily traced separately, as in most occasions it is absorbed by the more general scope of preservation of relation. Besides, we cannot have solidarity while there are relational conflicts, so the resolution of these conflicts is a prerequisite and inherent element of preservation of the relation. There are some obligations, however, such as non-competition, where the element of the relational conflict is so strong that this norm can appear separately as an important element. However, we tend to agree with Austen-Baker's view, that this norm along with preservation of the relation can be integrated into one single norm. We noted our observations about flexibility above. Lastly, we observe that supra-contract norms do not appear frequently, however we believe that they have a relative importance in the management contract relationship, as management contracts frequently lead to the incorporation of a company into a business network. In conclusion, we observe that the core norm in management contracts' obligations is preservation of the relation and that all the other norms, regarding management contracts, appear more or less related to this norm. We relate this conclusion to the contract's long duration and to the fact that its success and results can only be shown after a significant period, during which the parties have to cooperate. A solid relationship will lead to positive results for both parties, while these results will also lead to the preservation of the relation.

- As we observe, the 4 out of 5 norms that were suggested by MacNeil as “relational”, meaning preservation of the relation, role integrity, propriety of means (concerning bilateral obligations) and supra-contract norms (relatively) are indeed significant in management contracts (we explained about harmonisation of the relational conflict), as we analysed above. This observation seems to affirm MacNeil’s argument about these norms as specifically important in contracts with high relational element.
- Regarding the application of the 4 norms model, we can firstly observe that it generally leads us to the same conclusions as the more analytical model, while its simplicity is very obvious.
- However this model may also lead us to further results –in comparison to the analytical model-. First, it makes even more apparent that the 4 norms application is equal to both unilateral and bilateral obligations and in both behavioural and actions (or omissions) based obligations. Second, it clearly depicts that satisfaction of performance expectations and preservation of the relation are the most important norms in unilateral obligations, while the significance of harmonisation with the social context and substantial fairness seem to show their significance in bilateral obligations and in behavioural obligations set. Third, it is very interesting that the (MacNeil’s) norms that constitute the 4 norms model’s norms usually appear together. For example, it is usual that 3 or all of the 4 norms that constitute the “satisfaction of performance expectations” appear in specific obligations. That means that their content and scope often coincides –without decreasing their individuality-, so Austen-Baker’s choice to integrate them into 4 groups seems useful and not at all wrong. That may not be the case for “harmonisation with the social matrix” norm; we explained the reasons for that above, while an additional reason is that supracontract norms have a very special content as intensification of harmonisation with the social matrix<sup>320</sup>. Moreover, the “harmonisation with the social matrix” norm has the fewest appearances, and this may mean that it should be reassessed whether it should constitute a separate norm in a 4 norms model or

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<sup>320</sup> R. Austen-Baker, "Comprehensive Contract Theory: A Four Norm Model of Contract Relations", 232

it should be absorbed by another, if similar results derive from similar research on other relationships.

- On the other hand, we should note that in two cases, the 4 norms model did not succeed to depict the significant non-appearance of a norm in a specific set of obligations. We refer, firstly, to the implementation of planning, which does not appear in bilateral obligations –neither in behavioural obligations-, although the “satisfaction of performance expectations” appears equally to both sets of obligations, therefore the 4 norms model could not depict the substitution of this norm by other norms of the same “family”/ comprehensive norm, especially effectuation of consent/power norm (role integrity nevertheless appears in both sets of obligations). Second, propriety of means does not appear in unilateral norms, although “substantial fairness” is represented in this obligation’s category by reciprocity.
- However, generally speaking, 4 norms model helps us reach the same results as the MacNeil’s norms model, without complicating us much. When we analysed each norm’s appearance in each obligation, it could save us from frequent repetitions, from frequent co-appearances and coincidences of some specific norms and from the burden of investigating whether a norm appeared, although it was highly related to another also appearing or whether the slight differences between two norms made possible for them to appear separately. It is obvious from all the above that some of the MacNeil’s norms are so highly related to each other that they could be absorbed by each other or analysed together; that conclusion supports every effort for a simpler and more comprehensive norms model.
- On the other hand, no matter which model we will choose, norms seem very apparent in management contracts and obligations’ content and scope seem to be successfully related to specific norms. Moreover, in no case a specific obligation was related to less than four norms out of the 12 examined or less than two out of the 4 norms model. This seems to mean that each obligation cannot be related just to a single norm. This also highlights the norms’ individual and collective importance. If an obligation was related just to one norm that would mean that

maybe the relational contracts norms theory cannot apply to at least this obligation. The fact that many norms usually apply to an every obligation can lead us to the conclusion that all the norms together can build a complete explanatory mechanism for these obligations, while they retain a specific individual meaning. On the other hand, it is impressive that on the average each obligation is related to 6 norms out of 12. This may also mean that the norms system as a whole is very important and apparent in management contracts' obligations, as the different scope of different norms is combined, in order to support every specific obligation.

- On the other hand, the above conclusions mean that management contracts were a good paradigm for the test and application of norms theory. The primal conclusions of the second chapter are affirmed by the norms' application that showed that relational element is highly apparent in management contracts. We have to remind that management contracts were chosen as a type of business cooperation contracts, so the conclusions above may also appear in other contracts with a strong cooperative element.
- However, we have to admit that given the limitations of our research, there are certain questions that cannot be replied by it, although our research could provide material for a further relevant analysis. Firstly, although there are strong indications about the value of a simpler norms model, further research should show whether a simpler theory could substitute MacNeil's norms model. Second, a further research could indicate which norms' content can be totally absorbed by others. Third, a further analysis could move forward concerning the relation between fiduciary duties and specific norms. Fourth, we think that it would be very useful if a similar research could be conducted concerning other contracts with a highly relational character or other –mainly business- contracts with a strong cooperative element. It would be interesting to check if the results would be similar, concerning the total application of the norms model and each norm's distribution. Fifth, we have to note that regarding the issue of many norms' appearances in every obligation; we assumed that it may underline the highly relational character of management contracts and the significance of the norms

theory. On the other hand, it could also mean that some norms' application is so self-evident that the whole theory may not lead to any results. Our opinion is that in order to check whether the norms theory has an important significance or not, we should also check whether the norms' application differs from contract to contract and from relation to relation. Therefore, we think that it would be very interesting to conduct a similar research concerning other types of relationship, without the cooperative element being so apparent and compare it to the conclusions of our research.

- Nevertheless, we think that generally speaking this research succeeded in proving that:
  - a) in long-term relations in which the element of cooperation and interaction are very apparent, norms theory's application is quite strong
  - b) norms model may be simpler and more comprehensive than MacNeil's, at least in order to apply them to a specific type of relationship
  - c) some norms usually tend to coincide with others and their content overlaps
  - d) each norm usually has a different scope of application as other tend to apply solely to unilateral or bilateral or highly behavioural obligations and other tend to apply to the whole spectrum of obligations.



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## APPENDIX A

### **DIAGRAM OF THE OBLIGATIONS FROM MANAGEMENT CONTRACTS ANALYSIS UNDER A RELATIONAL CONTRACTS THEORY FRAMEWORK**

We include below a series of obligations of the parties of a management contract, unilateral or bilateral, concerning either the provider or the recipient or both. We do not include the provider's obligation for management of the recipient, because of its complexity and of being divided to several other obligations.

We try to justify each of these obligations, based on the 4 norms model you suggest in your "Comprehensive Contract Theory" article and on the 10 contractual norms, suggested by MacNeil. The first column describes the nature of the obligations according to which party they concern (provider/recipient/both), the second column names the obligations and also mentions which of them are usually explicit or implied and which are linked with fiduciary duties mainly of the provider (although it is possible that these obligations also concern the recipient as well). The third one links them with some of the 4 norms described in your article and the fifth one matches them to some of MacNeil's norms. The sixth column tries to explain in a few words why these obligations are mainly matched with these specific norms.

We examine some of these obligations under the framework of the contractual norms, without claiming that the matching of obligations and norms is exact or totally accurate or includes all norms involved (the exact matching may continue to be a matter of debate), however believing that this matching, is generally close to reality and can be justified in a rational way.

<b>RECIPIENT'S OBLIGATIONS</b>	1. Provider's Integration in Recipient's Structure (usually explicit)	a) satisfying performance expectations b) preservation of relation	a) implementation of planning b) effectuation of consent c) role integrity d) creation and restraint of power e) contractual solidarity f) preservation of relation	The recipient has to efficiently incorporate the provider in its structure. It is a constant process based on mutual consent and active behaviour on behalf of the provider. The parties share powers and duties, are integrated in a common and structural framework, therefore a fundamental and stable basis for cooperation is built.
	2. Fee Payment based on Provider's Performance (usually explicit)	a) satisfying performance expectations b) preservation of relation c) substantial fairness	a) role integrity b) harmonisation of relational conflict c) reciprocity d) flexibility e) contractual solidarity f) preservation of relation	Manager's fee is adjusted in a flexible way to its performance, thus linking both parties' benefits together, solving relative disputes, giving incentives for cooperation and enhancing mutuality.
<b>PROVIDER'S OBLIGATIONS</b>	1. Know-how Transfer (usually explicit)	a) satisfying performance expectations b) preservation of relation	a) role integrity b) contractual solidarity c) preservation of relation d) implementation of planning	In order that the relation produces future and stable results for the recipient, the provider has to transfer know-how. This transfer is usually an essential part of the recipient's business plan's implementation, an implied objective at which the recipient aims and a criterion according to which it chooses the provider.
	2. Obligation of Staff Training (usually explicit but not as often as it should)	a) satisfying performance expectations b) preservation of relation	a) role integrity b) contractual solidarity c) preservation of relation d) implementation of planning	Similarly as above (about know-how transfer).
	3. Obligation of Recipient's Integration in Provider's Business Networks (some times explicit)	a) satisfying performance expectations b) preservation of relation c) harmonisation with the social matrix d) substantial fairness	a) implementation of planning b) effectuation of consent c) role integrity d) creation and restraint of power e) contractual solidarity f) preservation of relation g) supracontract norms h) reciprocity	The recipient's incorporation in the provider's networks is usually an important part of mutual business planning and the foundation of inter-parties cooperation and involves mutual concessions on behalf of both parties (adjusted to their specific role) and allocation of duties and rights referring to the network, in order to succeed the recipient's full membership. This element is often interacting with the whole spectrum of relations between the other parties of the network between the provider and the recipient and the network's structure itself. This incorporation is accomplished by a mutual effort and consent of both parties and constitutes an essential objective for both parties.
	4. Obligation of Respect for the Philosophy and the Scope of the Enterprise (almost always implied)  LINKED WITH FIDUCIARY DUTIES	a) preservation of relation b) harmonisation with the social matrix	a) harmonisation of relational conflict b) contractual solidarity c) preservation of relation d) harmonisation with the social matrix e) supracontract norms	This obligation constitutes an essential prerequisite for the development of a harmonious and stable cooperation and in order that the recipient tolerates provider's intervention in its structure. Furthermore, such behaviour is also dictated by the need of the management transfer not causing problems to the recipient's stakeholders.
	5. Preservation of the Interests of the Recipient which are not related to the Contract (almost always implied)  FIDUCIARY	a) satisfying performance expectations b) preservation of relation c) substantial fairness	a) role integrity b) contractual solidarity c) preservation of relation d) reciprocity	The recipient has to anticipate that the provider will protect its interests even when these particular interests do not fall in the contract's spectrum. This is an expression of the mere contract's transformation to a complete relation and concerns the provider to the extent to which, given its usual advantageous position, it can promote the recipient's interests.

<b>BILATERAL OBLIGATIONS</b>	1. Obligation of Confidentiality (usually explicit)  FIDUCIARY	a) harmonization with the social matrix b) preservation of relation c) substantial fairness d) satisfying performance expectations	a) harmonisation with the social matrix b) contractual solidarity c) preservation of relation d) reciprocity e) role integrity	This obligation directly derives from the provider's fiduciary duties, is essential for the building of a stable relation of mutual trust and cooperation and is expressed by a mutual promise that none party will betray the other's sensitive information.
	2. Obligation for Provision of Information (usually explicit)  LINKED WITH FIDUCIARY DUTIES	a) preservation of relation b) substantial fairness c) satisfying performance expectations	a) contractual solidarity b) preservation of relation c) propriety of means d) reciprocity e) role integrity	This obligation constitutes an essential basis for constant cooperation and for just allocation of duties and liability and promotes trust and stability.
	3. Prohibition of Rights and Liability Transfer from the Agreement for Assignment of Business Management Responsibilities (usually explicit, but some times the contract includes contrary provisions)	a) satisfying performance expectations b) preservation of relation c) substantial fairness d) harmonisation with the social matrix	a) creation and restraint of power b) contractual solidarity c) preservation of the relation d) harmonisation of relational conflict e) reciprocity f) supracontract norms g) harmonisation with the social matrix h) role integrity i) effectuation of consent j) propriety of means	This prohibition, which constitutes a limitation of parties' freedom, although it is usually dictated by corporate law or even a business network's self-organisation, is also related to the nature of the relation. It helps parties build a stable relation of trust, as they can anticipate that their problems will be resolved by their interaction and they do not have to fear that they will have to deal with an irrelevant entity, thus proving the relation's distinctive personal and exclusive character.
	4. Collaboration Obligations (usually implied)  LINKED WITH FIDUCIARY DUTIES	a) harmonisation with the social matrix b) preservation of relation c) substantial fairness d) satisfying performance expectations	a) preservation of relation b) contractual solidarity c) creation and restraint of power d) propriety of means e) harmonisation of relational conflict f) harmonisation with the social matrix g) flexibility h) effectuation of consent i) reciprocity	Constant collaboration in every stage of the relation and concerning every aspect of management is essential for the stability of the relation, for the recipient's tolerance to the provider's interventions, for the smooth resolution of regular and non-regular disagreements and conflicts and for the flexible and efficient re-adjustment of goals and objectives. Such an obligation is also usually dictated by corporate law and the need for the reduction of the risk that the provider will abuse its position against the recipient.
	5. Non-Competition Clause (usually explicit)  FIDUCIARY	a) harmonisation with the social matrix b) preservation of relation c) substantial fairness	a) harmonisation with the social matrix b) preservation of relation c) contractual solidarity d) creation and restraint of power e) reciprocity f) harmonisation of relational conflict g) supracontract norms	This clause directly derives from the provider's fiduciary duties, is essential for the building of a relation of mutual trust and cooperation and is expressed by a mutual promise that none party will abuse the relation in order to promote its own benefits against the other party.

**APPENDIX B**

**MATRIX OF OBLIGATIONS AND NORMS' APPEARANCES**

4 Norms System	SATISFYING PERFORMANCE EXPECTATIONS				PRESERVATION OF THE RELATION			HARMONISATION WITH THE SOCIAL MATRIX		SUBSTANTIAL FAIRNESS			Flexibility
	Implementation of Planning	Role Integrity	Effectuation of Consent	Creation and Restraint of Power	Contractual Solidarity	Preservation of the Relation	Harmonisation of the Relational Conflict	Harmonisation with the Social Matrix	Supracontract Norms	Reciprocity	Creation and Restraint of Power	Propriety of Means	
1. Provider's Integration in Recipient's Structure	x	x	x	x	x	x					x		
	x				x								
2.Fee Payment based on Provider's Performance		x			x	x	x			x			x
	x				x					x			
Recipient's Obligations	1	2	1	1	2	2	1	0	0	1	1	0	1
	2				2			0		1			
3.Know-how Transfer	x	x			x	x							
	x				x								
4.Obligation of Staff Training	x	x			x	x							
	x				x								
5.Obligation of Recipient's Integration in Provider's Business Networks	x	x	x	x	x	x			x	x	x		
	x				x			x		x			
6.Obligation of Respect for the Philosophy and the Scope of the Enterprise					x	x	x	x	x				
					x			x					
7.Preservation of the Interests of the Recipient which are not related to the Contract		x			x	x				x			
	x				x					x			
Provider's Obligations	3	4	1	1	5	5	1	1	2	2	1	0	0
	4				5			2		2			
UNILATERAL OBLIGATIONS	4	6	2	2	7	7	2	1	2	3	2	0	1
	6				7			2		3			
8.Obligation of Confidentiality		x			x	x		x		x			
	x				x			x		x			
9.Obligation for Provision of Information		x			x	x				x		x	
	x				x					x			
10.Prohibition of Rights and Liability Transfer		x	x	x	x	x	x	x	x	x	x	x	
	x				x			x		x			
11.Collaboration Obligations			x	x	x	x	x	x		x	x	x	x
	x				x			x		x			
12.Non-Competition Clause				x	x	x	x	x	x	x	x		
	x				x			x		x			
BILATERAL OBLIGATIONS	0	3	2	3	5	5	3	4	2	5	3	3	1
	4				5			4		5			
TOTAL	4	9	4	5	12	12	5	5	4	8	5	3	2
	10				12			6		8			

