

The Uses of Reasonableness in the Constitutional Interpretation and Arbitration: A Comparative and Theoretical Analysis about the Law in Action

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Abstract:

This paper outline the main uses of reasonableness in the European constitutional practice, as well as in the international commercial arbitration, such as in the ICC and in others main European commercial chambers case law. It is important to deal with this subject matter as reasonableness is a very general concept that is routed in our common languages and may put in contact the western and the middle Eastern legal traditions.

Reasonableness is, for instance, a pivotal concept of the Unidroit Principles (2010 edition, hereinafter in brief the ‘principles’), which Arabic version has been launched in 2014 at a conference held at the sultan Qaboos university of Muscat. As the law in action shows in many countries , this concept is a vehicle for the development of law and plays a great role in the dialogue between legislators and judges. In this perspective reasonableness may also support the process of huge reforms currently carried on in Kuwait, as the Kuwait development plan 2015-2020 worthy points out.

Above all, especially a comparison with the intense communication among European courts, including the European court of human rights, may be very instructive for everyone. As the principles as the upper courts (civil supreme and constitutional courts) show, reasonableness is used as a general “standards of fair dealing” witch is related to justice, dignity and many others values. Moreover, the well-known “reasonable person” figure is applied to make prognoses about future events (e.g. impediments in performing

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or unpredicted harms) or, conversely, to evaluate uncertain past event, the reliance between the parties, etc. Reasonableness is also considered as a source of law and a criterion of legal validity. It is a device to fill gaps and adapt laws to changing in context. In addition, it plays a leading role in the legal interpretation as refereed to legislation, constitutions, customs and so forth. The pros and cons of this extensive use of reasonableness in the law are open to dispute. What is at issue is whether it represents a suitable solution of legal policy and legal drafting in order to develop legal certainty, equality and fairness especially in those case and transactions when the parties belong to differing legal system, legal traditions, cultures and languages.

In this paper this issue will be examined in order to demonstrate that, in spite of a common view, reasonableness is not a notion embedded only in the western thinking and surreptitiously applied to impose certain values. Rather, history and philosophy, as well as the contemporary legal practice shows that, by means of reasonableness, everybody may give public reasons for justifying actions, choices, promises, etc. As a consequence, reasonableness is a device to solve legal issues by an argumentative practice based on reciprocity and mutual respect.

1. Introduction:

Does reasonableness affect legal practice, and how does it happen? Can it be a tool for legal change and to what extent? Can it be an instrument for legal reform and development and to which direction? The scope of this paper is to reflect upon these issues both from both a theoretical and a practical point of view.

The approach applied to this inquiry belongs from the philosophy of language and, to be more specific, the jurisprudence as developed in the Nineties⁽²⁾, for instance, by the Oxonian legal philosopher Herbert L.A. Hart⁽³⁾ and the legal theory as practiced by the Italian analytical school⁽⁴⁾.

Thus, in the next paragraph, as a preliminary step of the analysis I shall sketch a redefinition of reasonableness as a general concept, which I hope, could help to clarify its semiotic features and, finally, its main legal uses and impact on legal practice.

In the third paragraph, I shall briefly elucidate the relevance of the reasonable in case law by making reference to some rulings and principles stated by constitutional courts and courts at the highest level in different countries, and by international chambers of arbitration (such as the ICC and ICSID).

In the fourth paragraph, I shall review some main typical uses of the concept of reasonable to show its considerable range and variety of uses in all fields of law. In particular, I will focus on reasonableness within the 2010 Unidroit Principles as its use

(2) See for an introduction G. Postema, *Legal Philosophy in the Twentieth Century: The Common Law World*, in *A Treatise of Legal Philosophy and General Jurisprudence*, Vol. 11, Springer, Dordrecht, 2011, and J.J. Moreso (ed.), *Teoría Del Derecho: Positivismo Jurídico y Análisis Conceptual*, Vol. I, *Legal Theory: Legal Positivism and Conceptual Analysis: Proceedings of the 22nd IVR World Congress, Granada 2005*, Franz Steiner Verlag, 2007.

(3) See e.g. H.L.A. Hart, *Essays in Jurisprudence and Philosophy*, Clarendon, Oxford, 1983.

(4) See e.g. A. Pintore and M. Jori (eds.), *Law and Language: Italian Analytical School*, Deborah Charles Publications, 1997; M. Atienza, "Southern European Philosophy of Law", in C.B. Gray (ed.), *The Philosophy of Law: An Encyclopedia*, Vol. II K-Z, Garland Publishing, Inc., 1999, 821-824, spec. 822-823.

there exemplifies well several significant uses widespread in many sectors of the legal practice and not just in commercial contract law.

The general aim of the inquiry is to refute widespread skepticism concerning the meaningful use of the term reasonable, challenging the idea that it is only an empty word, good for all seasons, or, from bad to worse, inevitably a surreptitious vehicle for imposing certain values and ideology without giving any reasons.

To sum up, therefore, the main outcome of the paper is to argue for a meaning full and transparent use of the term reasonableness and to show that it can be a proper instrument for law reform.

2. A semiotic perspective: reasonableness as a porous concept

The legal meanings of reasonableness are open to debate. Statutory laws and judicial decisions usually use the notion without an explicit definition, while many different doctrines and disagreements about what is reasonable and unreasonable exist among legal scholars.

In many cases the attempt to give a clarification of the notion is circular and, thus spurious, as in the comment to the 2010 Unidroit Principles where by the reference to reasonable persons is a “test” that does not entail “a general and abstract criterion of reasonableness, but rather the understanding which could reasonably be expected of persons with, for example, the same linguistic knowledge, technical skill, or business experience as the parties”⁽⁵⁾.

Here ‘reasonableness’ is explained through the use of the word ‘reasonably’, which is not explained. In the current philosophical main stream and in the contemporary legal theory, reasonableness is conceived as somehow related to a cluster of broad value-laden concepts such as, justice, equity, fairness, impartiality, sympathy,

(5) Comment to art. 4.1, at 138.

and so forth,⁽⁶⁾ that are fundamental in ethics and politics.

The analysis of reasonableness of legal scholars and philosophers tend to be variable, depending on diverse meta-ethical assumptions on practical rationality and on manifold conceptions of values. It is portrayed in many guises, as a human virtue, an indeterminate concept, a generic and vague moral or legal principle, a flexible standard related to common sense, etc.

In some essentialist frameworks, the reasonable is conceived as something objective, embedded in the human nature, or ascertainable by way of intuitions. On the other hand, for its most radical critics, reasonableness is able to assume whatever scope and meaning is dictated by the biases and the idiosyncratic preferences of everyone. In view of this, its uses are frequently censured for covering hidden prejudices and undeclared contested values under a veil of persuasion.

(6) The literature on this topic is extremely extent. Here I remember only few noteworthy works. See e.g. W.M. Sibley, "The Rational versus the Reasonable", in *Phil. Rev.*, Vol. 62, No. 4, 1953, 554-560; J.R. Lucas, "The Philosophy of Reasonable Man", in *Phil. Q.*, Vol. 51, 1963, 97-106; E. Green, "The Reasonable Man: Legal Fiction or Psychosocial Reality?", in *L. & Soc. R.*, Vol. 2, No. 2, 1968, 241-258; C. Hill, "Reason and Reasonableness in Seventeenth-Century England", in *Brit. J. Soc.*, Vol. 20, No. 3, 1969, 235-252; C. Perelman, "The Rational and the Reasonable", in *The New Rhetoric and the Humanities. Essays on Rhetoric and its Applications*, Springer, Dordrecht, 1979, 117-123; N. MacCormick, "On Reasonableness", in *Les notions à contenu variable en droit*, publ. par Perelman, Vander Elst, Bruylant, Bruxelles, 1984, 131-156; M. Atienza, "On The Reasonable in Law", in *RatioJuris*, Vol. 3, Suppl. 1, 1990, 148-161; B.J. Shapiro, «Beyond Reasonable Doubt» and «Probable Cause»: Historical Perspectives on the Anglo-American Law of Evidence, University of California Press, Berkley, 1991; M. Kelman, "Reasonable Evidence of Reasonableness", in *Crit. Inq.*, Vol. 17, No. 4, 1991, 798-817; D. Estlund, "The Insularity of the Reasonable: Why Political Liberalism Must Admit the Truth", in *Ethics*, Vol. 118, No. 2, 1998, 252-275; A. Walen, "Reasonable Illegal Force: Justice and Legitimacy in a Pluralistic, Liberal Society", in *Ethics*, Vol. 61, No. 2, 2001, 344-373; M. Moran, *Rethinking the Reasonable Person. An Egalitarian Reconstruction of the Objective Standard*, Oxford, 2003; L. Laudan, "Is Reasonable Doubt Reasonable?", in *Legal Theory*, Vol. 9, No. 4, 2003, 295-331; S. Besson, *The Morality of Conflict. Reasonable Disagreement and the Law*, Hart publishing, Portland, 2005; J. Rawls, *Hobbes's Account of Practical Reasoning*, in *Lectures on the History of Political Philosophy*, ed. by Freeman, Belknap, Boston, 2007, 54 ff.; R. Alexy, "The Reasonableness of the Law", in *Reasonableness and Law*, ed. by Bongiovanni, Sartor, Valentini, Springer, Dordrecht, 2009, 5 ff..

In addition, its open-meaning is often considered a significant obstacle towards legal certainty and a medium of arbitrariness in the use of authority.

However, both essentialism and skepticism are contradicted by many uses of reasonableness in ordinary speech and in legal discourses. In this respect for avoiding common misunderstandings it is instructive to get a glimpse of trivial situations. Thus, let us think of some examples as follows.

Being sympathetic toward person with serious disease is usually recognized as reasonable. Equally, *ceteris paribus*, it is normally reasonable to behave coherently with previous choices. On the contrary, insisting upon a same issue without considering objections is generally stigmatized as unreasonable. Also the attitude of making strenuous efforts so do something which is above our capabilities is supposed to be unreasonable.

All these statements convey complex ideas and involve sophisticated language skills, but -of most importance for our purposes - they are perfectly intelligible.

To understand how reasonableness really works it is useful to imagine at the following situation: a child, holding in his hands a chocolate snack, approaches the fridge to take another snack. When his mother understands his intentions, she tells him: "My dear, don't be unreasonable!". In this situation the child could respond: "Unreasonable? I? Why?". But, these questions seem manifestly not sincere. Everybody, including the child, perfectly understand what the mother says and what is (un) reasonable in this case.

In fact no reason exists for taking a second chocolate snack, especially before having finished the first one, insofar as one snack is considered sufficient to satisfy the appetite of the child and a second snack is considered unhealthy for him. But let us note that taking another snack would be plainly reasonable if

the second one is for a friend. In this situation, there would be a good reason for taking a second chocolate snack, even if the first one has not been eaten.

To offer a snack to a friend is generally approved as a polite gesture and therefore the child would convincingly answer to the charge of unreasonableness by saying “But mom, it is for John”.

These examples show that reasonableness is far from being an empty word. It is a pragmatic concept that presupposes multifaceted assumptions about human actions and entails an implicit chain of reasons.

This means that what is (un)reasonable is a context-dependent issue, that necessarily depends both on the circumstances in which it is used (in the example, for instance, it is relevant that the son is already eating a snack or the presence of a friend), as well as on a certain previous value-choice (in the example the value involved is, in the first case, health and, in the second case, hospitality).

These features make reasonableness similar to many ordinary concepts such as elegance, politeness, grace, finesse, delicacy, and so on. We cannot say indeed that something is elegant, polite, fine, delicate, etc. in abstracto without regard to a predetermined conception of human being and relationships. All these concepts regard actions not in a solitary confinement, but in relation with the actions and ideas of someone else.

Accordingly, what is fine, elegant, polite or, just, (un)reasonable is subject to the circumstances and the values chosen by each participant or an external observer. In this respect the internal point of view of each participant may diverge from the others' and from the external point of view.

On this account, to properly understand and use reasonableness the dictionary is not sufficient; referring the linguistics distinction

between dictionary and encyclopedia⁽⁷⁾, the knowledge of the dictionary can be joined to the broader knowledge of the encyclopedia which is essential for a comprehension of the notion of reasonableness.

Using a common metaphor, we can say that reasonableness is a porous concept⁽⁸⁾ that functions as a sponge. Sponges have an invariable skeleton and their life and natural role (i.e. of absorbing liquid around) is necessarily related to the environment.

Likewise, reasonableness has an internal semiotic structure and their functions in the various discourses are necessarily related to the specific context in which it is used. If we examine in-depth its semiotic structure, three logical-semantic constituents can be identified.

The first one is practical in nature and it is the reference to reasons for action⁽⁹⁾. This reference links reasonableness with practical reason and explain why the notion entails a practical justification.

The second constituent, is evaluative in nature, in reference to the values just mentioned. The third constituent, which is genuinely descriptive, is the reference to the factual circumstances in which the concept is used. All these components are analytically necessary, they are always present in reasonableness, but their content is not fixed once and for all.

At the outset, of course the circumstances where reasonableness

(7) J. Haiman, "Dictionaries and Encyclopedias", in *Lingua*, Vol. 50, 1980, 329-357.

(8) F. Waismann, "Language Strata", in *How I See Philosophy*, ed. By Harré, Macmillan, London, 1968, 91-121. See also Id., "Verifiability", in *Logic and Language*, ed. by Flew, Blackwell, Oxford, 1968, 117-144; Id., "Analytic-Synthetic", part IV, *Analysis*, Vol. 11, No. 6, 1951, 115 ff.; part V, *Analysis*, Vol. 13, No. 1, 1952, 1 ff.

(9) J. Raz, *Reasons for Action, Decisions and Norms*, *Mind*, 36, 1975, 481-499; Id., *Practical Reason and Norms*, Oxford UP, Oxford, 1975; and R.M. Hare, *The Language of Morals*, Clarendon, Oxford, 1952; Id., "Universalisability", in *Proc. Arist. Soc.*, 55, 1954-1955, 295-312; Id., *Freedom and Reason*, Clarendon, Oxford, 1963; Id., *Sorting out Ethics*, Clarendon, Oxford, 1997.

is used might change and any changing in the circumstances may determine a diverse evaluation of reasonableness. In this respect reasonableness is similar to many ordinary concepts: the concept of holiday, for example, has an open reference to the different circumstances where, when, how different people go on holiday but it is perfectly understandable.

It is useful just because it says nothing about all these details. Another example is the concept of delay that is equally useful precisely because it implies a generic chronological reference that is open to specification case by case. So that it is usually unreasonable to pretend to terminate a contract for a delay of just one day, but the claim is plainly reasonable if the agreed time is essential and, hence, there is a material breach.

A first important lesson emerges from these examples:

reasonableness is neither an observable property, nor an inner quality of actions, entities or whatever else. So that times, expenses, prices, offers, silences, and so forth are not reasonable or unreasonable by nature. Rather saying that a period of time is reasonable or that the expenses for the substitution of a good are unreasonable means that the effort of waiting for a certain time or to replace the good is or is not justified relating to the circumstances and certain values.

Then, as we said, reasonableness involves a reference to values, but as facts, so no values are reasonable by themselves. For instance a person might be late with respect to an important meeting. With regards to the value of punctuality, it would seem unreasonable to spend - we might say to lose - time for finding a certain garment.

But, on the basis of gratitude to take time and try to find out the one garment might be reasonable if it was gifted by the person we are going to meet.

Taking into account the features outlined here, reasonableness is a pragmatic concept also in the sense that it has a dispositional quality. Depending on the case, it may be used to give reasons.

3.The uses of reasonableness in case law and arbitration proceedings:

Reasonableness is commonplace in public debate⁽¹⁰⁾, as well as widespread at the upper court level, both in civil law and in common law traditions. References to it in national legislations, including European civil codes, have increased over the past few decades and have spread into the fields of contract and commercial law. This extension of the reasonable especially in private and contract law is said to be an outcome of the increasing influence of American and English legal systems⁽¹¹⁾, and an effect of international treaties and general customs such as the *lex mercatoria*, where reasonableness is a long-standing notion⁽¹²⁾. Yet, such opinions tend to be partial⁽¹³⁾.

It is of course true that the reasonable has progressively extended its range of application from constitutional and administrative law to become popular in private law too. In the field of contracts it

(10) See e.g. N.D. Kristof, "A call for U.S. reasonableness in the Middle East policy", *The Seattle Times*, 4 August 2011; *The Economist*, "Reasonableness is a political stratagem", 22 September 2009.

(11) A classical reference is G.P. Fletcher, *The Right and the Reasonable*, in *Harvard Law Review* 5, 1985, 949-982. On reasonableness in the criminal law, it is well-known and contentious the standard "Beyond a Reasonable Doubt (BARD)", see e.g. L. Laudan, *Is it Finally Time to Put "Proof Beyond a Reasonable Doubt" Out to Pasture?*, in A. Marmor (ed.), *The Routledge Companions to Philosophy of Law* (Abingdon: Routledge, 21 mar 2012), accessed 9 April 2017, Routledge Handbooks Online. See e.g. P. Cane, *Records, Reasons and Rationality in Judicial Control of Administrative Power: England, the US and Australia*, in *Israel Law Review*, 48(3), 2015, 309-328; E. Lust (ed.), *The Middle East, Fourteenth Edition*, SAGE, 2017, spec. Israel, 529.

(12) For further references see e.g. the detailed analyses of G. Weiszberg, *Le Raisonnable en Droit du Commerce International*, Th. Paris II, *Pace Database* no. 33, 2003, at www.cisg.law.pace.org and S. Fortier, *Le contract du commerce international à l'aune du raisonnable*, *Journal du droit international*, 1996, 315-379.

(13) In fact, it must be noted that the reasonable is far from being alien to the civil law tradition. Both canon law and the mediaeval *ius commune* indicate that reasonableness (in *lat-inrationalibilitas*) is deeply embedded in continental legal thinking and practice from ancient Rome onwards.

is currently applied both by the parties and the officials - judges, arbitrators and administrations - in many respects such as drafting and interpreting agreements, evaluating undertakings and performance, and checking the validity of contracts. In the law of torts it is used as a criterion for evaluating risks and liabilities and contributes towards defining what precaution and care are due in all situations. In company law, it is applied to drafting the financial accounts, which need to be based on reasonable evaluations of the corporate assets; it is generally associated with the business judgment rule as a parameter of the liability of company boards. In addition, proceedings in private matters in criminal and administrative law are guided by principles based on reasonableness.

In many European countries reasonableness is a pivotal concept in judgments and in the reasoning of the national constitutional courts; in particular, it is used in the well-known “balancing of principles/interests” and as a parameter to scrutinize the validity of laws, by itself or, depending on the case, severally jointly with the principle of general equality⁽¹⁴⁾. In the European Union, reasonableness is also used for preserving subsidiarity and proportionality in the exercise of powers both by European and national institutions and authorities⁽¹⁵⁾. This means that it plays a crucial role in defining the competences of political institutions and in the check and balances approach of European

(14) About the constitutional case law in Italy, see e.g. C. Cost. judgments no. 41/2008, 266/2008, 337/2010, 203/2011, 214/2011, 85/2013. For an introduction to Italian legal doctrine see G. Scaccia, *Gli “strumenti” della ragionevolezza nel giudizio costituzionale*, Giuffrè, Milano, 2000; R. Bin, “Ragionevolezza e divisione dei poteri”, in *Aa.Vv., Corte costituzionale e principio di eguaglianza* (Atti del Convegno in ricordo di Livio Paladin, Padova, 2 aprile 2001), Cedam, Padova, 2002, 159 ff.; A. Celotto, *Eguaglianza e ragionevolezza nella giurisprudenza costituzionale italiana*, in L. Mezzetti, E. Ferrer Mac-Gregor (ed.), *Diritto processuale costituzionale*, Cedam, Padova, 2010, 123 ff., at www.juridicas.unam.mx.

(15) G. Tesaro, “Reasonableness in the European Court of Justice Case-Law”, in A. Rosas et al. (eds.), *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-law - La Cour de Justice et la Construction de l'Europe: Analyses et Perspectives de Soixante Ans de Jurisprudence*, The Hague, Asser, 2013, 307-327; A. Adinolfi, “The Principle of Reasonableness in European Union Law”, in Bongiovanni et al., *op. cit.* 290 ff.

institutions where it contributes in improving the principle of loyal cooperation.

The European Court of Justice (ECJ) applies it for checking the exercise of powers when balancing the interests of European Union and those of member states. In addition, for European institutions (Commission and Court of Justice) the reasonable is a standard for assessing whether member states are in compliance with their obligations and for evaluating the legitimacy of national laws that derogate from European legislation. Some fields of significant applications are free trade and market competition and intellectual property⁽¹⁶⁾.

Many judicial principles and rules of procedure have been introduced for implementing such principle both in European and national legislations. In the well-known *Cilfit* case, the ECJ stated the *acte clair* doctrine according to which no duty of preliminary reference arises where the correct application of European law “may be so obvious as to leave no scope for any reasonable doubt”⁽¹⁷⁾. The ECJ has also created the doctrine of implicit powers according to which national laws and international conventions have to be construed so that they entail all the rules and principles deemed to convey their meaning and to permit their reasonable and suitable application⁽¹⁸⁾.

(16) Two leading cases are the Case 8-74 *Procureur du Roi v Dassonville*, [1974] ECR 837 where reasonableness was used to assess the legitimacy of national rules derogating from the free trade principle; and the Case C-309/99 *J.C.J. Wouters et al. v. Algemene Raad van de Nederlandse Orde van Advocaten* [2002] ECR I-1577 where reasonableness was used to measure whether a derogating national rule was necessary to pursue the aim of market competition. About intellectual property see Case C-479/12 *H. Gautzsch Großhandel GmbH & Co. KG v Münchener Boulevard Möbel Joseph Duna GmbH* (European Court of Justice 13 February 2014) available at www.eur-lex.europa.eu.

(17) C-283/81 *S.r.l. CILFIT and Lanificio di Gavardo S.p.A. vs. Ministry of Health* Judgment of the Court of 6 October 1982.

(18) ECJ Case 8-55 *Fédération Charbonnière de Belgique vs. High Authority of the European Community for Coal and Steel*. See M. Lagrange, *The Court of Justice of the European Communities from the Schuman Plan to the European Union*, in *Mélanges Fernand Dehousse. 2: la construction européenne*, Paris/Bruxelles, Fernand Nathan/Éditions Labor, 1979, in <http://www.cvce.eu/>.

Moreover, reasonableness is used in relation to the fundamental rights and for protecting the rights of European citizens from arbitrary exercises of power both of national and European institutions. Significant examples can be found in immigration and labor law and in the legislation on persons with disabilities⁽¹⁹⁾. In this context reasonableness is bound up with the overarching principle of equality and therefore mostly used to avoid all unreasonable discriminations⁽²⁰⁾.

The principle that differential treatment is discriminatory if it has “no objective and reasonable justification” is part of the case law of the European Court of Human Rights (ECHR) in the application of article 14 of the Convention.

One of the uppermost uses related to fundamental rights is the reasonable time principle as stated in article 6 of the ECHR. This is construed as a corollary of the primary principle of fair trial and the ECHR interprets both principles as applicable to all proceedings, whether judicial or administrative. As case law shows, reasonable duration depends on the circumstances: the same time can be justified in light of the complexity of the case or instead estimated as overlong⁽²¹⁾.

(19) See e.g. Case C-335/11 HK Danmark, acting on behalf of Jette Ring vs. Dansk almennyttigt Boligselskab and Case C-337/11 HK Danmark, acting on behalf of Lone Skouboe Wergevs. Dansk Arbejdsgiver forening, acting on behalf of Pro Display A/S, in liquidation (European Court of Justice 11 April 2013) available at www.eur-lex.europa.eu. In the Court’s opinion, a curable or incurable illness entailing a physical, mental or psychological limitation may be assimilated to a disability. A reduction in working hours may be regarded as an accommodation measure which the employer has to take in order to enable a person with a disability to work. The directive requires the employer to take appropriate and reasonable accommodation measures in particular to enable a person with a disability to have access to, participate in, or advance in employment.

(20) Among the most recent cases see Case C-423/12 Reyes v. Migrationsverket (European Court of Justice 16 January 2014) available at www.eur-lex.europa.eu.

(21) As in case law of ECHR so in the view of ECJ the principle of reasonable time of judicial and administrative proceedings is a corollary of the rule of law doctrine, that is to say a general principle of European law which “constitutes a principle of good government”. Case T-579/08 Eridania Sadam vs. Commission General Court Second Chamber of 20 October 2011, available at www.eur-lex.europa.eu. For an introduction see C.H. van Rhee (ed.), *Within a reasonable time: the history of due and undue delay in civil litigation*, Berlin, Duncker & Humblot, 2010.

The principle of reasonableness is widely used, and in a great variety of ways, by the ECHR with reference to, for instance, the relations between statutory laws and legal precedents. In general, the Court adopts a self-restraint in order to not interfere with the legislative choices of countries and national politics unless they appear patently unreasonable. On that account, the Court considers in each case whether, and within which limits, it is reasonable or unreasonable to permit or forbid, for example, some forms of artificial fertilization⁽²²⁾.

It might be instructive to outline also the state-of-the-art in other countries. Of course, I will mention only few paradigmatic cases.

In South America, the Federal Brazilian Tribunals affirmed that the principle of reasonableness is binding also for public authorities and administrations, and should to be applied by them and reasonableness should be construed in tune with acceptable criteria of rationality⁽²³⁾.

On the other side, the Supreme Court of South Africa, even when their rulings regard difficult subject matters such as human health, stated a principle of minimum interference with the decisions of the competent political authorities and institutions, as long as they appear reasonable and taken in good faith⁽²⁴⁾

. Besides, with reference to the fundamental right of water, the same Supreme Court of South Africa examined the content and the limits of the duty to adopt reasonable measures aimed to

(22) ECHR Case of S.H. and others vs. Austria, no. 57813/00, Gran Chambre 3 November 2011 and ECHR Case Klein vs. Russia, no. 24268/08, 1 April 2010.

(23) Cfr. www.jusbrasil.com.br/. Vedianche O.L.M. Ferraz, The Right to Health in the Courts of Brazil: Worsening Health Inequities?, in *Health and Human Rights Journal*, Vol. 11, No. 2, 2009, 33-45, at www.hhrjournal.org. About South America, e.g. the case law of Chile see e.g. J.I. Martínez, F. Zúñiga Urbina, El Principio de Razonabilidad en la Jurisprudencia del Tribunal Constitucional, in *Revista de Estudios Constitucionales*, Núm. 1-2011, 199-226.

(24) Cfr. O.L.M. Ferraz, Between Usurpation and Abdication? The Right to Health in the Courts of Brazil and South Africa, in www.conectas.org.

progressively implement such right⁽²⁵⁾.

Also in Anglo-Saxon common law jurists are very interested in rationality and reasonableness of legal reasoning⁽²⁶⁾ and the latter is often seen as an essential part of common law itself. It is noteworthy the use of reasonableness by the House of Lords for instance in *Roberts v. Ropwood* (1925) where judges said that a decision is not unreasonable as long as exists a reasonable proportion between costs and benefits or conflicting interests; in *Associated Provincial Picture Houses Ltd v. Wednesbury Corporation* (1948), Lord Greene said that judges have the power to scrutinize the choices and decisions of competent authorities if the latter are so unreasonable that no reasonable authority would have adopted the same choice or decision. Accordingly, this use of the reasonable as a criterion of limitation is known as *Wednesbury test*⁽²⁷⁾.

In the US, the judicial experiences related to discrimination and racial segregation are very significant of the relevance of reasonableness; many generations of judges of the Supreme Court, both before and after the adoption of the XIV^o amendment of the Constitution, were actively involved in the cause and interpreted the principle and the clause of “equal protection”, discussing if and when (i) a certain standard of reasonableness could safeguard an adequate protection (in *Roberts v. City of Boston* 1850), or (ii) a law could originate a different treatment

(25) M. Wesson, Reasonableness in Retreat? The Judgment of the South African Constitutional Court in *Mazibuko v. City of Johannesburg*, in *Human Rights Law Review*, 11(2), 2011, 390 ff., at <http://ssrn.com/abstract=2264042>; P. Danchin, A Human Right to Water? The South African Constitutional Court's Decision in the *Mazibuko* Case, 2010, in <http://www.dipublico.com.ar>.

(26) See e.g. R.S. Summers, Two Types of Substantive Reasons: The Core of a Theory of Common-Law Justification, in *Cornell L. Rev.*, vol. 63, 1977-78, 707 ff.; about the US see C. Nitch, «Coactus voluit». Prospettive dall'analisi weberiana sulle condizioni di lavoro negli Stati Uniti, in *Materiali per un'analisi della cultura giuridica*, n. 2, 2007, 337 ff. who outlines the changes in the meaning of reasonableness from formal equality to substantial equality as related to the concrete circumstances of people's life.

(27) A. Le Sueur, J. Herberg, R. English, *Principles of Public Law*, Cavendish, London-Sydney, 1999, 302.

grounded on a rational basis (in *re* *Strader v. West Virginia* 1880)⁽²⁸⁾ and, furthermore, (iii) distinctions made on racial elements could be reasonable (in *re* *Plessy v. Ferguson* 1896).

Another considerable example can be found in the legal system of New Zealand where the upper courts stated, for instance, that to invoke a reasonable mistake, is to say that a reasonable excuse is allowed, pursuant the Bill of Rights Act, as a defense respect to a possible defamation indictment⁽²⁹⁾.

Also in the arbitration proceedings reasonableness is frequently applied. Herein I will outline some cases pertinent to the matter of contracts, also involving Western and Middle Eastern parties.

A first case concerns the dispute between an English company and a government agency of a Middle Eastern country that stipulated some contracts for a supply of equipment and, in particular, the statute of limitations of the rights evoked by the claimant⁽³⁰⁾.

The arbitral tribunal stated that this issue was not ruled by the Unidroit Principles [1994 edition *ratione temporis*] and excludes the application of the 1974 New York Convention on Limitation Periods. In the opinion of arbitrators, this Convention does not contain widely recognized principles and no internationally accepted principles provide with a statute of limitation applicable to the case. On the other hand, the arbitral tribunal recognized the existence of a general principle of law according to which a right is not enforceable if claimed after an unreasonable time. Pursuant to article 1.7 of the Unidroit Principles, eleven years are not an unreasonable time considering two main circumstances: the political situation of the respondent's State in the relevant period and the fact that in the meantime the parties have continued to negotiate to reach an agreement.

(28) A. Kull, *The Color-Blind Constitution*, Harvard University Press, Cambridge (Mass.), 1992, 117.

(29) D. Oliver, J. Fedtke (eds.), *Human Rights and the Private Sphere: A Comparative Study*, Routledge-Cavendish, 2007, 515.

(30) ICC Arbitral Award, April 1998, No. 7110, in <http://www.unilex.info/case.cfm?id=650>.

Another example concerns a transaction between three companies, on one side, and the Turkish Ministry of Energy, on the other side, for the development of an electric power plant in Turkey⁽³¹⁾. As per the project, the companies had to build and operate the plant at their own expense; to sell the electricity to a Turkish state-owned electric entity at a fixed price over a certain period of time; and at the end to transfer the ownership of the plant to the Turkish State.

On the basis of a feasibility study prepared by the claimants, the parties reached an agreement on the key terms of the project, such as the plant capacity, the electricity price and the operational period. Moreover, the right of the companies *to*re vise, if needed, the mine plan was agreed, as well as the right of the Ministry to approve or not the new plan in case of increasing costs. According to the agreement, “[i]n the event the Ministry withholds its approval for the revised tariff on the basis of reasonable grounds and if [the companies] abandon the project prior to the construction start date, [the companies] and the Ministry shall have no claims against the other”.

The companies indeed submitted a revised mine plan in which the project costs were considerably higher than the original estimate and asked for a renegotiation, but the parties were unable to reach an agreement. For the companies, the Ministry was in breach having not fulfilled obligations essential for the success of the project and having destroyed the related investment. On the contrary for the Ministry no binding contract was reached as the parties solely entered into an initial agreement subject to further negotiation.

In the opinion of the arbitral tribunal, the mechanism of renegotiation based on reasonable grounds did not affect the validity of the

(31) ICSID Award, No. ARB/02/5, dated June 4, 2004, Case PSEG Global Inc., The North American Coal Corporation and Konya İlgin Elektrik Üretim ve Ticaret Limited Sirketi vs. Republic of Turkey, in <http://www.unilex.info/case.cfm?id=1256>.

agreement as a binding contract; both the language used by the parties and the context of the transaction demonstrated the intent to be bound and to complete the terms left open in a later time.

In another interesting arbitration proceedings, the principle has been stated as follows: “The contract should not be amended unless such amendment is conform to the parties’ agreement or is based on reasons set forth in the law. According to the theory of urgent circumstances, a judge can amend the contract’s obligations in favor of the debtor in the event of unforeseen and exceptional circumstances, which although not making performance impossible, threaten the debtor with serious loss. The role of the Judge in amending the obligation is not to compensate the debtor but to alleviate the burden (...) Therefore, a reasonable level should be respected when imposing a fine that is not evaluated in terms of compensation for damage sustained”⁽³²⁾.

Another significant application of reasonableness regards a three years contract between a company and a supplier of crude sand⁽³³⁾. Pursuant to the terms and conditions set forth in the contract and in the tender announcement, the sand had to be transported from the company’s quarry in Keraanah to its factory in Miknis. The quantity of supplies could be increased as per the company’s request in accordance with the circumstances. Thus, the quantities of sand to be supplied were not determined in advance. After the signing, the distance from the company’s quarry to the factory and hence the transport costs increased as the shorter road was closed for an external event. The documents submitted to the arbitral tribunal showed that both the parties had taken into account the distance in calculating the transport costs

(32) Cairo Regional Center for International Commercial Arbitration Case No. 394/2004, final award dated September 28, 2005, African company for environmental services vs. General Association for cleaning, in *Journal of Arab Arbitration*, No. 4, 2009, 383 ff., with Commentary by W. Tabbarah.

(33) Qatar International Center of Arbitration Case No. 9/2007, issued on June 10, 2008, in *Journal of Arab Arbitration*, No. 4, 2009, 403-407.

and that they were aware of the possibility that the route would change.

The award stated this principle: “Whereas Article 171 of the Qatari Civil Code provided that in the event where any general exceptional circumstances occur, which could not be foreseen, and as a result of which the performance of the contractual obligation becomes a heavy burden, the judge may, according to circumstances and after weighing the interest of both parties, reduce the onerous obligation to a reasonable extent”⁽³⁴⁾.

A further important use of reasonableness comes to light from a dispute arisen in relation to a contract entered into by and between the Lebanese Republic and a foreign company (Toto Costruzioni Generali S.p.A.) in 1997 having as scope the construction of the Saoufar-Mdeirej, a section of the Beirut-Damascus highway⁽³⁵⁾.

The general contractor affirmed that the Lebanese Government was in breach, having not fulfilled as due the private property expropriations and having not delivered works, having provided with erroneous design information, changed regulations and refused the adoption of corrective measures. As consequence the

(34) In the opinion of the arbitral tribunal, the applicable rules of Qatari Civil Code were as follows:

i) article 169, 1° par., that provides: “If the terms of a contract are clear, it will not be permitted to deviate from them by interpreting them in order to ascertain the will of the parties”; ii) article 171, that provides: “The contract is the law of the contracting parties and cannot be revoked or amended except with the agreement of the parties or for reasons required by law. Should any general exceptional events occur, which events could not be foreseen, and as a result of which the performance of the contractual obligation, though not impossible, becomes a heavy burden to the debtor threatening him with excessive loss, the judge may, according to circumstances, and after weighing the interest of both parties, reduce the onerous obligation to a reasonable extent. Any agreement to the contrary shall be void”; iii) article 172, 2° par., that provides: “The contract must be performed in accordance with its contents, and in a manner consistent with the requirements of good faith. Contracts are not confined to their content and include requirements of the law, custom and equity in accordance with the nature of the obligation”.

(35) ICSID Case No. ARB/07/12 In re Toto Costruzioni Generali S.P.A. v. Republic of Lebanon. See also ICSID Case No. ARB/04/13, November 6, 2008 Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt, and ICSID Case No. ARB(AF)/06/2, September 17, 2009 Cementownia “NowaHuta” S.A. v. Republic of Turkey.

general contractor claimed to have suffered damages, included the loss of investments and a negative impact on his reputation, and therefore requested compensation also for future damages (loss of profits and chances).

The Arbitral Tribunal rejected all the claims, affirming *inter alia* that: “fair and equitable treatment does not, in the circumstances prevailing in Lebanon at the time, entail a guarantee to the investor that tax laws and customs duties would not be changed.

In *Parkerings-Compagniet AS v. Lithuania*, the arbitrators recognized the right of States to modify their laws: ‘It is each State’s undeniable right and privilege to exercise its sovereign legislative power. A state has the right to enact, modify or cancel a law at its own discretion.

Save for the existence of an agreement, in the form of a stabilisation clause or otherwise, there is nothing objectionable about the amendment brought to the regulatory framework existing at the time an investor made its investment.

As a matter of fact, any businessman or investor knows that laws will evolve over time. What is prohibited however is for a State to act unfairly, unreasonably or inequitably in the exercise of its legislative power.’ In the absence of a stabilisation clause or similar commitment, which were not granted in the present case, changes in the regulatory framework would be considered as breaches of the duty to grant full protection and fair and equitable treatment only in case of a drastic or discriminatory change in the essential features of the transaction.

Toto failed to establish that Lebanon, in changing taxes and customs duties, brought about such a drastic or discriminatory consequence.

The additional cost resulting from increased taxes and custom duties is small compared to the overall amount of the Project.

The changes to the custom duties and taxes on cement, diesel, and construction material were moreover applicable to foreign investors as well as to Lebanese nationals.

This cannot amount to discriminatory or unreasonable actions towards Toto. (...) the investor was considered to have taken the business risk to invest, not with standing the possible legal and political instability. Likewise, the post-civil war situation in Lebanon, with substantial economic challenges and colossal reconstruction efforts, did not justify legal expectations that custom duties would remain unchanged⁽³⁶⁾.

Reasonableness is relevant also in the field of interpretation of contracts, due to “[u]nder general principles of law, contracts must be interpreted according to the common intention of the parties.

If the intention cannot be established, the contract should be interpreted in light of the meaning reasonable persons of the same kind as the parties would give to it in the same circumstances. (...) It would not be reasonable to hold - and reasonable persons of the same kind as the parties to this arbitration could not possibly claim - that the member firms not paying for or participating in the development of Andersen Technology are common owners of such technology or that the entities which funded and developed it are bound to forfeit their rights to those who have no title thereto. Equity would not dictate a different solution⁽³⁷⁾.

It is worth considering this ruling more in-depth as it is very frequent to explain what is reasonable by referring to the well-known reasonable person.

Despite much attention, the features of this figure are not wholly

(36) In re Toto Costruzioni Generali S.P.A. v. Republic of Lebanon ICSID Case No. ARB/07/12 quoted.

(37) ICC Case No. 9797/CK/AER/ACS Arbitral Award No. 9797 dated 28.07.2000 Andersen Consulting Business Unit Member Firms vs. Arthur Andersen Business Unit Member Firms and Andersen Worldwide Societe Cooperative.

clear⁽³⁸⁾.

A leitmotiv in legal thinking is the judicial tendency of the British common law to evaluate whether people's behavior is reasonable: as has been said, in order to find "a criterion, a measuring rod [...] the English judge more often than not appeals to the notion of reasonableness, the notion of a reasonable man, the notion of the right reason"⁽³⁹⁾. This reference to the 'right reason' - in Latin, the 'recta ratio' - must be correctly interpreted given that in most cases it does not involve superior ideals of rationality, but rather indicates common sense. A version of this figure is the man on the Clapham Omnibus in Anglo-American law who represents everyone and anyone in everyday situations.

Of course, as all models the reasonable person is only an ideal or - we can say - a legal fiction. For its supporters it is "a useful fiction for evaluating human conduct according to the law", while for its critics it covers mostly cultural stereotypes⁽⁴⁰⁾.

A communal basis of these conceptions is the intuition reflected in ordinary language that the reasonable implies somehow equilibrium and prudence.

This idea is significant since it evokes another association between reasonableness and aequitas or equity (ie justice as fairness).

(38) Some classical references are M. Moran, *Rethinking the Reasonable Person. An Egalitarian Reconstruction of the Objective Standard*, Oxford, Oxford UP, 2003; J.R. Lucas, "The Philosophy of Reasonable Man", 13 *The Philosophical Quarterly* 51, 1963, 97-106; E. Green, "The Reasonable Man: Legal Fiction or Psychosocial Reality?", in 2 *Law & Society Review* 2, 1968, 241-258.

(39) Original quotation: "un critère, un measuringrod [...] le juge anglais fait, le plus souvent, appel à la notion de reasonableness, à la notion du reasonable man, à la notion de right reason", in H.A. Schwarz-Liebermann vonWahlendorf, *Introduction à l'esprit et à l'histoire du droit anglais*, Paris, Librairie générale de droit et de jurisprudence, 1977, 10; "Les notions de right reason et de reasonable man en droit anglais", in *Archive de Philosophie du droit*, 1978, 43-57.

(40) Original quotation: "une fiction utile à l'évaluation de la conduit juridique humaine", W.E. Joachim, "The «Reasonable Man» in United States and German Commercial Law", 15 *Comparative Law Yearbook of International Business*, 1992, 341-365.

The reasonable person is usually compared to the rational man. While the latter is the perfect *maxi miser* and measures all his courses of action from an economic point of view by balancing benefits and costs (a disputed application of this model is the Learned Hand Test), the former is frequently seen as a person interacting with others and interested in pursuing fair terms of cooperation.⁽⁴¹⁾

Therefore, reasonable persons are typically aware of the pros and cons of all choices. They are also conscious that beliefs might be wrong and desires cannot be satisfied at all costs. This general idea is applied in constitutional law as well as in tort and criminal law, where the reasonable marks the dividing line between risks and chance/responsibility and luck.

Of course, the reasonable level of precautions is also an economic issue. Nevertheless, the distinctive feature of reasonable persons is to justify outcomes not exclusively by vested beneficial consequences, but also by the side effects of their activities on others. Besides, for reasonable persons there is no fixed scale of priority for values and interests: such judgment is based on the conviction that “in the crowded conditions of modern life even the most careful person cannot avoid creating some risks and accepting others” and “some genuine and avoidable risks may be disregarded [...] not because they are mere possibilities or cost-justified”, but because an important interest like liberty is at stake.⁽⁴²⁾

Though the proposal has a general character, a significant distinction has been drawn in criminal law. To decide whether an act is reasonable or unreasonable two situations need to be considered: “(1) where reasonableness concerns events and states, including risks of which an actor is conscious, that can be justly assessed without regard to the actor’s individual traits, and

(41) A. Ripstein, “Reasonable Persons in Private Law”, in *Reasonableness and Law*, quoted, 255-281.

(42) A. Ripstein, “Reasonable Persons in Private Law”, in *Reasonableness and Law*, quoted, 272.

(2) where reasonableness concerns culpable mental states and emotions that cannot justly be assessed without reference to the actor's capacities"⁽⁴³⁾.

As this *distinguo* shows, the reasonable person can be a disembodied and impersonal ideal incorporating the prevalent values of a society and its system of adjudication or, otherwise, it can take into consideration the physical, psychological and emotional traits of individuals. Accordingly, the reasonable person can be, at the same time, the symbol of justice as equality and of subjectivity and equity.

4. The uses of reasonableness in the 2010 Unidroit Principles:

Although few references to the term are expressed in the European civil codes, many principles and rules as well as argumentative and interpretative techniques are somehow related to the reasonable and consequently are all very familiar to European legal scholars and judges. It seems indeed reductive to depict reasonableness as a tool simply implicit in provisions of statutory law.

In actual fact, its impact is far greater and affects many aspects of legal practice. As some legal scholars have remarked, even the concept of law and of legal sources rest on and are shaped by the reasonable. In addition, the production of laws as well as their application depends on reasonableness, quite independently from written provisions.

However, in spite of significant doctrines and theories, all the conceptions and constructions of reasonableness that proliferate in legal practice seem not to influence its scope and uses as a matter of fact. In short, what is reasonable and unreasonable is detached from and unfettered by the various figures idealized by judges and legal scholars.

By way of illustration, and without any pretense of completeness, reasonableness is conceived as:

(43) P.K. Westen, "Individualizing the Reasonable Person in Criminal Law", *Criminal Law and Philosophy*, 2008, 137-162.

- (A) A normative and value-laden concept which belongs to ethics;
- (B) An inner feature of the law in general, that is to say a concept embedded in the concept of law itself;
- (C) A source of law, deep-rooted in the Western legal tradition, or an basic element of some legal sources such as customary law;
- (D) A criterion addressed to identify the law;
- (E) A criterion of legal validity;
- (F) A criterion or parameter which governs the logical relationships or implications made by jurists within the legal system;
- (G) A legal principle, that may be explicit or implicit according to the circumstances and the legal system taken into account; reasonableness is an element of many fundamental legal principles, such as the principle of the reasonable length of proceedings and the principle of (reasonable) equality,
- (H) A criterion for balancing legal principles, values, interests or goods;
- (I) A general clause which is close to fairness and/or equity and equality;
- (J) A criterion used in the application of legal precedents and, therefore, a key factor of the stare decisis doctrine,
- (K) A component of analogical reasoning;
- (L) An evaluative standard or criterion of conduct or decision, that can be applicable both to common people and officials, including judges;
- (M) A component of counterfactual reasoning related to the

- behavior of people;
- (N) A component of judicial presumptions;
 - (O) A limit with respect to the exercise of powers of authorities;
 - (P) A parameter of using discretion by the officials;
 - (Q) A standard of proof in the proceedings, like BARD, that is beyond any reasonable standard of doubt;
 - (R) A general tenet of legal reasoning conceived as a form of practical reasoning;
 - (S) A legal argument for interpreting texts; there are at least two main versions of this argument: according to one version, “each text shall be reasonably interpreted”; according to the second version, “when there are several reasonable interpretations, the most reasonable shall be chosen”;
 - (T) A legal argument fit for solving gaps or antinomies in case of over-inclusiveness or under-inclusiveness. For instance, if the outcome of a first interpretation turns out to be unreasonable due to over-inclusiveness, the process of interpretation shall continue by excluding the case that appears unreasonably included; symmetrically, if the outcome of a first interpretation turns out to be unreasonable due to under-inclusiveness, the process of interpretation shall continue by including the case that appears unreasonably excluded.

Besides, reasonableness is embedded in numerous common arguments used to justify legal interpretations and judgments, such as: (i) the argument of the economic legislator or against redundancies; (ii) the argument against absurdity; (iii) the argument of the nature of things; (iv) the argument of coherence (with certain values); (v) the argument of

proportionality; (vi) the instrumental argument from efficiency; (vii) the argument of costs-benefits analysis.

The aforementioned inventory is clearly partial and is based on heterogeneous criteria. Also the order of the items is conventional and does not represent a graduation of relevance. The following, however, is the heart of the matter: this inventory as well as other possible classifications of the functions of reasonableness cannot say anything about what is (un)reasonable or unreasonable. In a nutshell, reasonableness and its converse, albeit highly variable, are fairly independent from the constructions of jurists. In this respect all discussions basically devoted to understanding whether it is a principle, a standard, a criterion, or a concept, etc., are pointless and incapable to provide with a clarification of their possible meanings.

This ability of reasonableness to fulfill different functions and to be used in a huge variety of ways is a great virtue and defect at once.

It may be a defect whenever it is abused and bent to obtain arbitrary outcomes, beyond any control. But, his multifunctional feature may be a remarkable virtue as it may be a great conceptual resource for jurists. In this respect, reasonableness is an instrument for reform par excellence.

An example of the large possibility of uses of reasonableness is provided with the 2010 Unidroit Principles, where the lexeme occurs seventy-two times⁽⁴⁴⁾.

To understand the possible impact of reasonableness it might be

(44) For 'lexeme' I mean, according to the common meaning of the word, a basic lexical unit of a language, consisting of one word and all the other several derivative words that share the same etymon and have only a diverse linguistic function in the discourse (noun, adverb, adjective, etc.). Fifty-three articles of the Unidroit Principles mention the words 'reasonableness', 'reasonably', 'unreasonably', 'reasonable' and 'unreasonable'. See UNIDROIT, Unidroit Principles of International Commercial Contracts, International Institute for the Unification of Private Law, Rome, 2010, in <http://www.unidroit.org>.

useful to go through all these occurrences.

To begin with, many differing objects may be (un)reasonable. A preliminary list comprehend: the reliance of one party relating to the actions of the other or to the contract itself; the conduct of a party (relating to other actions); the application of a particular rule such as an international legal custom; the purpose of a rule; implied obligations; a contractual term and condition; times and periods of time and their length; a certain price existing in trade; the activity of determining of a price by one party or a third person or the reference to a current price in a certain time and place; the expectations of the parties or of third person; their beliefs; a person who is assumed in the same situation as a party or of the same kind as the parties; some commercial standards; the revocation of an act, for instance an offer; the possible alternatives with respect to an act or event such as the signing of a contract; the uphold or maintainability of a legal course of action; the costs deemed for the performance or to mitigate a harm; the predictions of the parties about possible future harms; the efforts to perform a duty or reduce a harm; the degree of certainty; the circumstances where some rights can be claimed (for instance, the right to remedy in case of mandatory rules); the quality of a performance.

All these items can be classified by distinguishing among uses related:

- (A) To abroad general action of a person, such as the past conduct of a party⁽⁴⁵⁾, eventually relating to the behavior of another one⁽⁴⁶⁾, or to a specific concrete act such as the determination of a price⁽⁴⁷⁾, or the manner to replace a transaction⁽⁴⁸⁾;

(45) See art. 2.1.18 of the 2010 Unidroit Principles.

(46) See art. 5.2.5 of the 2010 Unidroit Principles.

(47) See art. 5.1.7 (1), and (3) of the 2010 Unidroit Principles.

(48) See art. 7.4.5 of the 2010 Unidroit Principles.

- (B) To internal feelings or mental and emotional state of a person such as the reliance of one party upon the behavior of the other⁽⁴⁹⁾ or a certain act or content of the contract itself⁽⁵⁰⁾, expectations⁽⁵¹⁾, beliefs⁽⁵²⁾, and predictions about future events, such as a fundamental contractual breach or a harm⁽⁵³⁾;
- (C) To a predetermined model of human action: the well-known reasonable person model⁽⁵⁴⁾;
- (D) To (the perception of) time⁽⁵⁵⁾;
- (E) To hypothetical events such as possible alternatives to the conclusion of the contract⁽⁵⁶⁾, the means to determine a term left open by the parties⁽⁵⁷⁾, the reference to a current price in a certain place and time⁽⁵⁸⁾, the steps and the efforts that one person could make to change a certain situation of harm⁽⁵⁹⁾;
- (F) To abstract and general notions such as certainty⁽⁶⁰⁾;
- (G) To rules in general or a specific rule of various source or nature (e.g. legal or social, statutory or customary, national or international, autonomous or imposed by a public authority; contractual terms, obligations, commercial standards)⁽⁶¹⁾;

(49) See art. 1.8 of the 2010 Unidroit Principles.

(50) See art. 2.1.4 (2) (b), and art. 3.2.2 of the 2010 Unidroit Principles.

(51) See artt. 2.1.20 (1), 2.2.8, 3.3.1 (2), 5.1.3, 7.1.6, 7.1.7 (1) of the 2010 Unidroit Principles.

(52) See art. 2.2.5 (2), and art. 7.3.4 of the 2010 Unidroit Principles.

(53) See art. 7.3.1 (2)) and art. 7.4.4 of the 2010 Unidroit Principles.

(54) It comes out at articles 3.2.2, 4.1, 4.2 (1), (2), 5.1.4 (2) of the Unidroit Principles.

(55) See artt. 2.1.7, 2.2.7 (2) (b), 2.2.9 (2), 3.2.12 (1), 5.1.7 (1), 5.1.8, 6.1.1 (c), 6.1.12 (2), 6.1.16 (1), 7.1.5 (3), 7.1.7 (3), 7.2.2 (e), 7.2.5 (1), 7.3.2 (2), 7.3.4, 7.4.5, 9.1.12 (1)) of the Unidroit Principles.

(56) See art. 3.2.6 of the 2010 Unidroit Principles.

(57) See art. 2.1.14 (2) of the 2010 Unidroit Principles.

(58) See art. 5.1.7 of the 2010 Unidroit Principles.

(59) See art. 7.4.8 and 11.1.13 of the 2010 Unidroit Principles.

(60) See art. 7.4.3 of the 2010 Unidroit Principles.

(61) See art. 4.8 (1), (2)), art. 5.1.2., and artt. 3.2.2, 3.2.5, 3.2.7 (2) of the 2010 Unidroit Principles.

- (H) To the effective use of rules by parties, judges, arbitrators, etc. such as the application of a particular international legal custom⁽⁶²⁾;
- (I) To legal effects, such as the uphold/maintainability of the contract⁽⁶³⁾, and legal positions (for instance, powers, rights or claims, permissions, etc.) such as the grant of restitution, the allowance of restitution in money and the right to obtain a substitutive performance⁽⁶⁴⁾;
- (J) To qualified facts such as the quality of a performance or a price existing in trade⁽⁶⁵⁾, the burden of the performance enforcement⁽⁶⁶⁾, the expenses required to preserve or maintain the performance received or to mitigate a harm⁽⁶⁷⁾, the circumstances in which a right can be claimed in case of mandatory rules⁽⁶⁸⁾.

This inventory is common and widespread in many fields of law and legal systems. As the classification shows, in any event it is important to distinguish among concrete/factual acts, internal feelings or mental and emotional state of a person, models of actions, time perception, hypothetical actions, abstract and general notion, rules and their effective use and legal effects, and so forth, as the evaluation of reasonableness is fundamentally different in each case.

It is plain that a judgment of reasonableness hassles strength with regard to the future rather than to the past, and it is more discretionary with regard to internal states of mind rather than to concrete actions and factual acts.

(62) See art. 1.9 (2) of the 2010 Unidroit Principles.

(63) See artt. 3.2.13, 6.1.16 (2), 6.1.17 (1) of the 2010 Unidroit Principles.

(64) See art. 3.3.2, and artt. 3.2.15 (2), 7.3.6 (2), 7.2.2 of the 2010 Unidroit Principles.

(65) See art. 5.1.6, and art. 7.4.6 (2) of the 2010 Unidroit Principles.

(66) See art. 7.2.2 of the 2010 Unidroit Principles.

(67) See artt. 3.2.15 (4), 7.3.6 (4), and art. 7.4.8 (1) of the 2010 Unidroit Principles.

(68) See art. 3.3.1 (2) of the 2010 Unidroit Principles.

Moreover, reasonableness as a model is devoted to determine ex ante what is (un)reasonable in each single situation and hence it would represent a restraint to the judgment of the concrete individual. As all models, the reasonable person ideal requires indeed consistency in its application.

Furthermore, reasonableness, whenever related to time is deeply shaped by common sense and ordinary intuitions: time is in fact a fundamental category of thinking⁽⁶⁹⁾. On the other hand, if related to (legal) certainty, reasonableness becomes a technical notion implying properties specific to a specific domain of law⁽⁷⁰⁾.

Furthermore, reasonableness is not an inner quality of (brute) facts: when a fact or certain circumstances are said of being (un)reasonable, we do not describe something corporeal or sensible, but rather dependent by some actions and thinking.

Reasonableness cannot be perceived through the senses and it is not the mere result of the impressions on the mind that belongs from sensations.

Equally, rules may be (un)reasonable under numerous assumptions. We could say that a certain rule is reasonable with regard to the content or the meaning of the rule it-self, or its practical effects or social impact might be relevant. Again, we could think of the so-called ratio legis or, furthermore, dealt with their effective uses by officials.

(69) P.F. Strawson, *Individuals. An Essay in Descriptive Metaphysics*, Routledge, London, 1990.

(70) See S. Berteau, "Certainty, reasonableness and argumentation in law", in *Argumentation*, Vol. 18, No. 4, 2004, 465-478; A. Aarnio, *The Rational as Reasonable: A Treatise on Legal Justification*, Reidel, Dordrecht, 1987. See also H.L. Jr Chambers, "Reasonable Certainty and Reasonable Doubt", in 81 *Marq. L. Rev.*, 1997-1998, 655 ff.; A. Mugasha, "Evolving Standards of Conduct (Fiduciary Duty, Good Faith and Reasonableness) and Commercial Certainty in Multi-Lender Contracts", in 45 *Wayne L. Rev.*, 1999-2000, 1789 ff.; O. Raban, "The Fallacy of Legal Certainty: Why Vague Legal Standards May Be Better for Capitalism and Liberalism", in *Boston Univ. Publ. Inter. L. J.*, Vol. 19, No. 175, 2010 at <http://ssrn.com/abstract=1419683>.

Last, when reasonableness directly refers to rules, legal effects and legal positions, it is rooted in legal pragmatics rather than in any other use, and in this context its concrete meanings it is to be examined.

Within the Unidroit Principle reasonableness regards the most relevant aspects of a contractual relationship and covers the entire life cycle of contracts, but the same, *mutatis mutandis*, happens when it is related to the concept of law in general or some legal figures or laws. To make some samples, reasonableness affects:

- (A) The sources of contractual law and obligations⁽⁷¹⁾;
- (B) The existence itself of the contract (even if some terms are deliberately left open by the parties)⁽⁷²⁾;
- (C) The content of the contract⁽⁷³⁾;
- (D) The performance of obligations and duties⁽⁷⁴⁾;
- (E) The liability for non-performance and the non-performance excuses⁽⁷⁵⁾ and in particular the liability for harm⁽⁷⁶⁾; and in addition, the prohibition of *venire contra factum proprium* and the liability towards third persons⁽⁷⁷⁾;

(71) See e.g. art. 1.9 of the 2010 Unidroit Principles on usages and practices in international trade; art. 4.8 on omitted terms; art. 5.1.2 on implied obligations; art. 2.1.20 (1) on surprising standard terms; art. 3.2.7 (2) and (3) about the judicial power of adapting contracts in case of gross disparity.

(72) See art. 2.1.14 (2) of the 2010 Unidroit Principles.

(73) See art. 4.1 and 4.2 about the intention of the parties and the interpretation of their statements and conducts of the 2010 Unidroit Principles.

(74) See art. 5.1.3 of the 2010 Unidroit Principles about co-operation; art. 5.1.4 (2) about the duty of best efforts; art. 5.1.6, 5.1.7 about the determination of a contractual term and the performance; art. 6.1.1 (c) about the time of performance; and many others.

(75) See e.g. artt. 7.1.6, 7.1.7, 7.2.2, etc. of the 2010 Unidroit Principles.

(76) See e.g. artt. 7.1.6, 7.1.7, 7.2.2, etc. of the 2010 Unidroit Principles.

(77) See art. 1.8 and art. 2.2.5 (2) of the 2010 Unidroit Principles.

- (F) The remedies and guarantees of the parties⁽⁷⁸⁾, including restitutions⁽⁷⁹⁾;
- (G) The conventional modification of a contract⁽⁸⁰⁾;
- (H) The termination of contracts⁽⁸¹⁾.

All these occurrences can be ordered taking into account their function in legal application. A preliminary step is to understand who (the parties and/or the judges, the arbitrators, other officials, etc.) has to evaluate/decide what is (un)reasonable; and why, for which reason and purpose, a law requires such judgment.

Moreover, three main uses of reasonableness can be pointed out. First, reasonableness regards human behaviors and determines which conducts are legitimate, legal, licit, or, on the contrary, unlawful, illicit, illegitimate. In this use, reasonableness is a factor of the compliance with the law. It is a guide of conduct for everybody, on one hand, and a criterion of judgment for the judges, the arbitrators and any other officials, on the other hand.

Second, reasonableness is used to fulfill certain obligation or a specific duty or a more broad regulation. Here, reasonableness is addressed to the parties and the judges, the arbitrators, etc. and is conceived as an outstanding general source of laws or a specific source of certain rules; sometimes, it concurs to determine which laws (national, international, statutory, customary, social) should be applicable.

Third, reasonableness is a basic interpretative rule, as every interpreter should use first of all reasonableness to “discover” the content of the agreements, the meaning of texts and clauses and of all other relevant statements and practices.

(78) See art. 7.2.5 (1), art. 7.3.4 of the 2010 Unidroit Principles.

(79) See artt. 3.2.15, 3.3.2, 7.3.6 of the 2010 Unidroit Principles.

(80) See artt. 2.1.18, 5.2.5 of the 2010 Unidroit Principles.

(81) See artt. 2.1.18, 5.1.8, 7.3.1 (2) of the 2010 Unidroit Principles.

Of course, every reasonable person may be a primary interpreter of legal acts and conduct, but many others third parties, starting from legal authorities, are interested and have a specific duty and power of interpreting laws, including contracts.

5.A useful device for legal reasoning in a multicultural context:

The pros and cons of this extensive use of reasonableness in law are open to dispute. What is at issue is in particular whether it represents a suitable solution of legal policy and legal drafting especially when the parties belong to different legal systems, traditions, cultures and languages.

Considering this conference, this last issue may be discussed taking into account situations where Middle Eastern and Western parties may be involved.

According to a common view, reasonableness is a notion embedded in Western thinking. Under this perspective its legal uses necessarily entail the values and the beliefs existing in contemporary Western societies and culture.

In this view, reasonableness could appear surreptitious way of favoring the Western point of view against all others, especially the Middle Eastern one⁽⁸²⁾.

(82) See e.g. N.H.D. Foster, "Islamic Perspectives on the Law of Business Organisations I: An Overview of the Classical Sharia and a Brief Comparison of the Sharia Regimes with Western-Style Law", in *Eur. Bus. Org. L. R.*, 11, 2010, 3-34; M.B. Ayad, "Harmonisation of International Commercial Arbitration Law and Sharia. The Case of Pacta Sunt Servandavs Ordre Public. The Use of Ijtihad to Achieve Higher Award Enforcement", in *MqJBL*, 6, 2009, 93-118; M. Fadel, "The True, the Good and the Reasonable: The Theological and Ethical Roots of Public Reason in Islamic Law", in *Can. J. L. Jurispr.*, Vol. 21, No. 1, 2008, at <http://ssrn.com/abstract=1085347>; A. Al-Ramahi, "Sulh: A Crucial Part of Islamic Arbitration", in *Islamic Law and Law of the Muslim World Research Paper Series at New York Law School*, No. 08-45, 12, 2008, at <http://ssrn.com/abstract=1153659>; F. Kutty, "The Shari'a Factor in International Commercial Arbitration", in *28 Loy. L.A. Int'l & Comp. L. Rev.*, 2006, at <http://digitalcommons.lmu.edu/ilr/vol28/iss3/4>; A. Khan, "Interaction between Shariah and International Law in Arbitration", in *Chi. J. Int'l L.*, 2005-2006, 791 ff.; P.D. Sloane, "The Status of Islamic Law in the Modern Commercial World", in *22 Int'l Law*, 1988, 743 ff.; A. Ahmad, "The Role of Islamic Law in the Contemporary World Order", in *6 J. Islamic L. & Culture*, 2001, 157 ff.; H.S.

This idea, as sketched in the above paragraphs, is a naïve prejudice that neglects some basic circumstances.

First, the historical linkages, which are still strong today, between Middle Eastern and Western legal systems and traditions not only in the field of commercial contract law.

Second, the context where we live and where international relationships and contracts operate, that is a global world and market shaped by some broad and generally accepted ideas about what is reasonable or not according to common sense.

Third, the role played by interpretative practices in the law in action, in every field of law. The adjudication and the opinions of administrative bodies, agencies' panels, arbitral tribunals, etc. play an eminent role over all negotiations, agreements and litigations.

Last, and more important, the semiotic features of reasonableness must be correctly understood. This is a pragmatic and context-dependent concept open to diverse choices of values. Reasonableness has its place in the domain of practical reason and hence it is essentially linked with the fundamental practice of reasoning. Through reasonableness, it is possible to show what is obvious and does not require reasons, but – per converse – it is possible give reasons for justifying actions, choices, promises, etc. clarifying the relevant facts and values which constitute the starting point. In this framework, reasonableness permits to openly solve legal issues, using an argumentative practice based on reciprocity and mutual respect.

Shaaban, "Note, Commercial Transactions in the Middle East: What Law Governs?", in 31 *Law & Pol'y Int'l Bus.*, 1999, 157 ff.; N. Saleh, "The Law Governing Contracts in Arabia", in 38 *Int'l & Comp. L. Q.*, 1989, 761 ff.; W.M. Ballantyne, "The Shari'a and its Relevance to Modern Transactional Transactions, First Arab Regional Conference (Feb. 15-19, 1987)", in 1 *Arab Comp. & Com. L.*, 1987, 3-12.

REFERENCES:

- Aarnio A., *The Rational as Reasonable: A Treatise on Legal Justification*, Reidel, Dordrecht, 1987.
- Adinolfi A., "The Principle of Reasonableness in European Union Law", in *Reasonableness and Law*, ed. by Bongiovanni, Sartor, Valentini, Springer, Dordrecht, 2009.
- Ahmad A., "The Role of Islamic Law in the Contemporary World Order", in *6 J. Islamic L. & Culture*, 2001.
- Alexy R., "The Reasonableness of the Law", in *Reasonableness and Law*, ed. by Bongiovanni, Sartor, Valentini, Springer, Dordrecht, 2009.
- Al-Ramahi A., "Sulh: A Crucial Part of Islamic Arbitration", in *Islamic Law and Law of the Muslim World Research Paper Series at New York Law School*, No. 08-45, 12, 2008, at <http://ssrn.com/abstract=1153659>.
- Atienza M., "Southern European Philosophy of Law", in C.B. Gray (ed.), *The Philosophy of Law: An Encyclopedia*, Vol. II K-Z, Garland Publishing, Inc., 1999.
- Atienza M., "On The Reasonable in Law", in *RatioJuris*, Vol. 3, Suppl. 1, 1990, 148-161.
- Ayad M.B., "Harmonisation of International Commercial Arbitration Law and Sharia. The Case of Pacta Sunt Servandavs Ordre Public. The Use of Ijtihad to Achieve Higher Award Enforcement", in *MqJBL*, 6, 2009.
- Ballantyne W.M., "The Shari'a and its Relevance to Modern Transactional Transactions, First Arab Regional Conference (Feb. 15-19, 1987)", in *1 Arab Comp. & Com. L.*, 1987, 3-12.
- Berteia S., "Certainty, reasonableness and argumentation in law", in *Argumentation*, Vol. 18, No. 4, 2004.
- Besson S., *The Morality of Conflict. Reasonable Disagreement and the Law*, Hart publishing, Portland, 2005.

- BinR., Ragionevolezza e divisione dei poteri, in Aa.Vv., Corte costituzionale e principio di eguaglianza (Atti del Convegno in ricordo di Livio Paladin, Padova, 2 aprile 2001), Cedam, Padova, 2002.
- Cane P., Records, Reasons and Rationality in Judicial Control of Administrative Power: England, the US and Australia, in *Israel Law Review*, 48(3), 2015.
- Celotto A., Eguaglianza e ragionevolezza nella giurisprudenza costituzionale italiana, in L. Mezzetti, E. FerrerMac-Gregor (eds.), *Diritto processuale costituzionale*, Cedam, Padova, 2010, 123 ff., at www.juridicas.unam.mx.
- Chambers Jr H.L., “Reasonable Certainty and Reasonable Doubt”, in 81 *Marq. L. Rev.*, 1997-1998.
- DanchinP., A Human Right to Water? The South African Constitutional Court’s Decision in the Mazibuko Case, 2010, in <http://www.dipublico.com.ar>.
- Estlund D., “The Insularity of the Reasonable: Why Political Liberalism Must Admit the Truth”, in *Ethics*, Vol. 118, No. 2, 1998.
- Fadel M., “The True, the Good and the Reasonable: The Theological and Ethical Roots of Public Reason in Islamic Law”, in *Can. J. L. Jurispr.*, Vol. 21, No. 1, 2008, at <http://ssrn.com/abstract=1085347>.
- FerrazO.L.M., The Right to Health in the Courts of Brazil: Worsening Health Inequities?, in *Health and Human Rights Journal*, Vol. 11, No. 2, 2009, 33-45, in www.hhrjournal.org.
- FerrazO.L.M., Between Usurpation and Abdication? The Right to Health in the Courts of Brazil and South Africa, in www.conectas.org.
- Fletcher G.P., The Right and the Reasonable, in *Harvard Law Review* 5, 1985.
- Fortier S., Le contract du commerce international à l’a une du raisonnable (1996), *Journal du droit international*.
- Foster N.H.D., “Islamic Perspectives on the Law of Business Organisations I: An Overview of the Classical Sharia and a Brief Comparison of the Sharia Regimes with Western-Style Law”, in *Eur. Bus. Org. L. R.*, 11, 2010.
- Green E., “The Reasonable Man: Legal Fiction or Psychosocial Reality?”, in *L. & Soc. R.*, Vol. 2, No. 2, 1968.

- Haiman J., "Dictionaries and Encyclopedias", in *Lingua*, Vol. 50, 1980.
- Hare R.M., *The Language of Morals*, Clarendon, Oxford, 1952.
- Hare R.M., "Universalisability", in *Proc. Arist. Soc.*, 55, 1954-1955 .
- Hare R.M., *Freedom and Reason*, Clarendon, Oxford, 1963.
- Hare R.M., *Sorting out Ethics*, Clarendon, Oxford, 1997.
- Hart H.L.A., *Punishment and Responsibility. Essay in the Philosophy of Law*, Clarendon, Oxford, 1968.
- Hart H.L.A., *Essays in Jurisprudence and Philosophy*, Clarendon, Oxford 1983.
- Hill C., "Reason and Reasonableness in Seventeenth-Century England", in *Brit. J. Soc.*, Vol. 20, No. 3, 1969.
- Joachim W.E., "The «Reasonable Man» in United States and German Commercial Law", 15 *Comparative Law Yearbook of International Business*, 1992.
- Kelman M., "Reasonable Evidence of Reasonableness", in *Crit. Inq.*, Vol. 17, No. 4, 1991.
- Khan A., "Interaction between Shariah and International Law in Arbitration", in *Chi. J. Int'l L.*, 2005-2006.
- Kristof N.D., "A call for U.S. reasonableness in the Middle East policy", *The Seattle Times*, 4 August 2011.
- Kulla., *The Color-Blind Constitution*, Harvard University Press, Cambridge (Mass.), 1992.
- Kutty F., "The Shari'a Factor in International Commercial Arbitration", in 28 *Loy. L.A. Int'l & Comp. L. Rev.*, 2006, at <http://digitalcommons.lmu.edu/ilr/vol28/iss3/4>;
- Lagrange M., *The Court of Justice of the European Communities from the Schuman Plan to the European Union*, in *Mélanges FernandDehousse. 2: la construction européenne*, Paris/Bruxelles, Fernand Nathan/Editions Labor, 1979, in <http://www.cvce.eu/>.
- Laudan L., "Is Reasonable Doubt Reasonable?", in *Legal Theory*, Vol. 9, No. 4, 2003.

- Laudan L., Is it Finally Time to Put “Proof Beyond a Reasonable Doubt” Out to Pasture?, in A. Marmor (ed.), *The Routledge Companions to Philosophy of Law* (Abingdon: Routledge, 21 mar 2012), accessed 9 April 2017, Routledge Handbooks Online.
- Le Sueur A., Herberg J., English R., *Principles of Public Law*, Cavendish, London-Sydney, 1999.
- Lucas J.R., “The Philosophy of Reasonable Man”, in *Phil. Q.*, Vol. 51, 1963.
- Lust E. (ed.), *The Middle East*, Fourteenth Edition, SAGE, 2017, spec. Israel.
- MacCormick N., “On Reasonableness”, in *Les notions à contenu variable en droit*, publ. par Perelman, Vander Elst, Bruylant, Bruxelles, 1984.
- Martínez J.I., Zúñiga Urbina F., *El Principio de Razonabilidad en la Jurisprudencia del Tribunal Constitucional*, in *Revista de Estudios Constitucionales*, Núm. 1-2011.
- Moran M., *Rethinking the Reasonable Person. An Egalitarian Reconstruction of the Objective Standard*, Oxford, 2003.
- Moreso J.J. (ed.), *Teoría Del Derecho: Positivismo Jurídico y Análisis Conceptual*, Vol. I, *Legal Theory: Legal Positivism and Conceptual Analysis: Proceedings of the 22nd IVR World Congress*, Granada 2005, Franz Steiner Verlag, 2007.
- Mugasha A., “Evolving Standards of Conduct (Fiduciary Duty, Good Faith and Reasonableness) and Commercial Certainty in Multi-Lender Contracts”, in *45 Wayne L. Rev.*, 1999-2000.
- Nitch C., «Coactus voluit». Prospettive dalla riflessione weberiana sulle condizioni di lavoro negli Stati Uniti, in *Materiali per una storia della cultura giuridica*, n. 2, 2007.
- Oliver D., Fedtke J. (eds.), *Human Rights and the Private Sphere: A Comparative Study*, Routledge-Cavendish, 2007.
- Perelman C., *The Rational and the Reasonable*, in *The New Rhetoric*

- and the Humanities. Essays on Rhetoric and its Applications, Springer, Dordrecht, 1979.
- Pintore A. and Jori M. (eds.), Law and Language: Italian Analytical School, Deborah Charles Publications, 1997.
 - Postema G., Legal Philosophy in the Twentieth Century: The Common Law World, in A Treatise of Legal Philosophy and General Jurisprudence, Vol. 11, Springer, Dordrecht, 2011.
 - Raban O., "The Fallacy of Legal Certainty: Why Vague Legal Standards May Be Better for Capitalism and Liberalism", in Boston Univ. Publ. Inter. L. J., Vol. 19, No. 175, 2010 at <http://ssrn.com/abstract=1419683>.
 - Rawls J., Hobbes's Account of Practical Reasoning, in Lectures on the History of Political Philosophy, ed. by Freeman, Belknap, Boston, 2007.
 - Raz J., Reasons for Action, Decisions and Norms, in Mind, 36, 1975.
 - Raz J., Practical Reason and Norms, Oxford UP, Oxford, 1975.
 - Ripstein A., "Reasonable Persons in Private Law", in G. Bongiovanni, G. Sartor, and C. Valentini (eds.), Reasonableness and Law, Dordrecht, Springer, 2009.
 - Saleh N., "The Law Governing Contracts in Arabia", in 38 Int'l & Comp. L. Q., 1989.
 - Scaccia G., Gli "strumenti" della ragionevolezza nel giudizio costituzionale, Giuffrè, Milano, 2000.
 - Schwarz H.A., vonWahlendorf L., Introduction à l'esprit et à l'histoire du droit anglais, Paris, Librairie générale de droit et de jurisprudence, 1977.
 - Schwarz H.A., vonWahlendorf L., "Les notions de right reason et de reasonable man en droit anglais", in Archive de Philosophie du droit, 1978.
 - Shaaban H.S., "Note, Commercial Transactions in the Middle East: What Law Governs?", in 31 Law & Pol'y Int'l Bus, 1999 .
 - Shapiro B.J., «Beyond Reasonable Doubt» and «Probable Cause»: Historical Perspectives on the Anglo-American Law of Evidence, University of California Press, Berkley, 1991.

- Sibley W.M., "The Rational versus the Reasonable", in *Phil. Rev.*, Vol. 62, No. 4, 1953.
- Sloane P.D., "The Status of Islamic Law in the Modern Commercial World", in *22 Int'l Law*, 1988.
- Strawson P.F., *Individuals. An Essay in Descriptive Metaphysics*, Routledge, London, 1990, repr.
- Summers R.S., Two Types of Substantive Reasons: The Core of a Theory of Common-Law Justification, in *Cornell L. Rev.*, vol. 63, 1977-1978.
- The Economist, "Reasonableness is a political stratagem", 22 September 2009.
- Tesouro G., "Reasonableness in the European Court of Justice Case-Law", in A. Rosas et al. (eds.), *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-law - La Cour de Justice et la Construction de l'Europe: Analyses et Perspectives de Soixante Ans de Jurisprudence*, The Hague, Asser, 2013.
- UNIDROIT, *Unidroit Principles of International Commercial Contracts*, International Institute for the Unification of Private Law, Rome, 2010, in <http://www.unidroit.org>.
- van Rhee C.H. (ed.), *Within a reasonable time: the history of due and undue delay in civil litigation*, Berlin, Duncker&Humblot, 2010.
- Waismann F., "Language Strata", in *How I See Philosophy*, ed. by Harré, Macmillan, London, 1968.
- Waismann F., "Verifiability", in *Logic and Language*, ed. by Flew, Blackwell, Oxford, 1968.
- Waismann F., "Analytic-Synthetic", part IV, *Analysis*, Vol. 11, No. 6, 1951.
- Waismann F., "Analytic-Synthetic", part V, *Analysis*, Vol. 13, No. 1, 1952.
- Walen A., "Reasonable Illegal Force: Justice and Legitimacy in a Pluralistic, Liberal Society", in *Ethics*, Vol. 61, No. 2, 2001.
- Weiszberg G., *Le Raisonnable en Droit du Commerce International*, Th. Paris II, Pace Database no. 33, 2003, at www.cisg.law.pace.org.

- Wesson M., Reasonableness in Retreat? The Judgment of the South African Constitutional Court in *Mazibuko v. City of Johannesburg*, in *Human Rights Law Review*, 11(2), 2011, 390 ff., in <http://ssrn.com/abstract=2264042>.
- Westen P.K., "Individualizing the Reasonable Person in Criminal Law", in *Criminal Law and Philosophy*, 2008.
- Zorzetto S., *La ragionevolezza dei privati. Saggio di metagiurisprudenza esplicativa*, Milano, FrancoAngeli, 2008.

Italian Constitutional Court at www.cortecostituzionale.it

- judgments no. 41/2008, 266/2008, 337/2010, 203/2011, 214/2011, 85/2013
- European Court of Justice available at www.eur-lex.europa.eu [accessed 14 April 2017]
- Case 8/55 *Fédération Charbonnière de Belgique vs. High Authority of the -European Community for Coal and Steel*, Judgment of the Court of 16 July 1956.
- Case 8/74 *Procureur du Roi vs. Dassonville*, [1974] ECR 837.
- Case C-283/81 *S.r.l. CILFIT and Lanificio di Gavardo SpA vs. Ministry of Health*, Judgment 6 October 1982.
- Case C-309/99 *J.C.J. Wouters et al. vs. Algemene Raad van de Nederlandse Orde van Advocaten* [2002] ECR I-1577.
- Case T-579/08 *Eridania Sadam vs. Commission*, General Court Second Chamber of 20 October 2011.
- Case C-335/11 *HK Danmark, acting on behalf of Jette Ring vs. Dansk almennyttigt Boligselskab*.
- Case C-337/11 *HK Danmark, acting on behalf of Lone Skouboe Werge vs. Dansk Arbejdsgiverforening, acting on behalf of Pro Display A/S, in liquidation*, Judgment 11 April 2013.
- Case C-479/12 *H. Gautzsch Großhandel GmbH & Co. KG vs. Münchener Boulevard Möbel Joseph Duna GmbH*, Judgment 13 February 2014.
- Case C-423/12 *Reyes vs. Migrationsverket*, Judgment 16 January 2014.

**European Court Human Right available at <http://www.echr.coe.int/>
[accessed 14 April 2017]**

- Case of S.H. and others vs. Austria, no. 57813/00, Gran Chambre 3 November 2011.
- Case Klein vs. Russia, no. 24268/08, 1 April 2010.
- ICC Arbitral Award, April 1998, No. 7110, in <http://www.unilex.info/case.cfm?id=650>.
- ICC Case No. 9797/CK/AER/ACS Arbitral Award No. 9797 dated 28.07.2000 Andersen Consulting Business Unit Member Firms vs. Arthur Andersen Business Unit Member Firms and Andersen Worldwide Societe Cooperative.
- ICSID Award, No. ARB/02/5, June 4, 2004, Case PSEG Global Inc., The North American Coal Corporation and Konya Ilgin Elektrik Üretimve Ticaret Limited Sirketi vs. Republic of Turkey, in <http://www.unilex.info/case.cfm?id=1256>.
- ICSID Case No. ARB/07/12 In re Toto Costruzioni Generali S.P.A. v. Republic of Lebanon.
- ICSID Case No. ARB/04/13, November 6, 2008 Jan de Nul N.V. and Dredging International N.V. vs. Arab Republic of Egypt.
- ICSID Case No. ARB(AF)/06/2, September 17, 2009 Cementownia “NowaHuta” S.A. vs. Republic of Turkey.
- Cairo Regional Center for International Commercial Arbitration, Case No. 394/2004, final award 28 September, 2005, African company for environmental services vs. General Association for cleaning, in Journal of Arab Arbitration, No. 4, 2009, 383 ff., with Commentary by W. Tabbarah.
- Qatar International Center of Arbitration, Case No. 9/2007, 10 June 2008, in Journal of Arab Arbitration, No. 4, 2009.

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