THE GENTLEMAN'S AGREEMENT IN LEGAL THEORY AND IN MODERN PRACTICE – THE DUTCH CIVIL LAW PERSPECTIVE

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I Preliminary observations[1]

A Honour and law

1. According to an often quoted saying a gentleman's agreement is an agreement which is not enforceable at law and binding only as a matter of honour.[2] Honour, so the saying suggests, does not belong to the province of civil law. However, on second thoughts this suggestion may appear to be not very accurate.

This is so, in the first place, since the anthropology of law reveals that for instance in mediaeval Europe between the ninth and the thirteenth century honour in connection with the ownership and defence of land was considered as property in the agro-pastoral society. *The history of honor – dixit* Cottino *– is the history of the land and its defense. It is the story of land during a state of war, or in the near anticipation of war. It is the story of wars won, because he who loses land is dishonored. In the peasant's world*

1. In principle references will be made primarily to appropriate Dutch legal writing.
2. Description taken from The Concise Oxford English Dictionary (Clarendon Press Oxford 1990). Comp. Webster's New World Dictionary of the American Language (Webster New York 1994 [3e druk]): *an unwritten agreement secured only by the parties' pledge of honor and not legally binding.* Similar descriptions can be found in dictionaries on the Dutch language such as Van Dale's Groot Woordenboek der Nederlandse Taal (Van Dale Lexicografie Utrecht 1992 [12e editie]); Van Dale's Groot Woordenboek Engels-Nederlands (Van Dale Lexicografie Utrecht 1994); Kramers, Vreemde Woordenboek (Elsevier Amsterdam 1987). A more juridical description is offered by The Oxford Companion to Law (Clarendon Press Oxford 1980): *an agreement between two or more parties which, by express provision or technical defect, is not legally enforceable as a contact*. From the context it is clear, however, that this guide also places a gentleman's agreement in the perspective of honour. Comp. for a Dutch equivalent Fockema Andrea's Rechtsgeleerd Handwoordenboek (N.E. Algra, H.R.W. Gokkel eds., (Samsom Tjeenk Willink Alphen a/d Rijn 1994): *agreement between reputable people (afspraak tussen fatsoenlijke lieden).*

view, the defense of honor is also the defense of fundamental goods which ensure the production and reproduction of the peasant family: land, money, livestock and women.[3] In the second place, honour plays a prominent role as a legally protected interest in defamation and libel, and slander cases. Although in such cases compensation for personal injury is usually placed at the forefront, the proprietarian element (e.g. the loss of good name may lead to a loss of goodwill in business) is quite often also at stake.[4] The same is true for those legal regimes such as the Dutch one, that protect the moral rights of authors under copyright law.

On the other hand in an old English case which also illustrates standing Dutch legal practice, it was held that when a man writes *I promise to pay the above as a debt of honour* he does not mean to admit that it is a debt which may be enforced against him at law.[5] Similar other connotations of honour can be found in relation to the payment of debts (e.g. payment for honour; acceptance for honour).[6] Under Dutch civil law this man will be under nothing more than a *naturalis obligatio*.[7] In general, such a situation occurs when, according to the applicable law, in truth an obligation exists but non-enforceability *ab initio* ensues from statute or the parties' will. However, if the debtor undertakes to perform, he is then engulfed by the domain of the law and can no longer free himself from its reign. In addition it may be said that the good faith notion in civil law jurisdictions as well as equitable doctrines in common law as applied to contracts can be considered as referring to honest if not honourable conduct under certain circumstances.[8]

2. So it may be said that honour has a modest place in the law's empire. On the one hand, under certain circumstances it performs as a particular interest that may be protected by law. This may be called the static aspect of honour which apparently is acknowledged by the law. On the other hand, honour alone fails to be a driving force towards legally binding obligations. There is no such thing, legally speaking, as *noblesse oblige.* This may be called honour's dynamic aspect which seems to be acknowledged only morally as long as no act of performance has followed.

3. A. Cottino, Honor as Property, Journal of Legal Pluralisun 1993, Nr. 33, p. 33-51.
4. Asser-Hartkamp III, De verbintenis uit de wet (Tjeenk Willink Zwolle 1998) p. 223-230.
5. Ibidem, referring to Bret J., Maccord v. Osborne, 1. E.P.D. 568, cited by Ratify.
6. Stroud's Judicial Dictionary of Words and Phrases (London Sweet & Maxwell 1972) – Honour, Honoured, p. 1254.
7. B. Wessels, Natuurlijke Verbintenissen (Tjeenk Willink Zwolle 1988), p. 181-203.
8. Comp. A. Mason, The Impact of Equitable Doctrine on the Law of Contract, Anglo-American Law Review Vol. 27, No. 1, 1998, p. 1-28.

What implication does this finding have as to gentleman's agreements now that these agreements, at least in colloquial parlance, are considered to be not enforceable at law and binding only in honour? Is this a question of honour only or also a question of law? And if so, when and where will a gentleman's agreement cross the borderline from no-law to law, from simple agreement to contract? This will be the central question to be discussed in this report from a Dutch civil law perspective.

B Agreement and contract

3. Any study as to the nature of gentleman's agreements has to come to terms with the proper meaning of the notions *agreement* and *contract*.[9] This is so, since these notions appear to have a different meaning depending on the perspective from which they are viewed, e.g. from language, sociology, or law, i.e. from an external or an internal perspective.

As far as language is concerned, this is mainly but not solely a matter of terminology. Dictionaries on the English language commonly explain the word agreement by referring to words such as arrangement, engagement, concord or covenant.[10] English-Dutch dictionaries in conformity use words like *afspraak*, *convenant*, *overeenkomst* or *overeenstemming*.[11] All these words refer in the context of the domestic language to the intention of the persons involved to unite their interests (bilaterally or multilaterally) in a particular field, but irrespective of possible legal consequences. It should be noted, however, that in the Dutch language the word *contract* (also: *kontrakt*) can be used as a synonym of the word *overeenkomst*. On the contrary, in the English language the words *agreement* and *contract* appear not to be interchangeable, a contract being an enforceable agreement only, the term contract moreover commonly being reserved for the written instrument that embodies the agreement.

4. With regard to sociology, mention should be made of the studies by Macaulay into the nature of national and international commercial agree-

9. F.W. Grosheide, Naar een juridisch statuut voor internationale intentieverklaringen?, Molengrafica 1989 (Vermande Lelystad 1989), p. 119-145 (119-131), with references to both civil law and common law jurisdictions.

10. See note 2.

11. Ibidem.

ments.[12] According to Macaulay the parties in most instances do not have the intention to enter into legally binding agreements. Their main concern would be to establish good and stable trade relations, not primarily directed by law but by codes of conduct practised in a particular branch of industry. Failing to comply with such agreements leads to social punishment – no one in the branch will ever again embark upon business with such a party.[13]

It is noteworthy in this respect that particularly in the context of commercial transactions, i.e. in the in-between-zone of no-law and law, gentleman's agreements seem to flourish. This is noteworthy, since this finding might have significance for the legal qualification of gentleman's agreements, as will be seen in paragraph II.D.

5. When the law comes into play, attention turns to the internal perspective. It suffices in this paragraph to observe that legal cultures, i.e. common law jurisdictions and civil law jurisdictions in spite of the different legal techniques they apply, traditionally do not appear to give a different meaning to the notion agreement in relation to that of contract.

In civil law jurisdictions like the Dutch one, the concept agreement is perceived as mutual consent (*wilsovereenstemming*). The concept agreement thus perceived, serves as the basic assumption for the concept of contract. So contracts are qualified agreements, but not all agreements are contracts. Further, agreements do not necessarily have legal consequences, whereas contracts create legal obligations.[14] In common law jurisdictions the concept of agreement is quite the same. Apparently not all agreements lead to contracts, only legally binding agreements will have that effect. However, for an agreement to be legally binding it should consist of mutual assent.[15]

So for a conclusion it may be said that generally speaking the agreement and the contract have to be distinguished from one another. There appear to exist two categories of agreements with which legal systems should come to terms: legally non-binding agreements (*rechtens vrijblijvende afspraken*) and

12. S. Macaulay, Non-contractual Relations in Business: a Preliminary Study, in Am.Soc. Rev., Vol. 28, No 1, 1963, p. 55-67; idem, Paper to the 10th Symposium on the Sociology of Law, Amsterdam 24 October 1984. Comp. H. Beale, A.M. Dugdale, Contracts between Businessmen: Planning the Use of Contractual Remedies, Br. Journal L. and Soc. 1975/2, p. 45.
13. However, it is also reported that in case of disfunctioning of the social mechanism the law plays a role as *ultimum remedium*. Comp. M. Galanter, Knowledge Transcends Pessimism About the Law, Legal Times, September 24, 1984, p. 6.
14. Asser-Hartkamp II, Algemene Leer der overeenkomsten, (Tjeenk Willink Zwolle 1997).
15. I.A. Corbin, Corbin on Contracts § 22; 29 (2nd. ed. 1963/1989); I.J. Chitty, Chitty on Contracts (Sweet & Maxwell London 1994) Part One – Formation of Contracts; E. Farnsworth, Contracts (Little Brown Boston 1990), p. 118-160.

legally binding agreements (*rechtens verbindende afspraken*), only the latter category being able to form a contract. This raises the question of what makes an agreement legally binding, i.e. what constitutes a contract.

C Contact and contract

6. Obviously the interplay between agreement and contract has an overlap with the problem of precontractual liability. The key issue with regard to the latter concerns cases of broken off negotiations, the regime of precontractual liability commonly described as a form of *culpa in contrahendo*.[16]

Civil law and common law jurisdictions tend to differ from each other as to the sources of such precontractual liability. In civil law jurisdictions either specific legislation or the customary principles of good faith, tort, *negotiorum gestio*, or restitution may be referred to. In common law jurisdictions case law, in the absence of a general principle of good faith in bargaining, has developed general provisions and precedents. Traditionally, the main question to be answered here is whether in the absence of consideration the prospective parties to a contract may be held liable under negligence, estoppel or restitution.[17] Besides, it is understood that precontractual liability based on negotiations may have different legal consequences depending on whether or not a contract ensues.

7. It follows that the overlap between the issue of the legal status of gentleman's agreements and that of precontractual liability lies in the fact that gentleman's agreements, like comparable instruments such as binders, heads of agreements, letters of intent or memoranda of understanding, play an important role in the documentation and consolidation of the negotiation process from *contact* to *contract.* These so-called precontractual agreements have been mainly developed in commercial practice and are generally referred to as forms of the *pactum de contrahendo*. As has been rightly observed by Van Dunné there is little consistency in the range of precontrac-

16. E.H. Hondius, Precontractual Liability-Reports to the XIIIth Congress International Academy of Comparative Law 1990 (Kluwer Law and Taxation/Deventer/Boston 1991), p. 3-28.

17. As Hondius, note 16 p. 6, indicates a *caveat* should be made since the traditional common law position seems to be changing under the influence of the Australian case Waltons Stores (Interstate) Ltd v. Maher *[(1987) 164 CLR 387]*; under that rule remedies may be allowed where a promise is not supported by consideration. Comp. M.J. Bonell, An International Restatement of Contract Law (Transnational Juris Publications New York 1994), p. 82-84.

tual agreements as to their contents and legal effects.[18] As will be discussed more in detail in paragraph II.B., they can be placed on a scale, running from no-law to law. Here it is important to determine the status of these precontractual agreements in the bargaining process, and to decide, if precontractual lialbility is found, upon its source. According to Dutch law this may be contract or tort, provided that precontractual agreements are not considered to have a legal status of their own that makes them enforceable *per se*, a normative question finally to be answered by the courts in the absence of statutory provisions.[19]

8. So it may be said that legal questions with respect to gentleman's agreements constitute a specific aspect of precontractual liability. Indeed, gentleman's agreements, providing evidence of a form of contact between the respective parties, may contribute to precontractual liability. But this finding leaves unanswered the question on which this report is focussing: do precontractual agreements in general or gentleman's agreements in particular, even without any bargaining process connected with them, have a legal status of their own? To answer this question the first thing to do is to delineate the concept of contract more accurrately.

D Concept of classical contract

9. Contract, *contrat* and *Vertrag* – to use the terms found in three modern Western languages for the body of law considered here – all suggest drawing together, agreeing upon, and entering into. The classical law of contract is

18. J.M. van Dunné, The Prelude to Contract, the Threshold of Tort. The law of Precontractual Dealings in the Netherlands, Netherland Report to the XIIIth IACL Congres, referred to in note 17, p. 223-237. Idem Verbintenissenrecht Deel 1 Contractenrecht – 1e gedeelte (Kluwer Deventer 1993), p. 169-181.

19. See for references to Dutch Law until 1990 Van Dunné, o.c., note 18. See for further reading among others H.J. de Kluiver, Onderhandelen en privaatrecht (Kluwer Deventer 1992); J.M.M. Menu, De toezegging in het privaatrecht (Kluwer Deventer 1994); J.M. Smits, Het vertrouwensbeginsel en de contractuele gebondenheid (Kluwer Deventer 1995), p. 286; A.M.C. van den Berg, Van 'alles of niets' tot gedeelde draaglast in de precontractuele fase, in: W.H. Boon e.a. (ed.), Tussen 'Alles' en 'Niets' (Tjeenk Willink Zwolle 1997), p. 15-30; B. Wessels, Afbreken van contractsonderhandelingen: de stand van zaken, in Onderhandelen, bemiddelen en schikken (Tjeenk Willink Zwolle 1998), p. 62-100. See for a comprehensive overview Y.G. Blei Weissmann, Verbintenissenrecht, art. 217-277 (I. Precontractuele fase) (Seminal, updated to July 1997). See for a comparison of continental civil law and English common law with regard to precontractual duties J. Beaton/D. Friedmann, Good Faith and Fault in Contract Law (Clarendon Press Oxford 1995), p. 25-56.

concerned, in one way or another, with situations where these phenomena occur in some measure, that is to say, with situations where autonomous ordering occurs in some sense. Despite the already indicated differences between legal systems they concur in as far as they traditionally demand compliance with special requirements prescribed by the law in order for the contract to be valid.[20] With regard to the formation of contracts – as this ordering process is called – Dutch law generally follows the civil law system.

The Dutch law of contract is one of the most important parts of the law of obligations. The law of obligations is contained in Books 6, 7 and 8 of the Civil Code (*Burgerlijk Wetboek*; hereafter *DCC*) 1992. Book 6 contains the general part of the law of obligations. It consists of 5 titles of which Titles 1 and 2 are concerned with all obligations regardless of their source, and Title 5 is devoted to the general provisions of the law of contract. Following the German *BGB* in this respect Title 5 is closely related to and rather finds its foundation in Book 3. Title 2, containing general provisions on juridical acts (*Rechtsgeschäfte*) in patrimonial law and in its turn Title 5 of Book 6 serves as the basis for the special contracts dealt with in Books 7 and 8. Most of contract law is non-mandatory law.[21]

10. Being perceived as a juridical act, a contract in order to be valid has to comply with the statutory requirements of Book 3, Title 2 with regard to the formation, discrepancies between real and declared intention, nullity for lack of legal form or illegality, severability of void juridical acts as well as the transformation by operation of law into valid substitutes, nullity for threat

20. Generally R.B. Schlesinger (ed.), Formation of Contracts. A Study on the Common Core of Legal Systems (Dobbs Ferry London 1968); A. von Mehren, Contracts-Formation, in International Encyclopaedia of Comparative Law (J.C.B. Mohr Tübingen 1992), p. 4. I do not descend here into a debate about the justification of being contractually bound and will restrict myself to legal technique. On the point of justification I generally share the opinions expressed by J. Gordley, The Philosophical Origins of Modern Contract Doctrine (Clarendon Press Oxford 1991), p. 230-231, and approved by J.B.M. Vranken, Vertrouwen en rechtszekerheid in het Nederlandse overeenkomstenrecht, Tijdschrift voor Privaatrecht 1997/4, p. 1825-1857 (1932): *The attempt to build coherent doctrine seems to have ended in failure. (...) Perhaps we have finally learned that the task is impossible.* See also H. Kötz/A. Flessner, Europäisches Vertragsrecht Band I (Kötz), (Mohr/Siebeck Tübingen 19..), p. 11: (*es kann*) *nicht gelingen, das komplizierte Geflecht des vertragsrechtlichen Regeln aus einem einzigen 'Prinzip' herzuleiten.*

21. Compare D. Fokkema/A.S. Hartkamp, Chapter 8. Law of Obligations, in: Chorus et. al (eds), Introduction to Dutch Law for Foreign Lawyers, Deventer, 1993, p. 93-120. For the Englisch text of the provisions of the *Civil Code* reference is made to Haanappel/ Mackaay, New Netherlands Civil Code-Patrimonial Law, (Kluwer Deventer) 1990. See for a brief discussion of the DCC, especially in the area of contract law, M.H. Whincup, The New Dutch Civil Code, 142 New Law Journal 1992, p. 1208.

(duress), fraud, abuse of circumstances (undue influence), *fraus creditorum*, and the technique and effect of annulment of juridical acts. However, with regard to *error*, for reasons not be explained here the DCC does not contain provisions applying to all juridical acts; error is only dealt with in the context of contracts in Book 6, Title 5.

According to the general theory of juridical acts contracts constitute the most important class of multilateral juridical acts. Contracts being perceived as juridical acts means that one of their characteristics is aiming at legal consequences. The provisions on contracts only envisage obligatory contracts – those creating one or more obligations between the parties. Within the class of contracts further distinctions are made, among which is that between synallagmatic (bilateral: reciprocal) contracts and other contracts.

Contracts may have a distinct object, which means that they are determinate if not from the outset then from a later moment. One of the parties or even a third person may be given the power to complete the contract by determining the rights and obligations of the parties in more detail.

11. In what follows it suffices in this report to concentrate on the formation of contracts according to Dutch law. Contractual liability requires the mutual consent of the parties. The basis of contractual liability is found in a combination of the will theory (concurring intentions of the parties) and the reliance theory (confident reliance by the creditor on the debtor's promise). Mutual consent (agreement) is normally realized by offer and acceptance – the so-called mirror image-rule – (Article 6:217 DCC). According to Dutch legal doctrine both offer and acceptance are perceived as unilateral juridical acts, whereas the contract itself – as has been said previously – is considered to be a multilateral juridical act. The main rule is that no contract is formed on the basis of intention and reliance if offer and acceptance do not fully concur. In the absence of full concurrence doctrine and case law have developed legal notions such as *trunk contract, tentative contract, basic contract,* or *frame contract* to cope with situations in which the essentials of a contract are already shimmering through. See further paragraph II.B. Implicitly underneath the requirement of mutual consent as the basis of contractual liability lies the notion of freedom of contract: a party is free to choose if he wants to bind himself, to whom and under which conditions. Contracts are usually binding *solo consensu* (Article 3:37 (1) DCC), their formation not being subject to requirements of form without a special statutory provision saying so. The most important varieties of form prescribed by statute are writing and written instruments to be signed by the acting party or either party, and a notarial instrument. Also in some cases statutory provisions require writing or an instrument for the purpose of evidence only.

12. In conclusion it may be said that the indicated rules of the substantive Dutch law of contract concur with international instruments such as CISG, Unidroit Principles, and Principles of European Contract law. This is particularly true for the rules with regard to offer and acceptance.[22] So according to classical contract law the formation of a contract is governed by fixed rules dictated by the law. If these rules are not complied with, the parties are not *contractually* bound. As has been rightly observed by Beatson/Friedmann the crucial question here is to what extent the parties and the courts are free to mitigate the formal requirements of contract law.[23]

In addition it should be noted that although basically the concept of classical contract is applied equally in civil law jurisdictions and common law jurisdictions, there are at least two remarkable differences between the two. In the first place civil law jurisdictions like the Dutch one, have internalized in their fixed rules the notion of good faith, making it possible to adjust these rules to the circumstances of the particular case. In the second place in civil law jurisdictions the concept is commonly applied unitarily, whereas in common law jurisdictions a distinction is made between *commercial contracts* and *personal contracts*.[24]

22. A.S. Hartkamp, Principles of Contract Law, in: Towards a European Civil Code (Ars Aequi Libri Nijmegen 1994), p. 37-50. Formation of Contracts according to the Principles of European Contract law, in: Festschrift Lando (Gadjura 1997), p. 177-185. Idem Bonell, o.c. note 17, p. 72-73; Sj. van Erp, The Formation of Contracts, in: Towards a European Civil Code, note 22, p. 117-134; Kötz, o.c., note 20, p. 26-50. See also B. Rudden, The Domain of Contract-English Report; C. Jouffret-Spinosi, The Domain of Contract-French Report in D. Harris, D. Tallon, Contract Law Today (Clarendon Press Oxford 1989), p. 81-112; 113-150

23. Beatson/Friedmann, o.c., note 20, p. 52.

24. Mason, note 9, p. 2-3. The same distinction has been advocated for Dutch contract law by C.J.H. Brunner, De billijkheid in het nieuwe BW, in: Rechtsvinding onder het NBW. Een Groningse kijk op het nieuwe vermogensrecht (Kluwer Deventer 1992), p. 87-100; R.J. Tjittes, De hoedanigheid van contractspartijen (Kluwer Deventer 1994); idem, Naar een bijzonder contractenrecht voor ondernemers, in: S.C.J.J. Kortmann c.s. (eds.), Onderneming en 5 jaar nieuw burgerlijk recht (Tjeenk Willink Zwolle 1997), p. 375-388; A.C. van Schaick, Massa-contracten. Een nieuwe maatvoering in het contractenrecht, NJB 1995/26, p. 956-994. Comp. F.W. Grosheide, Evenwicht in internationale commerciële contractsverhoudingen, Molengrafica 1996 (Vermande Lelystad 1996), p. 45-97 (English Summary: Equilibrium in International Commercial Contracts). See J. Wightman, Contract – A Critical Commentary (Pluto Press London 1996), p. 86-87, who distinguishes the two categories of contract according to the criterion *(...) whether a party is contracting for purposes of exchange. (...) The reason these categories deserve separate treatment stems from the fundamentally different nature of the interests of the parties.*

E Classical contract confronted

13. Although the classical contract has over time evolved to what is now called the neo-classical contract, particularly making the requirement of *consensus* less subjective, it has come under fire over the last thirty years from two different but related sides: the death of the contract-theory on the one side, and the relational contract-doctrine on the other.

The death of the contract-theory, emphasizing bilateral consent instead of the unilateral promise as the core of the (neo-)classical contract, has as its main criticism that when it comes to enforcement of a contract, the (neo-)classical contract is flawed since it refers to the historical context of the mutual consent, not to the actual meaning of the promise.[25] If, under the circumstances, one party, in reliance on the promise of the other, has suffered a loss – so the theory goes on – compensating the damage (the *injurious reliance*) can be realized irrespective of the contract on the basis of tortuous liability. It is the unilateral promise, not the bilateral consent, that establishes liability.

The relational contract-doctrine defines the neo-classical contract as follows: *Neo-classical contract rejects the classical dichotomy between public and private, but retains the importance of the private transaction as its substantive core. Likewise, it rejects the idea that court's only choices are non-enforcement of a contract or enforcement according to its terms; neoclassical law recognizes that courts necessarily supplement, interpret, and impose limits on private agreements in formulating and applying contract doctrine. (...) In sum neoclassicism seeks to produce predictable, yet flexible, legal doctrines that balance mutual assent and public regulation to produce commercially reasonable results in individual cases and across classes of cases*.[26]

25. The theory has mostly been articulated by G. Gilmore, The Death of Contract (Ohio State University Press Columbia 1974) and elaborated by P.S. Atiyah, The Rise and Fall of Freedom of Contract (Clarendon Press Oxford 1979). See also Ch. Fried, Contract as Promise: A Theory of Contractual Obligation (Cambridge Mass USA 1981). The theory has been criticized by among others J. Adams, Reviews, The Modern Law Review Vol. 39, No. 2, 1976, p. 229-230; J. O'Connell, The Interlocking Death and Rebirth of Contract and Tort, Mich.L.Review Vol. 75, 1977, p. 659-685.

26. J.M. Feinman, Contract after the Fall, Standford Law Review Vol. 39, July 1987, p. 1537-1554 (1538). The relational contract-doctrine also dates back to the seventies; see the publications of one of its first advocates I. Macneil, The Many Futures of Contracts, 47 Southern California Law Review, 1974, p. 691-816; Relational Contract: What We Do and Do Not Know, Wisconsin Law Review 1985, p. 483-525. See also J. Wightman, o.c., note 24; Th. Wilhelmsson (ed.), Perspectives of Critical Contract Law (Dartmouth Aldershot 1993), and to that Kötz, o.c., note 20, p. 21-22 (critical). The idea of relational contracting is also found in Japanese law; see Sh. Kawakami, Precontractual Liability in

14. Although the relational contract-doctrine acknowledges that the classical approach seeks to balance predictability and flexibility it has been criticized for its alledged static nature and inability to adjust contracts to the changed circumstances caused by the course of time. In contrast, in the relational contract-doctrine contractual undertakings and legal relationships are defined by reference to the entire factual and legal circumstances surrounding the contract. In this respect, all aspects of the parties' relationship are relevant in delimiting the extent and scope of contractual undertakings. The characteristics of the relational contract-doctrine are the duty to cooperate in good faith, to share poor opportunities and losses and to adjust the contract to the changing factual and legal environment.

Despite the apparent similarities between the death of the contract-theory and the relational contract-doctrine, there seems to be one major difference in as far as the first taken at its extreme tends to strike out the notion of contract; the latter, however, wants to keep alive the notion of contract as a category of the law different from that of tort or unjust enrichment. Following Wightman it may be said that this is more a matter of convenience than principle.[27]

15. The new approaches to contract law have not taken ground in the Netherlands. The death of the contract-theory has been supported by Van Dunné.[28] The relational contract-doctrine has been welcomed by Van Erp and the present author.[29] However, this lack of support may not be misunderstood as a sign of comfort with the actual state of contract law. Schoordijk can here be quoted as writing that the notion of contract is more and more less clear.[30]

Japanese Law, in Hondius, o.c., note 16, p. 207-221 (221), stating that a contract must be considered *as part of an accumulated social relationship, not as an isolated fact (...).* See for the Dutch perspective also Smits, o.c., note 19, to be referred to in section 14.

27. Wightman, o.c., note 24, p. 137: *It is quite possible to regard the categorisation of obligations law or indeed law in general as no more than a matter of convenience in breaking down law into managable parts, in which tradition, on grounds of familiarity, starts with an advantage.* See also H.C.F. Schoordijk, Enkele opmerkingen over de bronnen van verbintenis en 'European law in the making', in: BW krant 1995, p. 95-126, observing that it is the contract and nothing other than the contract which is the criterion by which to judge whether someone's conduct is legally improper (p. 105).

28. J.M. van Dunné, De overeenkomst: de neushoorn in het privaatrecht?, NJB 1980/27, p. 668-678, and since then Verbintenissenrecht, note 18, p. 23-28.

29. J.H.M. van Erp, Contract als rechtsbetrekking (Tjeenk Willink Zwolle 1989); Grosheide, o.c., note 24, p. 60-70.

30. Schoordijk, o.c., note 27, p. 98.

Recently this state of affairs incited Smits and Vranken to express their views on the subject. Smits' approach comes close to that of Collins, Gordley and Wightman: the role of contract as a separate legal category is not questioned, a functional form of consensualism serving as the foundation of contractual commitment.[31, 32] Vranken also accepts contract as a distinct legal category. He has argued that the genuine concept of contract may be characterized as directed towards *normality* and *cooperation*. Normality is to be interpreted as the state of affairs which presents itself as normal and reliable, seen from a factual as well as from a normative perspective. This aspect of normality, moreover refers to the element of certainty which is required in legal relations. The requirement of cooperation refers to the contract understood as a mutual relation, placing the parties under the legal obligation to give proper consideration to the legitimate interests of the other party.[33]

It may be said, however, that Smits and Vranken fit into the neo-classical approach of contract. And so do some other leading authors on the law of contract such as Hartkamp, Hijma, Nieuwenhuis and Zwitser, in conjunction with the Dutch Civil Code and case law.[34] This means – see already section I.D. (12) – that according to Dutch law for an agreement to be a contract and to what legal consequences this may lead primarily depends on the intentions of the parties as expressed in their respective declarations (offer and acceptance) as well as on what they may expect from each other (mutual reliance), taking account of all the circumstances of the case (good faith).[35]

31. Smits, o.c., note 19, p. 187-216. Comp. Wightman, o.c., note 24, p. 119: *(t)he province of contract (...) is not based on any shared value or principle as the defining basis of contractual liability, but on a functional category* (indicated by Wightman as *consensual positive obligations*).
32. See for a brief analysis of the apparent differences between Collins, Gordley and Wightman Grosheide, o.c., note 24, p. 66-67.
33. Vranken, o.c., note 21, p. 1843-1846; 1855-1856, referring to German and French doctrine for a similar approach as well as to Dutch case law e.g. HR 15 November 1957, NJ 1958, 67 (Baris v. Riezenkamp).
34. See Smits, o.c., note 19, p. 200-209.
35. Asser-Hartkamp II, o.c., note 14, p. 14 (nr. 14). See in particular Hoge Raad 13 March 1981, NJ 1981, 635 (Haviltex).

F Further delimitation of the subject

16. In conjunction with the preceding paragraphs and broadly keeping in line with the framework suggested by the general reporter the next paragraphs will depart from the following assumptions.

Dutch contract law makes a distinction between agreements falling inside and agreements falling outside the domain of contract. However, it all depends on what is termed as a contract if one is to know what kind of agreement arises. At least three indicating factors may offer guidance in this respect: the intention of the parties to be legally bound (a), based on reasonable mutual expectations (b), taking account of the circumstances of the case (c). Leaving aside aspects of precontractual liability arising out of negotiations or otherwise, emphasis will be put here on the intention of the parties. Are they legally free to deliberately agree to stay outside contract law and to be bound by honour only, although their agreement fully complies with the terms of a normal contract (deliberate no-law)?

Given the fact that under Dutch law the term, if not the actual concept, gentleman's agreement is used mainly if not exclusively in connection with deliberate no-law in commercial relations, other so-called *honour only clauses*, although playing a comparable role in non-commercial situations such as family or religious relations (contextual no-law) fall outside the scope of this report (see however section II.B). The same is generally speaking true for other gentleman's agreements than those between private (individual or legal) persons such as gentleman's agreements in the field of taxes or between public authorities (see however section II.B). Moreover no attention will be paid to the role of gentleman's agreements in EC competition law.[36] As a consequence this report concentrates on the legal status and legal effects of gentleman's agreements from the perspective of civil law.

II Gentleman's agreements in Dutch civil law

A Introduction

17. Although gentleman's agreements are among the instruments commonly used in commercial practice to expressely indicate that the parties do not intend to enter into legally enforceable contracts, they are hardly debated in

36. W. van Gerven et. al, Kartelrecht (Europese Gemeenschap) (Tjeenk Willink Zwolle 1997), p. 130-133 (nr. 114). See with respect to the EC/UEFA gentleman's agreements relative to the transfersystem in football, K.J.M. Mortelmans, H.A.G. Temmink, Note Case C 117-/91 (UEFA v. Bosman), Ars Aequi 1996/3, p. 166-183.

legal doctrine and only seldomly figure in case law. This finding has been reported already by Wessels in his monography on the subject in 1984 and is confirmed by legal developments since then.[37] Legal doctrine usually discusses gentleman's agreements in the context of other precontractual agreements and their consequences.

In the following sections of this paragraph subsequently attention will be given to the category of precontractual agreements in general (section II.B), the phenomenology of gentleman's agreements, i.e. the societal relations in which they are used (section II.C), the legal concept gentleman's agreements if any and its use in modern practice (section II.D).

B Precontractual agreements

18. All agreements that tend to pave the way to an actual contract may be placed in the same category of so-called precontractual agreements. Following a distinction made by Van Dunné these precontractual agreements can be divided into two sub-categories: procedural agreements and material agreements.[38] Although Van Dunné's distinction primarily regards agreements made in the course of the negotiation process, it is also indicative outside the context of bargaining. According to Van Dunné procedural agreements are designed to structure future negotiations, material agreements expressing already the essence of the final contract, which may even lead to an outline of the contract bargained for. In the sub-category of procedural agreements may be placed precontractual agreements labelled *agreement in*

37. B. Wessels, Gentleman's agreements (Gouda Quint Arnhem 1984); idem, Gentleman's Agreements – Regulating Business Relations Under Dutch Civil Law, Netherl. Int. Law Rev., 1984, p. 214-254; J.M. van Dunné, Verbintenissenrecht Deel 2, Onrechtmatige Daad – Overige Verbintenissen (Kluwer Deventer 1997), p. 52-68. See also L. Hardenberg, De rechtens vrijblijvende afspraak, WPNR/5359 (1976), p. 507-516; H.G. van der Werf, Overeenkomstenrecht (Gouda Quint Arnhem 1981), p. 27; W.A.M. van Schendel, Enkele opmerkingen over 'voorovereenkomsten' in de bouw, Bouwrecht 1981, p. 162; F.W. Grosheide, Gentleman's agreements, Kwartaalbericht NBW 1985/3, p. 90-94; E. Dirix, Gentleman's agreements en andere afspraken met onzekere rechtsgevolgen, Rechtskundig Weekblad 1985/1986, p. 2119. See generally Asser-Hartkamp II, o.c. note 14, p. 13-14; Blei-Weismann, o.c. note 19, p. I-20-20b; Den Tonkelaar, Verbintenissenrecht I art. 213 (no. 21). Over the last ten years only two reported cases expressly refer to the concept gentleman's agreement: Hof Amsterdam 19 mei 1988, NJ 1989, 148; Rechtbank Rotterdam 18 maart 1991, NJ 1993, 347.

38. Van Dunné, o.c. note 18, p. 235-237, using the term *preliminary agreements* and in doing so, referring to a comparable distinction made by E.A. Farnsworth, Precontractual Liability and Preliminary Agreements, in: Fair Dealing and Failed Negotiations, 87 Col. Law Rev. 1987, p. 217-221. Comp. Blei Weismann, o.c. note 19.

principle (*beginselakkoord*), *letter of intent* (*intentieverklaring*), or *agreement to contract* (*principe overeenkomst*). In the sub-category material agreements precontractual agreements labelled *trunk contract* (*rompovereenkomst*), *provisional contract* (*voorlopige overeenkomst*), or *frame contract* (*raamovereenkomst*) are found. It is obvious, however, that there is no fixed borderline between the two sub-categories, that they tend to overlap and that often precontractual agreements fall in both sub-categories.

19. It appears that despite the indicated distinction that can be made between procedural and material precontractual agreements, Dutch doctrine and case law tend to approach both sub-categories in the same way. All precontractual agreements are agreements that contemplate contracts, the intention of the parties as judged by the courts deciding upon whether or not the parties are under any enforceable legal obligation. As has been correctly observed by Van Dunné the courts have a preference to construct precontractual agreements as contracts, being prepared to go to considerable lengths to construe a contract with open terms, if that seems justified under the circumstances of the case.[39] In doing so the courts take account of a number of connecting factors such as

– expressed intentions
– completeness
– usage
– escape clause
– subject-to-contract clause
– instructions to proceed
– contradiction
– complexity of transaction
– parties' conduct
– uses.

In addition it may be said that also the mere fact that a precontractual agreement exists, can be taken into account in order to answer the question whether a legally binding contract has been made.

Reported case law confirms that not the label given to a particular precontractual agreement, but the intention of the parties, considered in the light of the indicated factors is decisive as to the legal enforceability of precontractual agreements under contract law. It also shows that there is a gliding scale, running from non-enforceability to enforceability, procedural

39. Van Dunné, o.c., note 18, p. 235.

agreements more often appearing to answer to the first qualification, material agreements to the latter.[40]

20. It appears that doctrine (explicitly) and case law (implicitly) categorize and treat gentleman's agreements as *species* of the *genus* precontractual agreements.[41] As will be seen in section II.D this approach needs to be nuanced somewhat.

C Phenomenology of gentleman's agreements

21. From a phenomenological point of view gentleman's agreements may be approached from different perspectives. To be mentioned here are the following perspectives
– domain of social activity
– quality of parties
– area of law
– aims of parties.

Obviously, different perspectives will coincide in the case of a particular gentleman's agreement.

The indicated state of affairs explains that the use of gentleman's agreements is not limited to relations in the domain of civil law. Wessels reports that the term is used also in transnational public law and in national public law and other areas of private law other than civil law. In Wessels' inventory of such non-civil law gentleman's agreements are listed OESO

40. General Blei Weismann, o.c., note 19, p. I-20-20a (nr. 22); II-723-734 (nrs. 391-392). Most reported case law regards letters of intents. For further reading see H.C.F. Schoordijk, Onderhandelen te goeder trouw (Kluwer, Deventer 1984), p. 96-103; W.S.M. Schut, Letters of Intent (Tjeenk Willink Zwolle 1986), to which H.C.F. Schoordijk, NJB 1987; Asser-Hartkamp II, o.c., note 14, p. 14-15 (nr. 14); Van Dunné, o.c., note 18, p. 53-54; L. Hardenberg, WPNR/5819 (1987), p. 123-125; B. Wessels, R.M. Themis 1987/6, p. 309-312; F.W. Grosheide, Kwartaalbericht NBW 1988/2, p. 56-59; Further H.J. de Kluiver, M.M. Mac Lean, De voorovereenkomst, R.M. Themis 1987, pp.5-23; 60-75. Comp. B. Wessels, Contractsonderhandelingen in internationaal verband, in: Contracteren in de internationale praktijk (Kluwer Deventer 1994), p. 26. See for an overview of letters of intent from a comparative law perspective B. Lake, U. Draetta, Letters of Intent and Other Precontractual Documents – Comparative Analysis and Forms (Butterworth Legal Publishers, USA 1989), p. 24-41; M. Fontaine, Droit des Contrats Internationaux (Feduci Fec 1989), p. 5-54. See also G. Delaune, Transnational Contracts-Book 5 (Oceana Dobbs Ferry New York 1983), p. 38.

41. See references in note 36.

Directives and ILO Codes;[42] EC/EU institutional regulatory instruments and instruments in the field of competition;[43] as well as on a national level arrangements between taxpayers and fiscal authorities, and mutual covenants between public authorities.[44] All these agreements share the common characteristic that the parties involved *ab initio* waive any legal obligation whatsoever. The same is true with regard to the parties involved: their quality, i.e. their status may vary: they may either be private parties or public authorities.[45] And also the reasons for concluding a gentleman's agreement instead of a legally binding contract may differ: a gentleman's agreement may be concluded because its object cannot be achieved legally; a gentleman's agreement may be used to accompany a contract; or a gentleman's agreement may function as a side letter (*contre-lettre*).[46]

22. It follows from the limited scope of this report as indicated in section I.F (nr. 16) that here the attention is focussed on the use of gentleman's agreements in relations related to the domain of civil law. It appears, however, that even within this limited scope many examples of agreements can be given both from non-legal and legal sources with regard to a variety of societal activities which are labelled as gentleman's agreements by their parties.[47] To illustrate this the gentleman's agreement may best be first of all given its place in the context of the wide range of agreements that are used to structure social life. The following categories of such social agreements can be mentioned

– agreements in the sphere of the family

42. Wessels, o.c., note 37, p. 19-21, referring to OESO Guidelines for Multinational Enterprises 1976; ILO Code of Conduct for Multinational Enterprises 1977.

43. Wessels, o.c., note 37, p. 22-23, referring to the so-called *Kaderbesluiten* and the construction of agreements labelled as gentleman's agreements by the European Commission and the European Court of Justice under art. 85 EEC, reflected e.g. in (ECJ 15 July 1970 cases 41/69, 44/69 Jur.XVI 6 (1970) [Kinine], p. 661; 733; 769.

44. Wessels, o.c., note 37, p. 24-26, referring to the so-called *fiscale compromis* (fiscal compromise), and covenants between the central government and regional authorities with regard to norms for public financing of new industries. See since then H.L. van der Beek, Gentleman's agreements, Bouwrecht 1985, p. 738-741. See particularly F.J. van Ommeren, De verplichting verankerd: de reikwijdte van het loyaliteitsbeginsel en het materiële wetsbegrip (Tjeenk Willink Zwolle 1996), p. 71-72; 276-277.

45. Wessels, o.c., note 37, p. 24; 109-120.

46. Comp. W.J. Slagter, Het afbreken van onderhandelingen, in M.J.G.P. Kaplan, Internationale Commerciële Contracten (Academic Service Schoonhoven 1993), p. 79-84.

47. Wessels, o.c., note 37, p. 24-26; 71-82. Further Hardenberg, o.c., note 37, p. 515-516; H.C.F. Schoordijk, Het algemeen gedeelte van het verbintenissenrecht naar het Nieuw Burgerlijk Wetboek (Kluwer Deventer 1989), p. 161.

– agreements between friends
– agreements for the sake of social (or moral) behaviour.

Agreements in the sphere of the family may vary from financial support between parents and children, to custody of their children by the respective relatives without any legal obligation thereto. The oldest reported case in this respect concerns mate-swopping.[48] Agreements between friends (or neighbours or colleagues and the like) may be relative to assistance to build a house, payment for not witnessing in a case before the court, or to conduct a medical operation free of charge.[49] Agreements regarding other social behaviour may be found in the domains of sports (not competing), politics (voting) or the performing arts (promoting).

23. Evidently, all these agreements intend to keep the parties involved outside the legal sphere. However, as case law shows, if occasionally such an agreement is subject to a lawsuit, the courts happen to judge these agreements on their merits and often find that, despite the social context, in fact a contract has been concluded. A much quoted case in this respect is *Nukoop v. Saalfield* with regard to giving somebody a lift for free. Although generally speaking such an agreement will not generate any legal obligation, according to the Dutch Supreme Court under the circumstances of the case it may be that *the agreement between good acquintances, holding that the one shall take along with him the other for a holiday in his car, may well contain the conditions, required for the existence of a legally binding contract, even if this ride is for free.*[50]

It should be noted here that things tend to be complicated by the fact that so-called social agreements in general and gentleman's agreements in particular sometimes are made in situations where an enforceable contract is not within reach, e.g. because both parties know of its immoral contents as in the case of the partner exchange. Whatever the legal consequences after all may be, if the court would find a contract to exist in such a case, it would be nil and void *ex lege* because of its immoral contents.

24. Although from a general point of view social agreements and gentleman's agreements both may be categorized as honour only agreements, this finding does not suffice if the aim is getting a proper meaning of the phenomenon gentleman's agreement. A rather articulate description of the phenomenon

48. Hof Noord-Holland 28 December 1839, W. 76.

49. Comp. Hoge Raad 30 January 1980, BNL 1980/77. See Asser-Kortmann-De Leede-Thunissen, Bijzondere overeenkomsten III (Tjeenk Willink Zwolle 1994), p. 40-41 (nr. 54) with reference to case law.

50. Hoge Raad 11 april 1958, NJ 1958, 467 (*Nukoop* v. *Saalfeld*).

gentleman's agreement requires both from a sociological and a methodological point of view that it should be distinguished from mere social agreements. It is suggested here that to this aim only these agreements should be called gentleman's agreements which are made with regard to long-term continuing commercial relations relative to business-to-business transactions, expecting their parties to act accordingly.[51]

D Concept of gentleman's agreement

25. If one makes an attempt to articulate the concept of gentleman's agreement legal doctrine and case law, apart from generally referring to the parties' intention not to be bound legally, offer little guidance. Further, although such an articulation is not made *expressis verbis*, by focussing their attention on gentleman's agreements used in trade, both sources confirm the statement made in section II.C (nr. 24) that in order to be meaningful the concept gentleman's agreement should be limited to long-term continuing commercial relations relative to business-to-business transactions.[52]

So it seems appropriate to take this finding as a starting point for a closer look at legal doctrine (nr. 26-30) and case law (nr. 31).

26. Recently Van Dunné has suggested to subdivide the class of gentleman's agreements in the following four categories
– gentleman's agreements of a general nature
– gentleman's agreements relative to negotiations
– gentleman's agreements as substitute for financial guarantees
– gentleman's agreements accompanying contracts.[53]

Of a general nature are the gentleman's agreements which aim at establishing a commercial relation between the parties. They often regard arrangements in the field of competition, placing them on a strained footing with the applicable law. Gentleman's agreements relative to negotiations – by Van Dunné also called letters of intent and heads of agreement – intend to lay down the parties' intention to cooperate with each other. They often contain already what will become later the contents of the contract. Gentleman's agreements as substitute for guarantees in financial transactions − also referred to as comfort letters, letters of responsibility or letters of awareness − are used as putatively non-obligatory replacements of

51. Grosheide, o.c., note 37.

52. See references in note 37.

53. Van Dunné, Verbintenissenrecht Deel 2, o.c., note 37, p. 53; 55-60.

contracts.[54] Finally, gentleman's agreements accompanying contracts have no significance *per se*, e.g. an agreement with regard to the execution of a contractual obligation to pay a pension to an employee.

27. Although Van Dunné's classification undoubtedly has an illustrative value as to the aims for which parties try to avoid contractual commitments, it is not of much of help when delineating the concept of gentleman's agreement as it offers a diffuse mixture of various types of preliminary and other non-contractual agreements used in commerce. For to define for example the concept of gentleman's agreement by reference to the letter of intent or the comfort letter does not elucidate anything. Rather it obscures the fact that in trade different instruments are used for different purposes. Letters of intent commonly are used in precontractual relations to accompany and document ongoing negotiations. It is their very nature in the end to be replaced by a binding contract. They are made for the time being.[55] A comfort letter, on the contrary, is not a tentative step toward a contract, but a tentatively or putatively non obligatory part of a complete contract.[56] As has been observed by Lake/Draetta *(c)omfort letters are normally vaguely worded documents that are expressions of moral obligations*.[57] But they are made to stay for ever. Obviously letters of comfort in most instances will fall into Van Dunné's fourth category of gentleman's agreements, those that accompany contracts. It is even advocated by Schoordijk that letters of comfort, despite of or maybe because of their language of deliberate equivocation, ought to be judged by the real and main objectives of the parties , not by their intentional misleading vagueness, which often obscures that a real contract has been entered into.[58]

In addition to what has been said up till now with regard to Van Dunné's classification it should be noted that it does not qualify for a criterion to

54. Van Dunné, Verbintenissenrecht Deel 2, o.c., note 37, p. 53; 55-60.

55. Schut, o.c., note 40, p. 9-10; Lake/Draetta, o.c., note 40, p. 3-17.

56. Lake/Draetta, o.c., note 40, p. 13-14; 33-35.

57. Lake/Draetta, o.c., note 40, p. 14, describing the normal content of a comfort letter as follows: it (...) contains (1) an expression of awareness of the transaction: (2) an assurance that the issuer of this omfort letter will continue to maintain a specified ownership interest in the borrower; (3) an expression of an intent to provide a degree of financial support to the borrower (...). See also Wessels, o.c., note 37, p. 43-44.

58. H.C.F. Schoordijk, Letter of Comfort, NJB 1989/45-46, p. 1676-1678, with references to other writings. Schoordijk has been critisized by a number of Dutch practitioners (R.E. de Rooy, J. Spier, P.J.M. Akkermans, NJB 1990/21, p. 784-787 with *post scriptum* by Schoordijk), and in particular by W.E. Mooyen, De ongemakkelijke comfort letter, NJB 1990/21, p. 779-782. See also Van Dunné, Verbintenissenrecht Deel 2, o.c., note 37, p. 58.

decide upon the (social or legal) consequences of a gentleman's agreement. Rather, as far as the (social or legal) consequences are concerned Van Dunné seems not to make any difference at all between the four types of gentleman's agreements. Whether or not a particular type of gentleman's agreement is enforceable at law or only binding as a matter of honour depends indiscriminately on the circumstances of the case.

28. Two other noteworthy approaches of gentleman's agreements that have been put forward in legal doctrine, particularly regard their legal nature.

First comes Schoordijk stressing that if the parties themselves have placed their agreement (Schoordijk writes *contract*) *outside the brackets of the law* we find ourselves outside the sphere of the law. According to Schoordijk the crucial point concerns the *causa* of the agreement, we may never consider ourselves released from the obligation to distinguish the agreement (*afspraak*) and the legally binding contract (*rechtens bindende overeenkomst*).[59] The reasoning behind this distinction follows from Schoordijks opinion that a legal obligation not finding its sanction in state enforcement is a *contradictio in terminis*.[60] Consequently Schoordijk does not accept the concept of a contract which gives birth to obligations but at the same time is made unenforceable at law by the parties.[61] Second comes Wessels who advocates quite the opposite approach. According to Wessels the crucial issue is not to distinguish the agreement from the legally binding contract but to seek in every contract (Wessels writes *agreement*) the binding elements and to measure their scope.[62] Consequently Wessels approaches a gentleman's agreement as a contract explicitly made not enforceable at law by the parties. It follows that the obligations which the gentleman's agreements contain do not lack legal value (*rechtswaarde*); they ought to be considered as *naturalis obligationes*.[63]

29. In addition the present author may refer to a third option that he himself has proposed.[64]

Indeed a close look at the phenomenon of gentleman's agreement under consideration here reveals that a distinction can be made between its external

59. Schoordijk, o.c., note 47, p. 465.
60. Schoordijk, o.c., note 47, p. 62.
61. Schoordijk, o.c., note 47, p. 59.
62. Wessels, o.c., note 37, p. 44-45; 47-51.
63. Wessels, o.c., note 37, p. 67-69.
64. Grosheide, o.c., note 37, p. 93-94 with reference to P. Cahen, Toedrachtsbepaling van rechtsfeiten (Gouda Quint Arnhem 1975).

effect and its internal effect. This effect can be either social or legal, or both. As far as the legal aspect is concerned a gentleman's agreement may be said to have external effect if its mere existence, irrespective of the parties internal relation, has legal relevance, e.g. is hampering free competition. With regard to the internal legal effect a further distinction should be made as to

– agreements having internal legal effect not being contracts
– agreements having internal legal effect because they are contracts

The first category is not enforceable at law and only give rise to *naturalis obligationes*. Whether or not the internal legal effect is the reflection of a contractual relation has to be measured by taking into consideration all the requirements that have to be met for a contract to be concluded.

30. So it may be concluded that despite the indicated different doctrinal approaches of gentleman's agreement, all approaches tend to concur in as far as they seem to accept an area of freedom for the parties to long term commercial relations to substitute a legally binding contract by a not legally enforceable gentleman's agreement. However, no consensus exists as to the dogmatic underpinning of such an *in-between* position. Some argue that a gentleman's agreement is a contract in its own right, although enforceability in law is lacking and only *naturalis obligationes* are established. Others reject the concept of contract being applied to gentleman's agreements. For them possible legal obligations resulting from the mere existence of a gentleman's agreement should be based on tortious liability. It is of note that Dutch legal doctrine does not pay much attention to the question how to legitimize that parties place themselves outside the domain of the law. It seems, that all however do agree about the possibility to do so.

31. The picture does not change when the reported case law is taken into account. As already indicated the courts are not often asked for their judgment and if so they look at the contents of the gentleman's agreement in question and mostly take the approach suggested by Wessels: the gentleman's agreement is seen as a contract which has been explicitly made unenforceable in law by the parties, giving rise under the circumstances to *naturalis obligationes*. See:

– Hof Arnhem 4 januari 1949, NJ 1949, 581
– Rechtbank Rotterdam 19 januari 1949, NJ 1950, 276
– Kantongerecht 's-Gravenhage 9 augustus 1967, NJ 1968, 68
– Rechtbank Assen 24 december 1974, NJ 1975, 349
– HR 15 april 1977, NJ 1978, 163
– HR 11 november 1977 NJ 1978, 339
– HR 19 november 1985 NJ 1986, 125
– Hof Den Bosch 23 april 1988 NJ 1987, 48

– Hof Amsterdam 19 mei 1988 NJ 1989, 148
– Rechtbank Rotterdam 18 maart 1991 NJ 1993, 347

III Concluding remarks

32. Modern Dutch practice shows that gentleman's agreements are commonly used as substitutes for contracts to structure long term continuing commercial relations. Although the parties completely agree on all the terms of a contract, they also agree that this does not lead to legal consequences but is binding in honour only. Indeed these gentleman's agreements reflect the parties intention not to be bound in law as an expression of the autonomous ordering process which is quintessential for contract law. Businessmen often find that contracting is not needed because of relational sanctions. A party that is acting *infra honore* will be sanctioned socially in its field of trade; it will be stigmatized and set aside.

The notion honour should not be taken to literally in this respect though. It refers to the customs and practice common to a particular trade. So what may be called dishonorable in one trade may not necessarily also be dishonorable in other business relations. Moreover under the circumstances dishonorable conduct may be judged by private governments referring to particular codes of conduct.

The fact that the parties declare *expressis verbis* to stay outside the domain of the law does not mean that the law is of no importance at all. Gentleman's agreements are made in the shadow of the law. This is particularly true in those instances that they accompany contracts. When long term relations collapse, contract law and legal action will often come into play.

33. What then if such a case occurs, will be the answer given by Dutch legal doctrine and case law to the question of the legal status of gentleman's agreements? It appears that the answer will be far from clear cut and can be split up in a general and a specific part.

General is the part which refers to the intention of the parties and the requirements of contract law for a contract to be validly concluded. Both legal doctrine and case law clearly accept that the freedom of contract includes the freedom of the prospective parties to agree staying outside the domain of the law, and that the discretionary power of the courts entails mitigating the requirements of contract law. The key issue seems to be that the constituent elements of a contract: offer and acceptance, as well as the contract itself are juridical acts. Being essential for juridical acts to aim at legal consequences no juridical act exists if such aim is lacking. So it appears

that the gentleman's agreement as a legal concept again functions in the shadow, this time in the shadow of the contract. Gentleman's agreements are *would-be* contracts.

34. What does this finding mean for the binding force of the agreed issues in a gentleman's agreement? Case law tend to follow here the view taken by Wessels and others that these separate agreements ought to be considered as *naturalis obligationes*. They are not enforceable at law as long as they are not performed. Further – and here comes the specific part of the answer to the question about the legal status of gentleman's agreements into play – taking into account some or all of the factors enumerated in section II.B (nr. 19) may lead the court in a particular case to the conclusion that what is presented as a gentleman's agreement really is a contract.

This all concerns the internal effect of gentleman's agreement – the relation between the parties. But the mere existence of a gentleman's agreement may have as well an external effect, leading to legal consequences based on other than contractual liability, e.g. tortuous liability.